1964 CarswellOnt 498
Ontario Arbitration

U.S.W.A., Local 3257 v. Steel Equipment Co.

1964 CarswellOnt 498, [1964] O.L.A.A. No. 5, 14 L.A.C. 356

Re United Steelworkers of America, Local 3257 and the Steel Equipment Co. Ltd.

R. W. Reville, C.C.J., E. Park, A. A. White

Judgment: March 16, 1964
Docket: None given.

Counsel: H. Gargrave, W. Charboneau and others, for the union
J. W. Martin, for the company

Subject: Labour; Employment

Decision of the Board:

1 The only question remaining, therefore, is whether this board in the exercise of its undoubted powers under art. 31.01 of the collective agreement should mitigate and vary the penalty of discharge imposed by this company on this grievor for his undoubted breach of company rules.

2 Arbitration cases on this point are legion and almost invariably turn on their particular and peculiar facts. It has been held, however, that where an arbitration board has the power to mitigate the penalty imposed on a grievor, the board should take into consideration in arriving at its decision the following factors:

1. The previous good record of the grievor — *Re United Steelworkers of America, Local 5297, and Frontenac Floor & Wall Tile Ltd.* (1957), 8 L.A.C. 105.

2. The long service of the grievor — *Re U.A.W., Local 28, and C.C.M. Co.* (1954), 5 L.A.C. 1883.

3. Whether or not the offence was an isolated incident in the employment history of the grievor — *Re Amalgamated Ass'n of Street, Electric Railway and Motor Coach Employees of America and Sandwich, Windsor & Amherstburg Railway Co.* (1951), 2 L.A.C. 684.

4. Provocation — *Re United Brotherhood of Carpenters, Local 2537, and KVP Co. Ltd.* (1962), 12 L.A.C. 386.

5. Whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses, or whether the offence was premeditated — *Re U.A.W., Local 112, and DeHavilland Aircraft of Canada Ltd.*, being an award of Professor Bora Laskin dated March 13, 1959 (unreported).

6. Whether the penalty imposed has created a special economic hardship for the grievor in the light of his particular circumstances — *Re U.A.W., Local 127, and Ontario Steel Products Ltd.* (1962), 13 L.A.C. 197.

7. Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination — *Re Retail, Wholesale Department Store Union, Local 127, and Dominion Stores Ltd.* (1961), 12 L.A.C. 164.

8. Circumstances negativing intent, *e.g.*, likelihood that the grievor misunderstood the nature or intent of an order given to him, and as a result disobeyed it — *Re United Electrical Workers, Local 524, and Canadian General Electric Co.* (1957), 8 L.A.C. 132.

9. The seriousness of the offence in terms of company policy and company obligations — *Re Mine, Mill and Smelter Workers, Local 598, and Falconbridge Nickel Mines Ltd.* (1956), 7 L.A.C. 130.

10. Any other circumstances which the board should properly take into consideration, *e.g.*, (a) failure of the grievor to apologize and settle the matter after being given an opportunity to do so — *Re U.A.W., Local 456, and Mueller Ltd.* (1958), 8 L.A.C. 144; (b) where a grievor was discharged for improper driving of company equipment and the company, for the first time, issued rules governing the conduct of drivers after the discharge, this was held to be a mitigating circumstance — *Re Int'l Brotherhood of Teamsters and Riverside Construction Co.* (1961), 12 L.A.C. 145; (c) failure of the company to permit the grievor to explain or deny the alleged offence — *Re Int'l Brotherhood of Teamsters, Local 979, and Leamington Transport (Western) Ltd.* (1961), 12 L.A.C. 147.

3 The board does not wish it to be understood that the above catalogue of circumstances which it believes the board should take into consideration in determining whether disciplinary action taken by the company should be mitigated and varied, is either exhaustive or conclusive. Every case must be determined on its own merits and every case is different, bringing to light in its evidence differing considerations which a board of arbitration must consider.

4 Bearing the above catalogue of considerations in mind, however, despite its admitted shortcomings, the board must bear in mind that in the instant case the grievor had been employed by this company for over 12 years to the date of his discharge and during this period received only one written warning (see ex. 5) to the effect that he was not producing at a minimum of 60 earned minutes per hour. This written warning was dated March 6, 1961, and was labelled "First Warning". This was the only formal disciplinary action taken against this grievor during the course of his employment prior to his discharge, though there was evidence he had received three verbal warnings from Mr. Harold Griese who had formerly been his foreman when he was working in the trim department. The grievor had volunteered to keep the records for a group of employees, including himself, and Mr. Griese had detected errors on three occasions in his production reports in that he had added additional cabinets which had not been produced. Mr. Griese stated that he changed the records after he discovered the errors and no incorrect records went into the pay office or the company. He also testified that he had not brought these errors to the attention of the grievor at the time, though he did so later, and that the grievor explained that he had no intent to deceive or defraud the company and that if there were any errors in his group production reports, they were simple mistakes.

5 In view of this evidence and in view of the fact that the company called no evidence in reply to rebut the grievor's explanation, the board must find that the previous conduct and work record of this grievor was satisfactory for over 12 years. This board must also find that the grievor's falsification of his records on the two days in question constitutes an isolated incident in his work career with this company because, though he falsified the records on two separate days, the falsifications clearly sprang from one incident, namely, his inability to perform the original setup of his machine for Job No. 30250, resulting in him having to tear the setup down and reset up the machine, and from his desire to conceal from his superiors the delay time which resulted therefrom. There was no specific evidence that discharge would fall unusually harshly on the shoulders of this particular grievor, but the board can fairly draw the inference that job opportunities in Pembroke are more limited than in larger centres and that it would, therefore, probably be more difficult for the grievor to obtain alternative employment. It would seem, therefore, that of the catalogue of considerations mentioned above, at least four apply to the instant case. On the other hand, the board, in giving weight to these considerations, must also give consideration to the seriousness of this offence in terms of company policy, as falsification of production records goes to the very root of the honour system of recording production on which the company bases its incentive programme. In this connection, however, two reported cases are of interest and significance. In the case of *Re U.A.W., Local 28, and C.C.M. Co.*, 5 L.A.C. 1883, the grievor was working under an incentive system and under company rule No. 7 it was his duty to correctly record on job tickets the number of pieces he actually produced. The grievor in this case actually produced 27,225 pieces, but falsified his work tickets and recorded a total of 35,480, which was a 30% excess charge. This grievor had been in the employ of the company for 30 years and had a good past record. His Honour Judge Anderson, writing the award, has this to say at pp. 1886-7:

> At first blush it might seem that the harsh penalty of discharge which the Company imposed was a very severe penalty to impose on an employee who had 30 odd years of service and who had a good past record. On the other hand, dishonesty under the rules calls for discharge and the arbitrator's duty is to bring about the result which is just and equitable. It must be just and equitable not only to the employee concerned, but to the Company and to the remaining employees. The whole method of piece-work in this plant, on which by far the larger number of employees are engaged, is arranged on the basis that the employee books his own results, and the rules definitely provide that the employees are required to follow instructions given by their foremen in the preparation of their job tickets.
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> I have looked up a number of arbitration cases and it is my opinion in cases of dishonesty as flagrant as this, were it not

for the long service of this grievor, that the Company might well be justified in discharging the grievor outright.

The arbitrator then proceeded to substitute for the penalty of discharge a one-year suspension.

6 Comparing this case with the instant case, the grievor in the former had longer service than the grievor in this case, but on the other hand the dishonesty of the grievor in the former case was much more flagrant than the dishonesty of the grievor in this case, not only in quantum but also in results, because in the former case, the grievor reaped the ill-gotten gains of his dishonesty, where in the instant case the grievor did not.

7 Turning now to the second case which the board considers highly relevant and significant, namely, *Re U.A.W., Local 127, and Ontario Steel Products Ltd.*, 13 L.A.C. 197. In this case, the grievor had falsified the time sheets prepared by him and turned in to the company, upon the correctness of which depended the pay which he received, and the grievor had entered and was paid for work which had not been done. The grievor admitted that he had been falsifying time sheets for approximately one year and neither he nor the company was able to form any correct statement as to how much money had been thus fraudulently obtained. The grievor had been a satisfactory employee for 23 years and was 45 years of age, married, with one child still dependent upon him. On these facts, the arbitrator, His Honour Judge Beardall, has this to say at p. 199:

> The offence with which this grievor was charged and has admitted is a very serious one, and of necessity calls for a punishment that will deter others from embarking upon a similar course who might be tempted to do so if the consequences were not dire. In a normal or average case, I would concur in their view that discharge is the only fitting punishment.
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> In this particular case, however, the grievor has established a long and favourable record with the company prior to his last year of employment, and I feel that an employee is entitled to receive some credit for such a course of conduct, to be balanced to some extent against subsequent misbehaviour. Moreover, the punishment of dismissal will weigh more heavily in some cases than others, and in the present case would appear to me to be a tremendous economic hardship upon the grievor. If there is any reasonable doubt as to the adequacy of the punishment I think that the grievor should be given the benefit of such doubt. On the other hand, it must be demonstrated to the grievor and to all the employees of the company that such conduct must be severely punished and that the offender does not come off scathless.

In this case the arbitrator directed that the grievor make restitution to the company in the sum of $1,000 and be suspended until such restitution had been made and to lose 10 years' seniority. Comparing this case with the instant case, again it should be noted that the falsification of the company records by the grievor in the case cited is much more serious than the falsification of the records of the company by the grievor in this case, and again, that the grievor in the first case profited by his dishonesty, whereas this grievor did not.

8 This board therefore, has come to the conclusion that there are sufficient factors in the instant case which mitigate against the severe penalty of discharge imposed on this grievor by the company, and that this penalty should be reduced. The penalty substituted therefor, which while recognizing the seriousness of the offence committed by this grievor and while recognizing that it should be severe enough not only to teach this grievor a well-deserved lesson but also deter other employees from a similar course of conduct, still recognizes the principle that justice must be tempered with mercy.

9 In the result, therefore, the penalty of discharge imposed upon this grievor must be set aside and in substitution therefor this grievor will be suspended until the regularly scheduled working day next following receipt of this award by the company and the union, at which time the grievor will be reinstated without any compensation but without loss of seniority.

***A. A. White*, Dissent:**

10 I have read with interest the award of the chairman and I agree that it clearly outlines the facts and the evidence, and properly comes to the conclusion that the grievor was guilty of flagrant dishonesty and an equally flagrant breach of company rules. The award agrees that these rules — in particular the one violated — were properly posted, that the grievor was well aware of them or should have been, and that they were consistently enforced.

11 The award properly points out that under the collective agreement between the parties a board of arbitration has the power to reduce a discharge or suspension penalty.

12 I regret I cannot agree that this is a situation in which this power should be exercised.

13 The normal mitigating circumstances according to the authorities do not exist in this case. The grievor was not a

twenty or thirty-year man. He is a reasonably young man. He would not be hampered in his search for employment because of his age. The majority award cited with particular reference His Honour Judge Anderson's award in *Re U.A.W., Local 28 and C.C.M. Co.*, 5 L.A.C. 1883. I quote the relevant section from this award: "... were it not for the *long service* of this grievor, that the company might well be justified in discharging the grievor outright." (emphasis added). His Honour was talking about service in excess of 30 years, almost the full average working life of a man. In the instant case it is hardly more than one-quarter of the man's working life. Again His Honour Judge Anderson no doubt took into consideration that the chances of a man of the grievor's age getting employment were pretty slim. This situation does not obtain here. In the *C.C.M.* case the grievor overbooked some 30% in an isolated instance. In the case before this Board we have two instances involving a higher percentage of overbooking — in one case much higher — plus definite evidence of juggling setup and tear-down time.

14 The other case which appears very pertinent is the decision of His Honour Judge Beardall in *Re U.A.W. Local 127, and Ontario Steel Products*, 13 L.A.C. 197. I quote from this second case: "In the normal average case I would concur in their view that discharge was the only fitting punishment." I submit that the case before us is a normal average case of this kind.

15 To order reinstatement of the grievor is tantamount to putting up a notice advising all and sundry that they are free to cheat on their incentives until caught, and when caught they will still be guaranteed another chance.

16 I am further of opinion that the grievor was well aware of what he was doing. His evidence made it very clear that he was exceptionally knowledgeable with respect to the incentive system in effect, and very aware that it could be subverted.

17 The union's two main arguments that the employee should have been warned and secondly that he did not gain materially from his actions are completely unfounded. This offence is not of a nature that would allow a series of warnings. The rules which he violated were well known to him or should have been. He did not gain materially because he was caught in the act.

18 For the above reasons I respectfully submit that this is not a case wherein the "power to mitigate" should be exercised.