WorldColor v. Communications, Energy and Paperworkers Union of Canada, Local 525-G (Attendance Grievance), [2010] B.C.C.A.A.A. No. 13

British Columbia Collective Agreement Arbitration Awards

Panel: Gabriel Somjen (Arbitrator)

Heard: January 18, 2010.

Award: February 3, 2010.

No. A-012/10

[2010] B.C.C.A.A.A. No. 13 | 191 L.A.C. (4th) 51 | 100 C.L.A.S. 299 | 2010 CarswellBC 4026

IN THE MATTER OF the Labour Relations Code, R.S.B.C. 1996, c. 244 AND IN THE MATTER OF an Arbitration Between WorldColor, Employer, and Communications, Energy and Paperworkers Union of Canada, Local 525-G, Union (Nine Grievances -- Discipline over attendance records-- Section 86; Case No. 59966/09T)

(30 paras.)

Case Summary

Labour arbitration — Discipline and discharge — What constitutes.

The employer was having some financial difficulties and wanted to reduce the amount of absenteeism of certain employees in the bargaining unit. It sent letters to nine employees warning them that disciplinary action would be taken if their record of attendance did not improve. The union objected to the letters on the basis that they were disciplinary letters given to the employees without grounds. The employer replaced the letters in dispute with letters of "expectation" setting out what attendance it expected from the employees. The employer argued that the letters could be given to employees with non-culpable absenteeism issues, and that it had an obligation to warn employees if their absenteeism was excessive and that continued absenteeism problems could have resulted in loss of employment.

HELD: Grievance allowed.

The letters were clearly disciplinary in nature and could not have been allowed to stand because there was no culpable conduct. The subsequent effort by the employer to replace those letters with letters of expectation came too late in the process and would have been inequitable because only certain employees would have had the letters in their employment files.

Appearances

WorldColor, **Israel Chafetz, Q.C.**

CEP Local 525-G, **Richard L. Edgar**.

AWARD

I

1 This matter involves the issuing of certain warning letters to nine employees on July 2, 2009 by their employer, WorldColor. WorldColor had been having some financial difficulties and wanted to reduce the amount of absenteeism of certain employees in the bargaining unit.

2 As a result, six employees were given verbal warnings on July 2nd in the following or similar terms:

> The Company has reviewed your overall absenteeism record and found you have missed six work days in 2009 based on five incidents. A copy of our 2009 attendance profile to the end of June is attached.
>
> Regular and punctual attendance at work is the responsibility of every employee. The company expects you to conduct your personal affairs in a manner that will not interfere with work hours. As a continuously operating facility, it is essential that you are available for duty in accordance with the crewing schedules.
>
> This letter is a formal Verbal Warning that your record of attendance must improve immediately and consistently, or further disciplinary action will be necessary. This could include a Written Warning, Suspension and ultimately lead to termination of your employment.
>
> The Company relies on you to be at work as schedule at all times. Your understanding and expected cooperation are appreciated.

3 Three other employees were given letters of expectation with the wording such as:

> Please be reminded that regular and punctual attendance at work is the responsibility of every employee. The Company has reviewed your absenteeism record and found six absences over the past six months.
>
> Your regular and punctual attendance at work is necessary to service our customers, maintain cost effective production and ensure a safe quality of work life for your fellow employees. The purpose of this letter is to highlight that your absenteeism record is excessive and must be corrected. The Company expects immediate improvement or we will need to take formal disciplinary steps to address the situation.
>
> Thank you for your understanding and cooperation in this matter.

4 The Union grieved each of these letters on the basis that they were disciplinary and that there was no basis for the discipline.

5 Subsequently two of the employees resigned.

6 Just before the hearing of this matter, the Employer sent a revised form of letter of expectation to the remaining four employees who had received warnings originally. The terms of those letters are set out as follows:

> This letter is to confirm that the Company has changed your disciplinary Verbal Warning issued on July 2, 2009 for poor attendance at work to a Letter of Expectation. This letter is intended as a corrective step to remind you of your responsibility to be at work for your scheduled shifts and abide by the Attendance Policy. The record in your file will be amended accordingly.

7 The Employer therefore commenced the hearing by indicating that it considered that all the employees in question had received letters of expectation and that these letters were not disciplinary. The Employer conceded that the conduct in all instances was non-culpable and would not warrant discipline.

8 Notwithstanding the revised letters and the assurances of the Employer, the Union wished to proceed with the hearing on the basis that the letters were all disciplinary and should not be allowed to remain on the employees' files.

II

9 The Employer argued that letters of expectation such as the original warning letters and the revised letters substituting for the warning letters can be given to employees with non-culpable absenteeism issues. The Employer argued, furthermore, that there is an obligation on an employer to warn employees if their absenteeism is excessive and that continued absenteeism problems could result in loss of employment.

10 The Employer relied on a number of cases which stand for the proposition that employees who have excessive levels of non-culpable absenteeism can be given letters of expectation and should be warned that continuation of their pattern of absenteeism needs to be corrected and may result in non-disciplinary termination, if improvement does not occur. Some examples are the following:

11 *Maple Leaf Consumer Foods and U.F.C.W., Locals 175 & 633 (Whitehead)*, *86 C.L.A.S. 333*, at paragraph 12 the Arbitrator stated:

> In *Re Denison Mines Ltd. and United Steelworkers, [1983] O.L.A.A. No. 71, supra,* Arbitrator Adams was called upon to determine whether a warning letter regarding nonculpable absenteeism was disciplinary or non-disciplinary. Although phrased somewhat differently, the letter in question conveyed essentially the same information as the letters which form the subject matter of the instant case. It expressed the company's concern about the employee's excessive absenteeism and indicated that if that attendance did not improve the employee might be released. Although the letter did not expressly state that it was non-disciplinary, that information was conveyed to the union in each of the three stages of company replies during the grievance procedure. After reviewing the applicable arbitral jurisprudence, the arbitrator found the warning in question to be non-disciplinary and dismissed the grievance in an award which includes the following insightful observations:

> The union argued that the company should have to justify the standard of absenteeism at this time and that it is unfair for the grievor to be the victim of a warning letter that in fact is not merited. However, not every contact with an employer can be grieved. Written evaluations and verbal warnings are two examples that usually fall outside the grievance procedure unless there is specific language to the contrary: see *Re County of Norfolk and London & District Building Service Workers' Union, Local 220* (1972), 1 L.A.C. (2d) 108 (Palmer). Innocent absenteeism is a particularly difficult problem for the employer to regulate. While parties to collective bargaining agreements expect employees will on occasion be absent for reasons of illness or accident, substantial and disruptive absences where no improvement is in sight can give rise to an employee's termination. Because of this possibility, employers are entitled to monitor absenteeism and obligated to warn employees when the absenteeism, in the company's opinion, is beginning to reach a level where termination is a possibility. Such discussions may be verbal or written. Indeed, dialogue even before a problem gets out of hand is an acceptable and reasonable employer response where an absenteeism problem is becoming evident.
>
> Moreover, where a warning has been issued, it is important for the company, trade union and employee to review the situation. Following such discussions, should the employee and the trade union believe the warning to be unjustified, this fact can be recorded by them by sending a reply letter to the company. Ultimately, the company will have to justify the entire basis for its concern should the employee ever be terminated or should the warning letter be relied upon in some other way in making a decision affecting the grievor. I therefore fail to appreciate fully the prejudice to the grievor in not being able to contest before an arbitrator the warning in question at this time.

A similar conclusion was reached by Arbitrator Brandt in *Re Oshawa (City) and C.U.P.E., Loc. 250 (Connor)*, *[1996] O.L.A.A. No. 31*, supra, at page 247:

> It would thus appear from the case law that a counselling letter advising an employee of the concerns of the employer regarding excessive absenteeism and indicating that a failure to improve that record may result in discharge is not, in and of itself, disciplinary in nature. Indeed, it is regarded as a necessary prerequisite to the subsequent exercise of the right to terminate for innocent absenteeism where that is found to be necessary...

Deer Lodge Centre Inc. and P.S.A.C., *64 C.L.A.S. 305*

12 In *Foothills Provincial General Hospital and U.N.A., Local 115*, *29 L.A.C. (4th) 258*, the Arbitrator stated:

> 1. Are the letters disciplinary?
>
> It is the Board's conclusion that the letters are not disciplinary. Rather, their purpose was to communicate to the Grievor the concern of the employer with the Grievor's absenteeism record. Arbitral jurisprudence has firmly established the necessity of issuing such letters to alert an employee of management's concerns and to indicate possible consequences. Such letters are necessary even if the absenteeism is non-culpable. According to arbitrator Saltman "it simply would be unfair to terminate the employee without bringing to his attention the employer's concerns in this regard and giving the

employer a chance to improve" (Re Falconbridge Mines, *[1982] O.L.A.A. No. 37*, at p. 278).

In *Re Royal Alexandra Hospital*, *[1990] A.G.A.A. No. 4*, the instant chairman had the opportunity to review the arbitration cases on the subject and concluded that letters such as the ones before this arbitration board were not disciplinary in nature. Having reflected again on this issue, the Board finds no reason to abandon the conclusions reached in *Re Royal Alexandra Hospital.* In that decision, the arbitration board stated (at pp. 190-1):

> The Board's conclusions that the letters warning the grievors of their absenteeism records are not properly characterized as discipline is supported, in the Board's view, by almost all reported cases. A review of these cases (e.g., Re Aliments Steinberg Ltee; Re General Tire, *[1982] O.L.A.A. No. 103*) indicates that arbitrators: (1) do not consider absenteeism monitoring programs of the kind before this Board (assuming they do not contain the elements found in St. Paul's Hospital) as disciplinary in nature; (2) do not consider letters of warning issued pursuant to such policies, even if "heavy-handed" (Re Falconbridge Nickel Mines), as disciplinary letters, and (3) indeed require such warning letters be explicitly given to employees who may be excessively, though innocently, absent if dismissal is to ultimately occur. Chairman Beattie, in his Re Royal Alexandra Hospital award, reviewed these cases and appears to have followed their reasoning in concluding that the letters in question were non-disciplinary. This Board, having reviewed the same cases, comes to the same conclusion.

In *Re Foothills Provincial Hospital*, 22 C.L.A.S. 73, issued subsequent to *Re Royal Alexandra Hospital*, arbitrator Moreau reached the same conclusions, stating that "the letter fits into that category of correspondence which has as its purpose to warn of the absenteeism record and is therefore not disciplinary".

13 In *Greater Victoria Hospital Society*, *[1999] B.C.L.R.B.D. No. 385* the B.C. Labour Relations Board on reviewing an arbitration decision concluded:

> The Program's primary objective is to properly address non-culpable absenteeism. An employer has a legitimate and significant interest in so doing. An employer contemplating, however distantly or speculatively, the potential need to terminate a bargaining unit employee for excessive innocent absenteeism is required to take positive steps in order to found any eventual right to do so.
>
> Professor Innis Christie has described the arbitral jurisprudence relating to dismissal for innocent absenteeism as follows:
>
> > The fundamentals of the arbitration of innocent absenteeism have been reiterated countless times. While, as Arbitrator Paul Weiler stated in one Massey- Ferguson award, an employee cannot be punished for innocent absenteeism, the employer can terminate an employee after such absenteeism reaches a certain stage. -And, as Arbitrator Owen Shime said in another oft-quoted Massey-Ferguson award:
> >
> > > ...in order to justify a discharge [for innocent absenteeism] the company must establish: (a) undue absenteeism in the grievor's past record, and (b) that the grievor is incapable of regular attendance into the future.
> >
> > These two prongs of the doctrine of innocent absenteeism I call "diagnosis" "prognosis".

> The arbitration of a dismissal for innocent absenteeism is then, by definition, the balancing of competing employer and employee interests; like a disciplinary arbitration in that the question is whether the dismissal is justified, but unlike it in that justification must not lie in the fault of the employee but in the defeat of the legitimate contractual expectations of the employer.
>
> In most collective agreements there is no specific provision for release for incapacity or innocent absenteeism. What the doctrine amounts to is an established arbitral view that where both the diagnosis and the prognosis are established, there is just cause for discharge. ...
>
> The evidence related to the diagnosis may be a long story, but it is seldom open to dispute... The case will usually turn on the evidence of "prognosis", and on whether the arbitrator agrees with the employer's judgment calls on both "diagnosis" and "prognosis". Most often the latter is where they will differ.
>
> Christie, I., "The Right to Dismiss for Innocent Absenteeism: An Arbitrator's Perspective," in Kaplan et al, eds., Labour Arbitration Yearbook, 1993 (Toronto: Lancaster House, 1993), pp 201-223, at p. 202 (footnotes omitted).

Under the current jurisprudence an employer's assertion of negative "prognosis" is most unlikely to succeed in the absence of the employee's having been formally warned that his or her level of absenteeism was unacceptable and given an opportunity to seek assistance or undertake efforts that might lead to an improved ability to attend work:

> [F]ailure to issue a letter of warning may well invalidate any subsequent non- culpable dismissal. The rationale is that employees should not be lulled into a false sense of security that everything is fine when in fact their jobs might be in jeopardy. Arbitrators will ameliorate the discipline imposed by the employer when the employee has been lulled. Thus, arbitration jurisprudence in effect requires an employer who has a concern about an employee's level of absenteeism to bring such concerns to the employee's attention as a condition precedent to any eventual termination. As stated in Foothills Hospital (Gibson grievance):
>
> > It is the Board's conclusion that the letters are not disciplinary. Rather, their purpose was to communicate to the Grievor the concern of the Employer with the Grievor's absenteeism record. Arbitral jurisprudence has firmly established the necessity of issuing such letters to alert an employee of management's concerns and to indicate possible consequences. Such letters are necessary even if the absenteeism is non-culpable. According to arbitrator Saltman "it simply would be unfair to terminate the employee without bringing to his attention the employer's concerns in this regard and giving the employee a chance to improve" (Re Falconbridge Mines, at p. 278).
>
> As well, there is a premise that, while management may be acting reasonably in the exercise of its rights, it is essential that employees be given a chance to explain or justify their absences. Managers must be able to communicate to employees in circumstances where the employee's explanation or feedback might be in the interests of both parties. ... [Employers] are obliged to issue such letters if employees with severe attendance problems are ultimately to be discharged. Generally, these letters are the necessary precursor to any further employer response.

> Ponak, A. and Gottlieb Taras, D., "What is Grievable Discipline," Kaplan et al. eds, Labour Arbitration Yearbook, 1996-97 (Toronto: Lancaster House, 1997), pp. 193-210, at pp. 197-98 (footnotes omitted).
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> For British Columbia arbitral jurisprudence to this effect see, for example, *Re Vancouver (City) and BMREU* *(1983), 11 LAC (3d) 121* (Hope) (at pp. 22-24).

14 I agree with the principles set out in these cases. The Union took no serious objection to the proposition that letters of expectation, if properly worded and applied in appropriate circumstances can be an employer's proper response to excessive absenteeism and can serve as a warning of future action by the employer, not for culpable reasons but in response to the failure of the employee to properly attend work. However, in some of these cases, and certainly in the instant case, there is the question of whether the action taken by the employer is in fact disciplinary. In order to make that determination I must look at all the surrounding circumstances. The fact that the Employer says it is not disciplinary does not necessarily determine the issue. In this case, the fact that the Employer changed the letters of warning to letters of expectation does not necessarily determine the issue either.

15 The Union argued that all the letters are disciplinary on their face, and in the circumstances of the present case. I agree that the original verbal warnings were clearly disciplinary. The third paragraph of those letters state:

> This letter is a form of verbal warning that your record of attendance must improve immediately and consistently, or further disciplinary action will be necessary. This could include a written warning, suspension and ultimately lead to termination of your employment.

16 Those letters were disciplinary on their face and anyone reading them would take it that they were an early step in a progressive disciplinary process.

17 Before this hearing commenced, the Employer changed those letters for the employees who had received verbal warnings and issued subsequent "letters of expectation", as set out above.

18 The original letters of expectation issued on July 2, 2009, on their face also appear to be disciplinary. The letters include statements such as "absenteeism record is excessive and must be corrected", and "the Company expects immediate improvement or we will need to take formal disciplinary steps to address the situation". These letters appear disciplinary in that they are not merely pointing out the degree of absenteeism and seeking improvements, but also speak of disciplinary steps that the Employer intends to take in the future to address the absenteeism itself.

19 Since the underlying premise of all the arguments in this case was that the absenteeism in question was non-culpable, the threat of present or future discipline, for such non-culpable absences would not be appropriate.

20 Even the subsequent Employer's Formal Attendance Policy (the "Policy") which was issued on August 17th is not clear in making the distinction between culpable and non-culpable conduct of an employee. Article 3.6 of the Policy speaks of unexcused absences, failure to call and

leaving work without permission, as being serious infractions subject to discipline. Those types of conduct may well attract a disciplinary response as they could be considered culpable.

21 Paragraph 3.7 sets out the progressive discipline that may arise as a result of attendance infractions. There is a reference to "severity of the absenteeism record". Some or all of the absenteeism record may well be non-culpable even though the "infractions" which would attract discipline may be culpable.

22 The Policy's mixing of disciplinary action for culpable conduct with potentially non-culpable absenteeism still reflects the confusion of culpable and non-culpable conduct which is apparent in the original July 2, 2009 letters of warning and letters of expectation.

23 While it is important for an employer to have a policy to deal with absenteeism issues (both culpable and non-culpable), it is also important to make the distinction, as both counsel have done in this case, between culpable and non-culpable absences. Non-culpable absences should not attract discipline.

24 The original letters were issued before any formal policy was in place, making them even more capable of misinterpretation.

25 The Union argued that the determination of whether a letter is disciplinary or merely a letter of expectation is based on the particular facts, and referred to various cases including the *Hilton Villa Care Centre and B.C.N.U.*, *115 L.A.C. (4th) 154*. In that case the arbitrator set out a useful table that compares some of the factors that distinguish performance expectations letters from disciplinary letters:

Performance Expectations Letter	Disciplinary Letter
Purpose: to counsel and communicate, to identify or clarify expected behaviour in performance of job duties.	**Purpose:** to correct poor performance or undesirable behaviour – assumes that discipline is needed to achieve correction.
Employer's Intention: helpful, supportive.	**Employer's Intention:** disciplinary.
Examples used only as a means to clarify inappropriate or acceptable behaviour.	Nature of Employee's conduct: culpable – specific incident of poor performance, or infraction of a rule, policy or standard.
Support is offered by way of training and/or other resources.	Should be clearly stated to be disciplinary.
Develops, with employee's input, mutual goals to encourage employee's commitment to change.	Does the employee have to grieve the letter to be able to respond effectively to it?
Focus: assumes behaviour will change in future, when an employee understands what is expected and is supported in an effort to change.	**Focus**: expected behaviour is identified, but consequences are attached to present and any future failure to meet prescribed standards.
A review period is set to give feedback on progress of change.	May require compliance with provisions of the collective agreement, such as the presence of a union representative when discipline is imposed.
A future discipline offence will be treated with no reference to this letter as a foundation for any progressive discipline. This letter may only be used to show that the employee was aware of the employer's requirements.	Negative impact on employee's work record. Part of progressive discipline – further incidents of a similar nature may be followed by further possible increased discipline.

26 The arbitrator concluded:

> In view of all of the facts and circumstances of this case, I am persuaded that the basic character of the January 26th **letter of expectation** is that of a disciplinary letter seeking the correction of specific culpable conduct. As I have already observed, some of the

> circumstances of this case support the Employer's characterization, while others support the Union. On balance, I am satisfied the letter seeks to correct poor performance or undesirable behaviour.
>
> I am also persuaded by the Union's submission that the above-quoted "aside" remarks of Arbitrator Price are equally applicable here. If the Employer's argument were accepted, the January 26th letter would remain on the Grievor's personnel file indefinitely and could not be explained by the Grievor in the way she is entitled to respond to performance evaluations under Article 16.02(a). Ms. Drummond expressed an assurance regarding the limited future use of the letter, but the letter may well remain on the Grievor's file long after Ms. Drummond has left the employ of the Employer. Moreover, if a prospective employer contacted the Employer for a reference, this **letter of expectation** containing allegations of misconduct including dishonesty towards co-workers could be referred to inadvertently. This would undoubtedly have an adverse effect on the Grievor's employment prospects.
>
> (at pp. 7-8)

27 Based on this analysis and the terms of the letters themselves, I conclude that all of the original letters were disciplinary (i.e. the original verbal warning letters and the original letters of expectation). They all refer to the possibility of future discipline due to absenteeism. The verbal warning letters on their face were clearly disciplinary, even without reference to future discipline. They all seek to correct absenteeism which in itself would not determine that they were disciplinary since correcting excessive absenteeism might be part of a proper non-culpable response seeking to assist the employee to improve his attendance through counselling, medical assistance or other means that might be available. However, taken together with the discipline or threat of discipline in the future, and the fact that there was no basis for the distinction between one group of letters and the other (some employees had more absenteeism, some had more instances of absenteeism), I conclude that all of the original letters were disciplinary and because there was no culpable conduct, the letters cannot stand.

28 That leaves the question of whether the subsequent letters of expectation issued on January 14, 2010 should remain. These letters were only issued a few days before the hearing of this matter (January 18th) and it was not clear whether the employees themselves had even seen them by the time of the hearing. Also, although these letters were issued six months after the original warning letters were issued, the subsequent letters of expectation addressed events that took place before the Policy came into Force. Finally, the new letters of expectation were only issued to those employees who had received previous verbal warnings, but not to the employees who originally received letters of expectation.

29 To allow the January 14, 2010 letters to stand in these circumstances would be inappropriate. The letters came very late in the process, after the Employer's formal implementation of the Policy and if allowed to stand would leave the inequitable situation of some employees having these letters on their file while others did not, even though the employees were all originally chosen for some kind of action in July of 2009. I therefore conclude that the new letters of expectation cannot be allowed to stand either.

30 This does not mean that the Employer should resile from its attempt to reduce excessive absenteeism. It is important that employees attend work regularly, while recognizing that legitimate illnesses and accidents will occur. Now that the Employer has the Policy in writing I

would encourage the Employer to use it appropriately in conjunction with discussions with the Union, and work with employees who have attendance problems to assist them in improving their attendance.

February 3, 2010

Gabriel Somjen, Arbitrator

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