2015 CarswellBC 1831
British Columbia Arbitration

West Fraser Mills and USW, Local 1-424 (Williamson Dismissal), Re

2015 CarswellBC 1831, [2015] B.C.W.L.D. 5688, [2015] B.C.W.L.D. 5691, 123 C.L.A.S. 191, 256 L.A.C. (4th) 259

In the Matter of an Arbitration into a Difference

West Fraser Mills (Fraser Lake Sawmill Division), (the Employer) and United Steelworkers, Local 1-424, (the Union)

Joan I. McEwen Member

Heard: May 20, 2015
Judgment: June 2, 2015
Docket: None given.

Counsel: Donald Jordan, Q.C., Erin White, for Employer
Dan Will, for Union

Subject: Occupational Health and Safety; Public; Labour
Related Abridgment Classifications
Labour and employment law
I Labour law
I.6 Collective agreement
I.6.j Employee status
I.6.j.iii Probationary employees
I.6.j.iii.C Discharge
Labour and employment law
I Labour law
I.6 Collective agreement
I.6.u Management rights
I.6.u.xi Termination
Headnote
Labour and employment law --- Labour law — Collective agreement — Management rights — Termination
Grievor had passed medical examination before being hired but expressed concerns about aches and pains, not wanting to go up and down stairs, having sore toe and sore arm — Collective agreement provided for 30-day probationary period and provided that during that period probationary workers were "considered to be temporary workers only" — Union brought grievance concerning dismissal of probationary weekend cleanup person after only nine weekend shifts — Grievance dismissed — Grievor was kept apprised, from outset of her employment, that employer had serious concerns regarding her ability to perform her work safely in what was physically demanding job — Employer's decision to terminate employment relationship was anything but arbitrary, as it had showed grievor how to do job, teamed her up with more experienced employees and afforded her every opportunity to demonstrate her physical fitness.
Labour and employment law --- Labour law — Collective agreement — Employee status — Probationary employees — Discharge
Grievor had passed medical examination before being hired but expressed concerns about aches and pains, not wanting to go up and down stairs, having sore toe and sore arm — Collective agreement provided for 30-day probationary period and provided that during that period probationary workers were "considered to be temporary workers only" — Union brought grievance concerning dismissal of probationary weekend cleanup person after only nine weekend shifts — Grievance dismissed — Grievor

was kept apprised, from outset of her employment, that employer had serious concerns regarding her ability to perform her work safely in what was physically demanding job — Employer's decision to terminate employment relationship was anything but arbitrary, as it had showed grievor how to do job, teamed her up with more experienced employees and afforded her every opportunity to demonstrate her physical fitness.

Table of Authorities

Cases considered by *Joan I. McEwen Member*:

Belkin Paperboard v. C.P.U., Local 1129 (1980), 25 L.A.C. (2d) 303, [1981] 3 W.L.A.C. 62, 1980 CarswellBC 980 (B.C. Arb.) — considered

Canadian Forest Products Co. and I.W.A.-Canada, Local 1-424, Re (1998), 1998 CarswellBC 3985 (B.C. Arb.) — referred to

Canadian Forest Products Ltd. v. P.P.W.C., Local 25 (2002), 108 L.A.C. (4th) 399, 2002 CarswellBC 3335 (B.C. Arb.) — considered

Donohue Forest Products Inc. and IWA Canada, Local 1-424 (Cooper), Re (2000), 2000 CarswellBC 3607 (B.C. Arb.) — referred to

Edith Cavell Private Hospital v. H.E.U., Local 180 (1982), 6 L.A.C. (3d) 229, 1982 CarswellBC 2638 (B.C. Arb.) — distinguished

Ontario (Ministry of Natural Resources) and OPSEU (Magee), Re (2010), 2010 CarswellOnt 11872 (Ont. Grievance S.B.) — referred to

P & H Foods v. U.F.C.W., Local 175 (1990), 10 L.A.C. (4th) 1, 1990 CarswellOnt 5453 (Ont. Arb.) — considered

Teck Highland Valley Copper and USW, Local 7619 (Basil), Re (2014), 2014 CarswellBC 3754 (B.C. Arb.) — considered

Weyerhaeuser Co. v. U.S.W.A., Local 1-80 (2005), 2005 CarswellBC 4194 (B.C. Arb.) — considered

Statutes considered:

Workers Compensation Act, R.S.B.C. 1996, c. 492

s. 115 — referred to

s. 117 — referred to

Regulations considered:

Workers Compensation Act, R.S.B.C. 1996, c. 492

Occupational Health and Safety Regulation, B.C. Reg. 296/97

s. 2.2 — referred to

UNION GRIEVANCE concerning dismissal of probationary weekend cleanup person after only nine weekend shifts.

***Joan I. McEwen Member*:**

I. Nature of Grievance

1 The Union grieves that the Employer dismissed the Grievor, a probationary employee, in violation of Article III (Management), Section 2 of the Collective Agreement:

> The Company shall have the right to select its employees and to discipline them or discharge them *for proper cause.*
>
> (Emphasis added)

2 The Union submits that, in dismissing the Grievor after only nine shifts, the Employer failed to afford her the opportunity to demonstrate her fitness to safely perform the duties of the weekend cleanup person ("WCP"). In particular, it failed to adequately lay out the expected standards of performance, notify her as to her deficiencies, and warn her that, absent improvement, her job was in jeopardy. As well, the Employer, in making its decision, improperly relied on the unsubstantiated hearsay opinion of a co-worker.

3 In support of its decision, the Employer relies on Article VIII, Section 1 (a):

> Notwithstanding anything to the contrary in this Agreement, it shall be mutually understood that all employees are hired on probation, the probationary period to continue until thirty (30) days have been worked, *during which time they are to be considered temporary workers only*, and during this time no seniority rights shall be recognized.
>
> (Emphasis added)

4 The Employer submits that, from the very beginning, it had serious concerns regarding the Grievor to safely perform the physically demanding job. Given that the Grievor failed to alleviate those concerns over the next several weeks, the Employer decided to terminate her employment after only nine (weekend) shifts. Based on the first-hand observations of the charge-hand and supervisor that the Grievor was "struggling," the Employer acted reasonably in ending the employment relationship when it did. Though the Union argues that "due process" was not followed, the Employer submits that it raised its concerns on an ongoing basis — escalating from charge-hand to supervisor to superintendent. Though the Grievor responded on each occasion that she was improving, the Employer witnessed no such improvement.

5 Given their statutory and regulatory obligations under Workers' Compensation legislation — specifically, to ensure a safe workplace — the Employer concluded that its only option was to end the Grievor's probationary status.

II. Evidence

A. Employer

6 The duties of the WCP (8 hours per day, Saturday and Sunday) include: shoveling, sweeping, moving lumber, hosing down areas and equipment, and frequent use of the stairs.

7 Noel Silva, charge-hand and Level 3 first aide attendant, testified regarding his obligation "to ensure people work safely and go home safe." Following the orientation every new hire receives, he reviews with each of them, on a weekly basis, the "New/Young Worker Assessment Report" — a document focussing primarily on the employee's knowledge of, and adherence to, safety rules and procedures.

8 Checking in with the Grievor on September 7, 2014, her second day of work, Silva was told she was "good, but tired." That day, he wrote (in notes attached to his Report, albeit not shared with the Grievor): "She says she needs to quit smoking as walking up and down the stairs is hard. I did notice that she is struggling walking throughout the mill, especially up the stairs."

9 Asked in cross-examination about his note to the effect that "She has only gone up/down stairs at break times," Silva agreed that employees might also use the stairs when, for example, going to the lunchroom or washroom, putting away tools at the end of the Sunday shift, etc. He said, however, that WCPs, once located in their main assignment for the day, "mostly — 90% of the time — stay there (without the need to go up and down stairs)."

10 In his weekly email to Dave Kirkby, the sawmill superintendent, Silva made this comment: "Darlene Williamson is very hesitant, seems very wary. I spent lots of extra time with all of (the new hires) and paired them up with experienced workers. Darlene is struggling with the physical part, and is really struggling with walking up and down the stairs.... Hopefully it gets better but I'm afraid she will trip and fall going down the stairs."

11 On September 14, Silva saw the Grievor sitting on the steps. When he asked her how she was doing, she said that her back was hurting; she was using muscles she did not normally use. When he told her to stretch out and not hurt herself, she said "she needs to get in shape and smoking is not helping." That day, Silva noted in his Report: "She seems to be struggling, and my concern is that she is going to hurt herself."

12 In his weekly email to Kirkby, Silva wrote, "An update on Williamson. She continues to struggle and complained of a sore back on Saturday as they were cleaning up around the #1 re-entry. She again is having a hard time walking up and down the stairs, and has mentioned a few times that she is in bad shape, not used to using these muscles..... Either way, I will keep you updated and I have also let (supervisor) Tyler Daniel know what is happening."

13 On September 15, Kirkby emailed Silva and Daniel, copy to Scott MacDougall, the mill manager, as follows: "If Darlene isn't any better this weekend, or show signs of getting better, I think we should look at getting her out of here? You can call me and I will come in and deal with it. Thanks, Dave." At the end, Kirby added, "Scott — FYI Darlene is 60 and doesn't seem to be in very good shape. She started 2-3 weeks ago."

14 Asked why he sent it, Kirkby said it was due to Silva's concerns that she would get hurt and because it was not getting better.

15 On September 20, the Grievor told Silva that, because she had broken her toe at home, she would probably be moving slower than normal. He told her to be careful "as there is not much they can do with a broken toe."

16 At the one-on-one that same day, Tyler Daniel — at Kirkby's suggestion that a management representative be present — sat in. Daniel told the Grievor that she must be able to perform all tasks assigned to her, and that the Employer, in turn, must make sure she is safe and goes home safe. Silva said that there may be times she must crawl or get down low, and the Employer does not want her to get hurt. He noted that, because spark-watching entails a lot of running up and down stairs, she could not do that work. While volunteering that the work — especially the stairs — was very tiring on her legs, the Grievor said that she was feeling better and that her body was getting used to it. Silva testified that he "observed different."

17 Asked to comment generally about the meeting, Silva testified that he and Tyler made it clear to the Grievor that her health and well-being is critical, and that, at the end of the day, the Employer needs her to go home safe and healthy.

18 Later that day, the Grievor mentioned to Silva, in Tyler's presence, that her right arm was hurting — "a bit swollen and sore from shoveling." Though asked three times if she wished first aid treatment, the Grievor declined, saying she would ice it when she got home. Later noticing her wearing a tensor bandage, Silva asked how her arm was. When she said, "oh, it's just an old injury from home," he assumed it was "a controlled injury that she was able to work with."

19 After the September 20 meeting, Daniel made the following notes (a typed version of which he forwarded to Kirkby in February 2015):

> On September 20, Noel Silva and I had a sit-down with Darlene and explained to her that we had some concerns about pain levels when she was going home after a weekend at the mill. I explained to her that we didn't want her leaving work hurt or hurting. Explained that we need to be able to put our employees where we need them so that we can get tasks completed as needed, and that if you are only able to (do) jobs such as painting or clean-up and not spark-watch that we can't have that. Also explained that to be fair we need to be able to put people on different jobs so that everyone has somewhat fair of a chance to get put on different jobs. Not fair that she gets to paint every weekend when someone else has to shovel every weekend.

20 "On multiple occasions," Daniel testified, "(the Grievor) made mention in front of me about different aches and pains she was going through. Her arm was actually bruised one day from shoveling. She told Noel and I that she had to take epsom salts after the weekend because she was so sore. One weekend, she couldn't walk up the stairs anymore by the end of Sunday (September 20) night."

21 On September 27, Silva saw the Grievor wearing what looked to be a working splint. (In cross-examination, he agreed it might have been a tensor bandage.) Again, the Grievor described it as a "home injury" and said that she be seeing a doctor about it. She said that it still bothers her a lot. Silva testified that he was concerned that, although she had originally said her wrist hurt from shoveling, now she was saying it was not a work-related injury.

22 On Friday, October 3, Kirkby called the Grievor in to work for a meeting. He asked her whether this was the right kind of work for her. When he said there had been no improvement, she said she was getting better and would be okay.

23 At Silva's October 4 one-on-one meeting, the Grievor reiterated that she was feeling better and that her body was getting used to it.

24 On October 11, Silva reported to Kirkby that the job appeared to be too much for the Grievor. Two days later, he emailed Kirkby, reporting that a co-worker ("C") had told him that the Grievor

> was complaining about walking around picking up brooms, shovels, hoses, garbage, clutter at the end of their Sunday shift. That she could not do it because it was hurting her and she did not want to go up and down the stairs anymore.
>
> Again, I don't want her to be hurt at the end of every shift and I believe this is too much for her.

25 Asked in cross-examination whether he knew whether C's comments were true, Silva said no.

26 Agreeing that a lot of employees "struggle" with the job's physicality, he said that the Grievor "stood out." Asked why he did not mention the Grievor in his weekly report to Kirkby, Silva said that, while he might have been too busy, his observations of her performance satisfied him that nothing had changed.

27 Asked whether the Grievor's work was "okay," Silva said, "Her production was minimal. We can't take six hours to do a three-hour job. I'd say you must be productive. We'd have these discussions regularly. We were hopeful, but concerned for her safety." Asked whether there were some jobs the Grievor could not do, Silva replied, "scrambling into trimmer areas, down on her knees."

28 Tyler Daniel testified that, throughout the Grievor's probationary period, Silva brought his concerns to him. As well, given his presence at the start and end of each weekend shift, he had observed her work performance and had spoken to her more than once. He had observed that she never performed spark-watch duties. On (Sunday) September 20, he had noted the bruising of her arm; heard her mention that she "could no longer walk up the stairs." "Yes, (Sunday night's) a busy time," he agreed in cross-examination, "on account of putting tools away."

29 Through September and early October, Daniel had "multiple phone calls and in person" with Silva and Kirkby regarding the Employer's safety concerns: "Our main concern was that she would get hurt."

30 Dave Kirkby testified that, after his October 3 meeting with the Grievor, Silva and Daniel continued to express concerns. Upon receipt of Silva's October 13 email referencing concerns raised by C, he met with MacDougall. In the course of their "long discussion," it was decided that they "could not take a chance on (the Grievor) injuring herself. So we would terminate her employment."

31 When told on October 18 of the decision, the Grievor was "visibly upset." When she asked if she could be "laid off" as opposed to terminated, Kirkby said no — an opinion he later confirmed in a phone call to her.

32 Asked in cross-examination why he did not act on Daniel's September 20 critique of the Grievor's performance, he said he was waiting to see how she progressed. He agreed he received no emails from Silva between September 20 and October 13.

33 Regarding his September 20 email to MacDougall — "If Darlene isn't any better this weekend, or show signs of getting better, I think we should look at getting her out of here?" — Kirkby was asked how he could possibly make such as assessment after such a short time on the job. "I wasn't assessing," he replied. "I was just saying we should watch her. This was the first time I'd ever had a problem with a casual (weekend) employee."

34 Regarding the hearsay comments contained in Silva's October 13 email, Kirby said that, when he spoke to the Grievor about them, she denied being too tired to perform her tasks. He agreed that he does not know whether C's allegations are true.

35 Asked about the dismissal meeting, he said that he does not recall starting the meeting before the Union representative arrived: "He was there the entire time."

36 Acknowledging that some people take longer to get used to the work, Kirkby agreed but said that, throughout the Grievor's shifts, there had been "no sign of improvement." Asked whether he himself had observed her working, he said no.

B. Union

37 Married for six years and the mother of four adult children, the Grievor said that, before being hired, she successfully passed a medical examination — which included the testing of her back and leg strength — mandated by the Employer for all new hires.

38 Asked to describe the tasks of the WCP, she said "sweeping and shoveling dry and wet sawdust, piling boards, putting short boards into a wheelbarrow and dumping them. On Sundays," she said, "there's a clean-up of tools. We take them up to the main floor and put them in the closet. This involves 5 or 6 trips. Lots of stairs. I cleaned up around machines. We had to climb into narrow spots to get out the sawdust."

39 Agreeing that she regularly interacted with Silva, she said that every Saturday they would have a one-on-one, at which time they would discuss the items in his Assessment Report. "I told him I had some aches and pains. It would take some time getting used to." On October 11, due to a Hydro outage, she — together with employees Herbert Hummel, Taylor Raymond, and Keith Toews — shoveled wet sawdust off the roof for eight straight hours.

40 Asked whether anything different was discussed at the one-on-one attended by Daniel, the Grievor replied, "My aches and pains. They didn't want me to get hurt. While I was sore initially, I got better, weekend by weekend.... By the end of September, I was feeling a lot better. It was improving a lot." Asked whether Silva or anyone in management complained about or spoke to her about her work performance, she said no.

41 Having broken her toe at home, her "new work boots made it irritable." Did she have a sore arm? "That's why I wore the tensor bandage. Shoveling and piling boards made my wrists a little tender. I've seen others wear them." How is her arm now? "Fine."

42 Asked about the allegations contained in Silva's October 13 email, she said that she and a newly hired employee were rolling up the hose, picking up shovels and brooms — "from one end to the other" — then taking them upstairs, "4-5 times", to put in the very full closet. "(C) came from spark-watch and told us to go and do clean-up. When I said it was done, she asked me if I'd done a little cubby-hole in the back of the mill. I'd forgotten about it. We went into that area and retrieved a couple of shovels. By then (Silva) had made room in the closet.

43 "After that, with about 10-15 minutes left in the shift, (C) said we had to find something else to do. She said 'let's go on an adventure.' I said there was nothing left to do in the basement, and I wasn't going down those stairs again. After (C and the other employee) left, I picked up garbage under the vending machines. With 3 to 4 minutes left, C returned and said we could sweep sawdust off the computer room roof. We each got a broom and did it."

44 Asked whether she had ever complained about putting away tools or climbing the stairs, she replied, "no, it's part of my job." Though she shoveled wet sawdust for 8 hours on October 11, she felt achy and tired "but not as bad as when I started."

45 Regarding her meeting with Kirkby, the Grievor said he told her she was one of the older people they had hired, and that management's concern was that she not get hurt. To which she replied, "Given that I only work two days a week, my body will take time to adjust. If my body told me I couldn't do it, you'd be the first to know."

46 The Grievor testified that, though the Union representative had not yet arrived for the October 18 meeting, Kirkby said he was starting it anyway so as "to relieve the tension". He said the Employer didn't want to take a chance on her hurting herself. "I was in shock," she testified. "I asked if they could put me on layoff. I had bills to pay, I needed EI to make my car payment. Mr. MacDougall said he'd look into it."

47 When Kirkby called her on October 21 to tell her the Employer was not allowed to place her on lay-off status, she said that no-one had ever talked to her about her job performance. "He said he had no issue with my job performance."

48 The Grievor testified that, though she returned to her old (part-time) job the day after being let go, she will soon be laid-off.

49 Asked in cross-examination whether the Employer's consistent message to her had been that they wanted her to be safe and that they did not believe she was getting better, the Grievor agreed.

Was it their "honest belief"? "Yes."

You didn't agree? "I took all precautions not to be hurt. I made sure I followed all safety procedures. Sunday evenings were the worst."

You thought your opportunity should be longer? "Yes."

You believed that, had they done so, you would have gotten in shape and alleviated their concerns? "Yes."

50 Herbert Hummel, a student and a WCP, testified that he worked with the Grievor, on and off, on at least 4 weekends. He said she had no trouble performing the physical tasks required of the job, she kept up, and she never complained.

III. Argument

A. Employer

1. The Law

51 There is a lengthy history of decisions dealing with termination of probationary employees in the forest industry of British Columbia. Those decisions focus on the somewhat unique language of Article VIII (1) which, in addition to establishing a 30 day probationary period, provides that during the 30 days probationary workers are "considered to be temporary workers only". In light of this language the case law not only rejects the notion that "just and reasonable cause" is required for the termination of a probationary employee; the cases observe that since probationary employees are "temporary" the employer's refusal to engage them as a regular employee is not properly characterized as a discharge but rather simply a refusal to grant a probationary employee a status to which the employer decides he has not shown himself suited. See e.g., *Donohue Forest Products Inc. and IWA Canada, Local 1-424 (Cooper), Re* ([2000] B.C.C.A.A.A. No. 213 (B.C. Arb.)), citing the "Sloan" award at para. 38 and 39.

52 The relevant case law also cedes to the employer a very wide latitude recognizing that an assessment of a probationary employee involves intangible and subjective factors which must be taken into account by the employer. Arbitrators have reasoned that — provided that the assessment of "suitability" is not done in an arbitrary, bad faith or discriminatory manner — they should be reluctant to interfere with management's prognosis: e.g., *Canadian Forest Products Co. and I.W.A.-Canada, Local 1-424, Re*, [1998] B.C.C.A.A.A. No. 528 (B.C. Arb.)] (Kelleher); *Canadian Forest Products Ltd. v. P.P.W.C., Local 25*, [2002] B.C.C.A.A.A. No. 198 (B.C. Arb.) (McPhillips); and *Ontario (Ministry of Natural Resources) and OPSEU (Magee), Re*, [2010] O.G.S.B.A. No. 114 (Ont. Grievance S.B.) (Briggs).

53 Arbitration boards are virtually unanimous in declaring that safety is a vital consideration within the employment relationship. The ability of employees to work without injuring themselves is amongst the most serious of matters in the workplace. It is so serious that both the employer and individual supervisors are subject to statutory prohibitions, enforceable by fines and prosecutions, related to ensuring employees can work without injury. The first and foremost obligation of any employer, and any supervisor, is to protect employees from injury. An employer who believed that an employee was in jeopardy of injuring themselves and allowed them to remain in the workplace would be in violation of the law and subject to sanction: e.g., *Weyerhaeuser Co. v. U.S.W.A., Local 1-80*, [2005] B.C.C.A.A.A. No. 88 (B.C. Arb.); paras. 43 to 47 (McPhillips); *Workers Compensation Act [RSBC 1006] Chapter 492*, Part 3, sections 115 and 117; and *Workers Compensation Act, Occupational Health & Safety Regulation* 2.2.

54 The issue of whether the Employer acted arbitrarily must be viewed through the lens of that statutory and regulatory obligation.

2. The Evidence

55 Noel Silva's evidence is consistent with that obligation; his focus was on ensuring the Grievor worked safely and went home safely. From the very beginning, he had concerns regarding whether the performance of her duties put her at risk of injury. Though the Grievor assured him that she was "getting better", his observations were at odds with that — "she continued to struggle. It was too much for her."

56 Those concerns were brought home to her — *via* an increasingly formal approach — by management. At the September 20 meeting, supervisor mill Tyler Daniel, who had observed the Grievor working, made it clear both that the Employer did not want her leaving work hurt or hurting, and that each employee must perform the full range of duties. On October 2, mill superintendent Dave Kirkby called the Grievor at home to ask her to come in for a special meeting. When he asked her whether this was the right job for her, her only response was to say she was getting better.

57 The longer the Grievor failed to show improvement in her ability to handle the physical demands of the job, the higher management's concerns rose.

58 Regarding the Union's argument that the Employer was obliged to afford her more time to prove her fitness, the *Weyerhaeuser* decision makes it clear that, when employers have statutory obligations, that adds to their responsibility. Had the Employer not brought the employment relationship to an end when it did, it would have risked running afoul of those obligations.

59 In summary, the evidence establishes that the Employer had a bona fide and reasonable belief that the Grievor could potentially injure herself. In view of that fact, its decision to terminate the probationary period cannot be viewed as being arbitrary, discriminatory or in bad faith. Given the risks imposed on the Employer, it was not obliged to afford her more time in which to try to improve her physical capability.

B. The Union

1. The Law

60 The Collective Agreement makes it clear that probationary employees enjoy the same "proper cause" standard for dismissal as do regular employees:

> The Company shall have the right to select its employees and to discipline them or discharge them for proper cause.

61 In *Belkin Paperboard v. C.P.U., Local 1129* (1980), [1981] 3 W.L.A.C. 62 (B.C. Arb.) (Chertkow)), a probationary employee case involving so such "proper cause" language, the arbitrator nevertheless held that employers must engage in a fair and objective inquiry into the circumstances. The arbitrator held that, though the grievor had been dismissed due to a pre-existing back injury, no such back injury had been established, nor did anything occur at work so as to render him unsuitable for permanent employment.

62 In *Teck Highland Valley Copper and USW, Local 7619 (Basil), Re* [2014 CarswellBC 3754 (B.C. Arb.)] (December 9, 2014; unreported (Nichols)), the grievor was reinstated notwithstanding collective agreement language saying that probationary employees have no seniority rights and "may be discharged at the Company's discretion." The employer argued that an employee's performance, attitude and level of interest are valid considerations to be assessed, and that the grievor failed to show initiative and "continued to have difficulty."

63 The arbitrator, applying the "suitability" standard, held that employers cannot act on a mere whim; instead, they must have a valid and acceptable reason for the dismissal. The grievor had not been advised, at any time after her first shift, that her performance was sub-standard. Indeed, not only did both the grievor and her supervisor expect that she would be afforded the opportunity to improve her performance; she received no negative feedback for the next ten shifts, nor was there a precipitating event prior to her dismissal. In upholding the grievance, the arbitrator said, "(While the grievor understood after her initial evaluation) that she had to improve, I cannot conclude that the company provided a fair and reasonable assessment of whether her performance had reached an acceptable standard after her evaluation."

64 In *P & H Foods v. U.F.C.W., Local 175* (1990), 10 L.A.C. (4th) 1 (Ont. Arb.) (Hinnegan)), a case absent the subject "proper cause" language, the arbitrator upheld the grievance on the basis that the only support for the allegation of unsatisfactory work performance was that of the "rather vague and non-specific hearsay evidence of (the plant superintendent), which is clearly insufficient as the sole basis for the finding of such a critical fact. The fact that (the acting supervisor) is a bargaining unit employee does not preclude his being called as a witness by the employer, and is not a compelling reason for not having his direct evidence when he is the individual who allegedly made the assessment of the grievor's work performance."

65 The arbitrator in *Edith Cavell Private Hospital v. H.E.U., Local 180* (1982), 6 L.A.C. (3d) 229 (B.C. Arb.) (Hope)) laid down the ground rules when an employee is dismissed on the basis of sub-standard performance. Where an employer seeks to defend the dismissal of an employee for a non-culpable deficiency in job performance, it must show that it has:

- Defined the level of job performance required;
- Communicated the expected standard to the employee;
- Given reasonable supervision and instruction to the employee and afforded the employee a reasonable opportunity to meet the standard;
- Established 1. an inability on the part of the employee to meet the requisite standard to an extent that renders her incapable of performing the job, as well as 2. that reasonable efforts were made to find alternate employment within the competence of the employee; and
- Given reasonable warnings to the employee that a failure to meet the standard could result in dismissal.

66 Finally, relying on the *Canadian Forest Products Co. and I.W.A.-Canada, Local 1-424, Re* (above), the Union submits that arbitrator McPhillips, notwithstanding the absence of "proper cause" language, ruled that the standard to be applied to probationary employees is "the most minimum arbitral standard, that of the employer's assessment of suitability."

67 The arbitrator held that the "key source of information for the termination decision" was "not objective in arriving at his evaluation of (the grievor)," and that, therefore, the grievor was not "given a fair opportunity to complete the training period and be judged objectively on her merits." Had the employer had legitimate concerns, it could have allowed her to complete, under close supervision, her probationary period. In the result, the grievance was upheld.

2. The Evidence

68 In dismissing the Grievor, the Employer acted arbitrarily. Though the Grievor reported, consistently over time, that her ability to handle the work was improving, the Employer paid those comments short shrift.

69 The Employer failed to build any kind of coherent case against the Grievor. For instance, no notes were recorded between October 4 and October 11; Silva's notes regarding their one-on-one meetings were not shared with the Grievor; and, notwithstanding Kirkby's premature judgment on September 15 that the Employer should be looking at "getting her out of here," there was no immediate follow-up.

70 In short, the Employer took no issue with the Grievor's statements that her ability to do the work was improving — that is, until C's hearsay comments contained in Silva's October 13 email caused "the whole thing to go off the rails." In an instant, and although the Employer had no idea whether C's allegations were true or not, it decided to dismiss the Grievor. The Grievor's testimony that the allegations contained therein are without merit was not challenged and is credible.

71 Further, it is consistent with Herbert Hummel's testimony that the Grievor could perform the job, kept up with the others, and did not complain.

IV. Decision

72 After carefully considering the evidence and submissions of the parties, I am satisfied that the grievance must be dismissed.

73 As argued by the Employer, the language in Article VIII (1) is unique. In addition to establishing a 30 day probationary period, it provides that during those 30 days probationary workers are "considered to be temporary workers only". Because the employment relationship is "temporary" in nature, the Employer's refusal to engage them as regular employees may be described as simply a refusal to grant them a status to which the employer decides they have not shown themselves suited: *Donohue Forest Products Inc. and IWA Canada, Local 1-424 (Cooper), Re* (above).

74 Further, the preamble to Article VIII (1) — "Notwithstanding anything to the contrary in this Agreement" — cancels out the applicability of Article III Section 2 in respect of probationary employees.

75 However, as argued by the Union relying on the *Teck Highland Valley Copper and USW, Local 7619 (Basil), Re* case (above), even where collective agreement language provides that probationary employees have no seniority rights and "may be discharged at the Company's discretion," it is appropriate to apply the "suitability" standard. In that case, as noted, the arbitrator held that employers cannot act on a mere whim; instead, they must have a valid and acceptable reason for the dismissal.

76 Assuming (which I do) that the Employer in this case was obliged not to act arbitrarily (the Union alleges neither bad faith or discriminatory treatment), I am satisfied that — rather than acting on a "mere whim" or without an "acceptable reason"), it acted reasonably and in good faith. In so doing, and consistent with its legal duty to ensure a safe workplace, it made a "fair and reasonable assessment" of the Grievor's suitability for employment.

77 Though the Union relies on the *Edith Cavell* case (above), that case is distinguishable in that the Employer here is not alleging inadequate work performance on the Grievor's part. Its position, rather, is that, as a matter of keeping her safe from injury, it could not take the risk of having her work any longer.

78 The Union argues that, as in the *Teck Highland Valley Copper and USW, Local 7619 (Basil), Re* case, the Grievor was not kept apprised of the fact that her performance was sub-standard; was not afforded the opportunity to improve; received no negative feedback; and did not engage in a precipitating event prior to her dismissal.

79 The facts however do not accord with that submission. The Grievor was kept apprised, from the outset of her employment, that the Employer had serious concerns regarding her ability to perform her work safely. Those concerns were communicated to her — first by the charge-hand, then the supervisor, and, finally, in a special meeting called by the mill superintendent. Though the Grievor was afforded every opportunity during the nine shifts to allay the Employer's concerns in this regard, she failed — through no fault of her own — to do so.

80 Asked in cross-examination whether the Employer's consistent message to her had been that they wanted her to be safe and that they did not believe she was getting better, the Grievor agreed. Was it their "honest belief?" "Yes," she said. In response to the question, "You didn't agree?", she replied that she "took all precautions not to be hurt." Agreeing with the suggestion that she thought her opportunity should be longer, she also agreed that, had the Employer given her a longer period of time, she would have gotten in shape and alleviated their concerns.

81 In summary, the essence of the Union's case is this: The Grievor should have been afforded more time to prove her physical fitness to do the job. However, I cannot second-guess management's opinion that, in the circumstances, such constituted an unacceptable risk.

82 The Union argues that it was the hearsay report of a co-worker that triggered the decision to end the employment relationship. I am not satisfied that the evidence supports that assertion. To the contrary, the evidence is that safety concerns regarding the Grievor had been mounting; in fact, it was on October 11, two days before Silva's email relaying C's concerns, that Silva reported to Kirkby that the job appeared to be too much for the Grievor.

83 In summary, I am satisfied that the Employer's decision to terminate the employment relationship was anything but arbitrary. To the contrary, the Employer did what it could to show the Grievor the ropes, team her up with more experienced employees, and afford her every opportunity to demonstrate her physical fitness.

84 At a certain point, the Employer determined that, notwithstanding the Grievor's protestations that she was becoming more fit by the day, it simply could not run the risk of her injuring herself.

85 For these reasons, I am satisfied that the grievance must be dismissed.

Grievance dismissed.