2003 CarswellBC 4105
British Columbia Arbitration

Babine Forest Products Ltd. and IWA-Canada, Local 1-424 (Tress), Re

2003 CarswellBC 4105, [2003] B.C.C.A.A.A. No. 131, 73 C.L.A.S. 319

IN THE MATTER OF AN ARBITRATION BETWEEN: BABINE FOREST PRODUCTS LTD., (the "Employer") AND: I.W.A. CANADA, LOCAL 1-424, (the "Union"); (Grievance: D. Tress - Failure to Hire According to Preference) C.A.A.B. Case Number 2002/555T

Sanderson

Judgment: April 25, 2003
Docket: X-023/03

Counsel: for the Employer: Thomas A. Roper, Q.C.
for the Union: Sandra CAFFREY

Subject: Labour; Public

Headnote

Labour and employment law

An employer must have reasonable grounds not to re-hire an employee, having regard to the circumstances of the case.

The grievor worked as a summer student as a Spare Board Operator in 2000 but was not physically able to perform the work because of an existing medical condition, carpal tunnel syndrome. The employer designated the grievor as a no re-hire. The grievor alleged that he was not given preference in hiring when he applied as a summer student for the position of Spare Board Operator in 2002. The grievor claimed that he had currently experienced no pain from his medical condition and it would not prevent him from working. The union brought this grievance. — Grievance upheld in part. — What had to be determined was whether in the circumstances the employer had reasonable grounds not to re-hire the grievor. Each case had its own individual circumstances that had to be weighed. The employer acted responsibly and properly when it was told of the grievor's difficulties on the job and it tried to accommodate him. However, the employer then effectively made a medical judgment that it was not qualified to do when it decided that the grievor's physical condition was such that he could never work for the employer again. The employer did not put its mind to the grievor's state of health in 2002 when he was seeking to invoke his preferential hiring rights. The decision making process that brought about the rejection of the grievor's application was incomplete and flawed.

***JOHN P. SANDERSON, Arbitrator*:**

AWARD

1 This grievance involves a complaint that the grievor was not given preference in hiring in April 2002, when he applied, as a summer student, for a position as Spare Board Operator. The collective agreement provision alleged to have been violated reads as follows:

> *ARTICLE VIII - SENIORITY*
>
> ...
>
> *Section 7:*
>
> It is agreed that companies signatory to this agreement shall give preference in hiring, competency considered, on the following basis, in the following order:

a) previous employees of the Division who have both previous seniority and an application on file

b) previously employees of the company who have previous company seniority and are seeking employment as a result of operational closures or crew reductions in other operations of the company

c) laid off employees of other forest industry companies in the communities, who are seeking employment as a result of operational closures or crew reduction in excess of ninety (90) days

d) laid off forest industry IWA members of Local 1424 and 1-425 who are seeking employment as a result of operational closures or crew reduction in excess of ninety (90) days

e) persons who qualify for preference, and wish to exercise their rights to preference, must make application within six months of the operational closure or the ninety day layoff period.

Applications will be kept on file as active for 60 days. After which time, applications must be renewed by the person seeking employment, or no preference shall be considered.

2 The position of the employer in rejecting the grievance is that the grievor had demonstrated, during the period of his previous employment in the summer of 2000, that he was not physically able to perform the work in question because it aggravated an existing medical condition, carpal tunnel syndrome. The employer designated the grievor as a "no re-hire". As a result, the employer asserts the grievor was not entitled to exercise his preferred hiring rights in accordance with the above-noted article and the terms of the following letter dated October 8, 1994, which I will discuss later in this award:

Conifer

902 - 299 Victoria St.

Prince George, B.C.

V2L 5B8

Attention: Dave Gunderson

Director

Dear Sir,

Re: Preferential Hiring

Art. VIII, Section 7(1), (2), (3) & (4)

To clarify the application of the agreement reached in 1994 negotiations with regard to Preferential Hiring under Article VIII, Section 7, it is not our intent that this provision will apply to persons who have voluntarily terminated their employment and are considered "no rehires."

It is not our intent to have the terms of Article VIII, Section 7 cause any employer to be required to hire as employees persons who are not acceptable to them under normal hiring practices, nor is this section to be construed as a guarantee of hire.

Sincerely yours,

Harvey Arcand

4th Vice President

IWA-Canada

3 The background and essential facts are not seriously in dispute.

4 The grievor is a young man who at the time he was originally hired as a summer student in April of 2000, was attending university. At that time, he was assigned the position of Spare Board Operator. In this role, he filled in for absent employees in the yard doing a variety of manual labour tasks. Virtually by definition, his days of work were irregular as they depended on when and for how long other employees were unavailable. From the evidence, it appears the grievor worked 23 days in the first two months. It also appears that about 75% of his work was characterized as "clean up" of the second floor and basement of the saw mill, work that involved sweeping, shoveling and some handling of lumber. The most physical demanding work assigned to the grievor was as a strip layer, which according to the grievor, accounted for approximately ten percent of his work, work that was intermittent in its duration.

5 As events progressed in June and July, it appears the grievor was working on a more regular basis. However, he began to experience pain in his wrists and hands. Despite this, he was able to continue his work although there is evidence he reported his discomfort to the safety department. He saw a doctor at the end of June 2000 and was told that he could continue to do the clean up work. Perhaps the clearest expression of the grievor's medical condition at that time is the following quotation from the Workers' Compensation Board Decision of January 3, 2001 about which more will be said later:

> You advised that you first started experiencing symptoms in both your hands approximately mid June 2000. You were unclear whether your symptoms started in your right hand or both hands at the same time.
>
> You say your doctor's replacement on June 31, 2000 and he recommended light duty because of carpal tunnel syndrome. You say your doctor on August 10, 2000 and he noted"? carpal tunnel syndrome". You saw a neurologist on September 28, 2000 who agreed with your doctor's diagnosis of carpal tunnel syndrome but was not able to confirm whether or not you had it because your hands had recovered at that time.
>
> Carpal tunnel syndrome is a common condition that occurs in the population at large. It has clearly documented risk factors that are non-occupational. There is also evidence to link some kinds of work activities to this condition. The Workers' Compensation Board does recognize that, in some circumstances, work activities can cause carpal tunnel syndrome. An occupational cause may be suggested where there is frequent, repetitive and forceful flexion of the wrists.

6 On August 10, the grievor reported to the mill and spoke with Darwin Eftoda, one of the employer's supervisors. He told Mr. Eftoda that he could not do heavy work, particularly the strip layer work and he related to him his doctor's diagnosis and why he had gone to see the doctor. Mr. Eftoda suggested he would assign light duties to the grievor, which he did. The grievor did light clean up work, basically sweeping on the graveyard shift, for about one and a half weeks. The pain and discomfort continued and the grievor reported he could no longer do that work. Again, the employer representative, Mr. Eftoda, suggested he might spend time dusting and painting handrails. The grievor, on reflection, decided this would not be possible and on August 25, 2000, he sent the following letter of resignation to the employer:

> Dear A1 and/or Darwin:
>
> Please accept this letter as my resignation for August 25, 2000.
>
> September and school are fast approaching and I wish to use my remaining days in Burns Lake to prepare myself to go back. I'm sorry for not giving you the standard two weeks notice but since I am not actively on the spare board (and have been for two weeks) I trust that this is acceptable.
>
> I would like to sincerely thank you for giving me the opportunity to work at Babine Forest Products, as my experience here has provide me with a few important life lessons, and has also helped me financially.
>
> Sincerely,

Darnell Tress

7 In March 2002, the grievor went to the mill and filled out a new application for employment, again as a Spare Board Operator. In that application, he advised he had made a WCB claim in the past because of carpal tunnel syndrome but "it will never happen again". Having submitted the application, two days later he telephoned Keith Beerling, another of the employer's supervisors, to enquire as to his status. Mr. Beerling told him the employer had no interest in hiring him because it was apparent that the grievor was not physically fit for the kind of work that was involved. The grievor told Mr. Beerling that the symptoms had disappeared and he did not expect them to return because he had developed an exercise routine and was now much stronger.

8 It is not disputed that other employees were hired as Spare Board Operators, none of whom had prior experience with the employer. It is also not disputed that the only reason for the grievor not being hired were the physical problems he experienced doing the same job in the summer of 2000. Other than that, it is agreed that his job performance was satisfactory.

9 In October 2000, the grievor made application to the Workers' Compensation Board, under Section 5(1) of the *Worker's Compensation Act* which is based on a claim arising from a personal injury incurred during the course of employment. That claim was subsequently dismissed by Decision dated January 3, 2001. The relevant portion of the Decision is as follows:

> The risk factors associated with carpal tunnel syndrome are frequency, repetition and force. There are bilateral carpal tunnel risk factors in the work activities of strip piler and green chain. This is due to the fact that strip piling and piling lumber on the green chain involves repetitive gripping with both hands while handling either strips or lumber. The other activities of strip shack, cleanup and log yard strapper do not contain bilateral risk factors. This is because they do not involve the repetitive use of both hands. Although you did do some handling of lumber on cleanup, which would involve the use of both hands, I am satisfied that it did not comprise a significant portion of your time.
>
> Although there are some risk factors in the work activities that you did, specifically in strip piler and the green chain, these activities did not comprise a significant portion of your time. These 2 activities only accounted for 10% of the hours that you worked. I am not satisfied, on the balance of probabilities, that your bilateral carpal tunnel syndrome was due to the nature of your employment according to Section 6(1) of the *Workers' Compensation Act*. Accordingly, your claim for compensation is not accepted and any costs associated with your carpal tunnel syndrome will not be covered by the Workers' Compensation Board.

10 At the hearing, the parties agreed that the letter of October 8, 1994, reproduced above, is properly before me and is binding on them as it relates to the proper interpretation of Article 8.7.

11 As can be seen, this letter is not between these two parties. Its history and background was the subject of considerable evidence. The author of the letter, Harvey Arcand, presently First National Union Vice-President, traced its origin and explained its purpose and intent. According to his evidence, the letter was necessary because Conifer, the employer with which the union was then negotiating, was concerned about the impact of the preferential hiring language in the collective agreement. He testified that because the article had been broadened in scope to cover former employees of other employers, that company did not want to hire former employees who had bad disciplinary or absentee records. As Mr. Arcand stated, "they didn't want to hire someone else's fuckups". Apparently, the resolution of this issue was a difficult and critical element in the negotiations. Mr. Arcand told me that he wrote the letter to give Conifer the assurances it required and to break the negotiating log jam.

12 In due course, collective bargaining negotiations took place between these parties with respect to the current agreement. The union demanded the same preferential hiring language that now appears in the agreement and that it had negotiated with Conifer. The employer, for the same reasons as Conifer, demanded the same protection and insisted on the same letter. The union had a political problem with respect to another local union and it was not able to agree to the letter being part of the agreement. However, Mr. Arcand as part of the union negotiating team, advised that the union was willing to agree that the terms and the full intent of the letter would be binding on it and the employer under the new agreement. Again, this was a critical negotiating issue between these parties. It is a credit to the respectful relations between the individuals involved that after a full

discussion as to the proper interpretation and intent of the letter being the same as I have described in the preceding paragraph, the employer accepted the union's assurances and dropped its demand that a formal letter had to be signed.

13 The result of this arrangement was Article 8.7 in the terms in which it now appears in the signed agreement. In addition, the parties agreed that the Conifer letter of October 8, 1994 was binding upon them to the same extent as if it had been actually signed by them as part of the negotiations. Consequently, I am obliged to interpret Article 8.7 in light of the October 8, 1994 letter in determining this grievance.

14 The submission of the union is that the employer discriminated against the grievor on the basis of a physical disability in refusing to hire him in April of 2002. According to the union, the collective agreement has been breached and the grievor's preferential hiring rights denied him without the employer having reasonable or proper grounds for rejecting his application for reemployment.

15 The union submits that it is important to my determination to consider the standard or rationale by which the application of a former employee may be rejected under this contractual language as modified by the October 8 letter. The union argues that the employer must act reasonably in making its decision and that in doing so, it must have objective evidence before it, not speculations or assumptions it has made. In arbitral terms, the union submits that the employer must not only act reasonably, but may not act in an arbitrary, discriminatory or in bad faith manner.

16 The union agrees that much of the present dispute revolves around the October 8 letter. The union accepts that the employer is not obliged to rehire applicants who had been terminated because they were bad employees. In addition, the language does not require the employer to rehire people who would not normally have been hired in the first place under the employer's existing practices or workplace standards. However, the union was equally clear that in its view, there must be an evidentiary base of objective evidence to support the conclusion that the employee who was designated as a "no re-hire" was a "bad employee" (or, to quote Mr. Arcand, "a fuck-up"), in order to have that employee's preferential hiring rights denied him.

17 In this case, the union submits that the employer's decision not to hire the grievor was not reasonable as the decision was based solely on the existence of the occurrence of carpal tunnel syndrome and that was discriminatory under the collective agreement and the *Human Rights Code*. The union emphasizes that the grievor was a satisfactory employee in all respects and that the evidence of Mr. Eftoda is clear the sole reason for him reaching a conclusion in August 2000 that the grievor would not be rehired, was the grievor's disability. Simply put, the union argument is that the fact the grievor was disabled with carpal tunnel syndrome was not a reasonable ground for refusing to rehire him, was discriminatory in nature and was a decision contrary to the collective agreement and the *Human Rights Code*.

18 In support of its position, the union relied on a number of arbitral authorities as set out below:

1. *Canadian Forest Products Ltd. (Netherlands Division) -and- IWA Canada, Local 1-424* (unreported) December 7, 1992, Albertini

2. *Lilydale Co-Operative Ltd. v. United Food & Commercial Workers' Union, Local 1518*, [1995] B.C.C.A.A.A. No. 178Award No. A-169/95

3. *Crabtree v. 671632 Ontario Ltd. (c.o.b. Econoprint (Stoney Creek))*, [1996] O.H.R.BiC.C. No. 37, Decision No. 96-037, November 6, 1996 (MacNaughton)

4. *Goudie v. Ottawa (City)*, [2003] S.C.J. No. 12, 2003 SCC 14

5. *Evans Products Company Ltd. (Savona Division) -and- International Woodworkers of America, Local 1517*, December 12, 1986, Vickers

6. *Johnman v. Chilliwack Furniture World Ltd.*, [1996] B.C.H.R.T.D. No. 11, February 22, 1999 (Neilson, Q.C.)

7. *Re Canada Packers Inc. -and- United Food and Commercial Workers International Union*, 30 L.A.C. (3d) 178, October 14, 1987 (Burkett)

8. *Simon Fraser University (the "Employer"), and- Association of University and College Employees, Local 6, Teaching Support Staff Union (the "Union)*, No. 169/83 (Appeal of No. L88/82), June 28, 1983 (Black)

9. *Roy v. B.C.Rail Ltd.*, [1986] B.C.C.H.R.D. No. 20, October 20, 1986 (Edgett)

19 The argument of the employer began with the submission that my jurisdiction as arbitrator arises solely from the application of article 8.7 as modified and qualified by the October 8 letter and not from any statute or other law. As a result, the company submits I have no jurisdiction to treat this matter as a human rights claim. Further, while the employer does not disagree with the general proposition that the employer's decision must be reasonable in the circumstances, that determination must be judged in relation to the facts that applied at the time the employee in question was designated as a "no re-hire". According to the employer, when one looks closely at the letter, it focuses on the employment circumstances and the employee's capabilities in the job the person had previously, in contrast to the facts that prevailed when the new application for employment is made.

20 As can be seen, the employer argument centers on the use of the words "no rehire". If the employer argument is not adopted, the employer counsel argues that it would make the letter meaningless. As the employer counsel stated his views, it makes no sense to believe that the parties would have intended to allow a bad employee with a poor disciplinary record to be designated as a no re-hire, but then have that changed because the employee "got religion".

21 Alternatively, the employer submits that even if one takes into account the circumstances during the previous period of employment as well as the date the application for employment is made, the decision of the employer was reasonable and based on objective and appropriate facts. The employer relies on the evidence of Mr. Arcand in cross-examination that a valid no re-hire would include a situation where the employer had reasonably judged that person not be up to the requirements of the job. While Mr. Arcand said that the "company must prove it", the employer submits that is not an issue here, as on the facts before me it is clear the grievor was not able to do this job without serious risk of injury to himself.

22 The principle submission of the employer was that on the facts, the grievor is simply not suitable for this kind of work. Even if the letter did not exist, the employer argues the result would be the same, namely that the employer made a reasonable decision at the time it rejected the grievor's application for employment. As to the question of whether there was an objective basis for the employer's determination, the employer submits that conclusion is inescapable. Specifically, the employer argues that the grievor's physical symptoms developed in June and July 2000 as he began to work on a more regular basis. In any event, employer counsel submits the employer had accommodated the grievor to the greatest possible level and the symptoms did not disappear until after he left the work environment all together. Accordingly, the employer's position is that the grievor was not physically capable of doing the job and that conclusion is based on fact and was not a mere assumption.

23 In support of its submissions, the employer relied on the following arbitral authorities:

1. *Canadian Forest Products Ltd. (Netherlands Division) -and- IWA Canada, Local 1-424* (unreported) December 7, 1992, Albertini

2. *Centurion Lumber Ltd. & Centurion Lumber Manufacturing (1983) Ltd. -and- International Woodworkers of America Local 1-80* (unreported), March 27, 1985, Munroe

3. *Evans Products Company Ltd. (Savona Division) -and- International Woodworkers of America, Local 1517*, December 12, 1986, Vickers

4. *Versatile Pacific Shipyards Inc. (Victoria Division) -and- International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers Lodge 191* (unreported), November 19, 1085, Munroe

5. *Re Edmonton Regional Airports Authority and- Public Service Alliance of Canada* (2001), 103 L.A.C. (4th) 437 (Smith)

6. *Re Pasteur Merieux Connaught Canada -andCommunications, Energy and Paperworkers Union of Canada, Local 1701* (1998), 75 L.A.C. (4th) 235 (Knopf)

7. *Oak Bay Marina Ltd. (c.o.b. Painter's Lodge) v. British Columbia (Human Rights Commission)*, [2002] B.C.J. No. 2029 (Newbury)

8. *Mc Donald v. Martech Electrical Systems Ltd.*, [1996] B.C.C.H.R.D. No. 9 (Vallance)

9. *BC Rail Ltd. (the "Railway"), and The United Transportation Union, Local Nos. 1778 and 1923 (the "UTU", and- The United Association of Journeymen and Apprentices of The Plumbing and Pipefitting Industry of The United States and Canada, Local No. 170, Metal Trades Division ("Local 170"), and The Council of Trade Unions on BC Rail*, [1992] BCIRC No. C152/92 (Hall) (excerpt)

24 I have carefully considered the various arbitral authorities referred to me. I conclude that the arbitral question I must ask is whether the employer had reasonable grounds not to rehire the grievor, having regard to all of the circumstances of the case. In my view, the clearest articulation of this approach is the following quotation from the *Centurion* case:

> I agree that "reasonable cause not to re-hire" is a proper and workable formulation of the test. However, I agree as well with the observation in the *CIPA* award (at p.4) that "reasonable cause, self-evidently, must be judged against the circumstances surrounding each case." And, it is self-evident that "reasonable cause not to re-hire" cannot and should not invariably be equated with "reasonable cause to dismiss". No doubt, there are times when the two ought to be given the same meaning. Suppose, for example, that an employer refuses to give preference to a former employee because of the belief that during the prior employment the employee committed theft of some of the employer's tools. That is an allegation of specific industrial misconduct. Proof of the misconduct and its proper consequences should be required to the same degree as in the more common disciplinary setting.
>
> As I read the *CIPA* decision, that was the general nature of the case laid before the arbitrator. Properly characterized, the dispute was within the disciplinary milieu. Essentially, the employer's contention was that the former employee was a disciplinary problem.
>
> By contrast, take the case of the former employee who gave exemplary service but who is admittedly not qualified for the opening that has arisen. Clearly, there would be "reasonable cause not to re-hire" even though one could not possibly say that there would have been "reasonable cause to dismiss". Again, "reasonable cause" is a contextual judgment. Its meaning is shaped by the circumstances in which it is to be applied.

25 In this case, I am functioning in the capacity of grievance arbitrator. I agree with counsel for the employer that my jurisdiction flows from the collective agreement. There is no specific contract language in the collective agreement that addresses the responsibility of the employer not to discriminate against employees, either expressed in general terms or by reference to designated grounds. Neither is there language in the collective agreement that makes any reference to the *Human Rights Code*. Of course, the notion that the employer must not act in a discriminatory fashion is part of the general arbitral law and is captured by the principle of acting reasonably in the circumstances. Here, I am not speaking of reasonableness in the abstract but asking whether the employer's decision meets that criteria in the circumstances of this particular case.

26 To repeat, I do not wish to speak in too general terms. Each case has its own individual circumstances that must be carefully weighed. These circumstances will provide the full factual context against which the decision in question is measured and judged for its reasonableness. There will be cases where the circumstances are such that the employer's decision to designate a former employer as a "no re-hire" can be judged, without consideration of what occurred after the initial designation was made, consistent with the October 8 letter and Mr. Arcand's evidence. Examples that come to mind would be terminations for disciplinary reasons or a resignation after a series of employment offences had been committed. Those events are fixed in time and have no on-going elements. However, that is not the case before me. Here, the circumstances that must be examined deal with the grievor's physical condition, something that is not static and is subject to constant change, sometimes positive and other

times negative, for the individual. It is necessarily relevant to a determination of the reasonableness of the employer's decision to review the grievor's physical condition during his period of employment in the summer of 2000 and his physical condition at the point in time when his new application for employment was rejected.

27 Applying those principles to the circumstances of this case, it is apparent there were two decision points, the first being when the grievor was designed as a "no re-hire", and the second when his application for re-employment was rejected. As I have said, since the deciding factor is judging the grievor's capacity to work at this job at both points in time, the reasonableness of the company's determination must take into account all of the circumstances, not just what they were when Mr. Eftoda decided the grievor would not be re-hired.

28 What were the significant circumstances? In my view, the employer acted responsibly and properly when the grievor informed them of the difficulties he was having on the job, the pain in his hands and wrists he was experiencing and the medical diagnosis he had received. The employer attempted to accommodate him by assigning light duties, but that effort was not successful. Mr. Eftoda then effectively made a medical judgment, something he was not qualified to do, that this grievor's physical condition was such that he could never work for the employer again. In October, the grievor applied for Workers' Compensation benefits but his claim was rejected and the employer was informed of the reasons. In addition, the employer learned that the grievor's symptoms had disappeared.

29 The real difficulty with this case arose two years later when the grievor reapplied for employment and told Mr. Beerling that he had no symptoms of carpal tunnel syndrome, that he had taken on a work-out schedule and exercise program and had improved his general physical condition. He wrote on his application that he was sure the condition would not reappear. Mr. Beerling was frank to say that he ignored that information and made his decision solely on the no re-hire determination made by Mr. Eftoda in August 2000.

30 On the facts, it is obvious Mr. Beerling did not put his mind to the question of the grievor's state of health in April 2002, when the grievor was seeking to invoke his preferential hiring rights. Yet the very question he was required to answer was the state of the grievor's then present physical capacity to do the work. As a result, I have no alternative but to find his failure to seek out the necessary facts, for example, to ask the grievor for an updated medical diagnosis, was not a reasonable evaluation of the grievor's preferential hiring rights in these particular circumstances. There is no question Mr. Beerling acted in good faith. Unfortunately, he did not do what he should have done by making a proper inquiry to enable himself to make an informed decision.

31 These circumstances are quite unique. The job the grievor was applying for was of a temporary nature for the summer of 2002. Mr. Beerling, as I have said, did not address the question before him with regard to the grievor's then-current physical condition, but neither did the grievor present any information from a qualified medical person in support of his application even though he should have known that would be a significant concern to the employer. As a consequence, the decision making process that brought about the rejection of the grievor's application and the denial of his preferential hiring rights was incomplete and flawed. Both parties share responsibility for that result.

32 Neither party made submissions before me on the matter of remedy. Accordingly, I direct the parties to meet and discuss that issue with respect to these events and the principles outlined in this award. I will remain seized of any issues regarding the outcome of those discussions and the implementation of this award.

33 In the result, the grievance succeeds to the extent set out above.