

Cited as:

**Mill & Timber Products Ltd. v. Industrial Wood and Allied
Workers Local 1-3567 (Sidhu Grievance)**

IN THE MATTER OF An Arbitration
Between
Mill & Timber Products Ltd. (the "Employer"), and
IWA - Canada, Local 1-3567 (the "Union")

[1995] B.C.C.A.A.A. No. 47
Award no. A-45/95

**British Columbia
Collective Agreement Arbitration
S. Kelleher, Q.C., Arbitrator**

Heard: (Vancouver, B.C.) January 26 & 27, 1995.
Award: February 6, 1995.
(30 paras.)

Appearances:

Lloyd Doidge, for the Employer.
Sandra Caffrey, for the Union.

AWARD

I

¶ 1 On January 28, 1994, the Employer terminated the employment of Baldir Sidhu for being absent without leave. In these proceedings the Union challenges this decision. There are three issues: whether Mr. Sidhu engaged in conduct meriting some form of discipline; if so, whether discharge was an appropriate disciplinary response in all the circumstances; and finally, if discharge was excessive, what measure ought to be substituted as just and equitable. See *Re William Scott & Sons Co. Ltd.* [1977] 1 Can.L.R.B.R. 1 (B.C.L.R.B.).

II

¶ 2 The facts, although largely not in dispute, are somewhat complex. Mr. Sidhu was hired in February of 1978. He is a Lumber Grader. Between 1978 and 1990 the grievor was absent on many occasions and for substantial periods of time. These absences arose from Workers' Compensation claims, illnesses and non-occupational injuries.

¶ 3 On November 1, 1990, Mr. Sidhu sustained an injury to his left ankle. The Workers' Compensation Board accepted his claim and paid him wage loss benefits until November 30, 1990. By that time, the Board determined, the grievor had recovered from this injury. In the meantime, however, on November 7, 1990, he was injured in a motor vehicle accident. He suffered neck and shoulder strain

and fractured ribs. He applied for and received Weekly Indemnity benefits from CU&C, the carrier of the IWA-Forest Industry Health and Welfare Plan.

¶ 4 In April of 1991, there was an independent medical examination by an orthopaedic surgeon. The surgeon concluded:

With regard to the shoulder, neck and back soft tissue injuries, in my opinion the disability is also mild and should not prevent him from returning to work in the next six weeks.

¶ 5 CU&C, relying on this opinion, ceased wage indemnity benefits on May 5, 1991. Mr. Sidhu did not return to work. According to Diane Moleschi, the Company's Personnel Supervisor, Mr. Sidhu told her that he was still disabled. He then provided some medical evidence indicating he would shortly be fit for work. Ms. Moleschi then wrote to his physician and chiropractor, describing the tasks of the job to which he would be returning, asking whether he could perform these duties.

¶ 6 Neither the physician nor the chiropractor felt Mr. Sidhu was fit to return to work. He remained off work.

¶ 7 On September 9, 1991, Mr. Sidhu was involved in another motor vehicle accident. Several months later, in January of 1992, he made a new application for Weekly Indemnity. The physician's statement which accompanied the application included this:

He had another accident on Sept 9/91 which aggravated his condition.

¶ 8 Peggy Grant, the Disability Claims Manager at CU&C, testified that this was not considered a new claim because he had never returned to work after the last claim. Mr. Sidhu also provided CU&C with another independent medical report which had been conducted on behalf of the Insurance Corporation of British Columbia. This report, which had been written in November of 1991, concluded:

In my opinion, this soft tissue injury is very mild. In my opinion the degree of disability at the time of assessment is minimal. He should be able to return to work in four to six weeks' time. During this time, while waiting to return to work, he should start performing exercises to strengthen his abdominal muscles and upper back musculature.

¶ 9 CU&C did not pay any wage claim in connection with this application.

¶ 10 Then, in July of 1992, the grievor made another application for Weekly Indemnity. It was supported by a statement by his physician that he was not fit for work. Ms. Grant testified that because it was outside the normal time limits, the matter was referred to the Trustees of the Plan.

¶ 11 Mr. Sidhu's absence from work continued. There was some indication, in fact, that Mr. Sidhu did not intend to return to Mill & Timber. Paul Toor, a supervisor at the mill, testified that approximately one and one-half or two years ago he received a telephone call from an individual who said that Mr. Sidhu had given his name as a reference. He said Mr. Sidhu was applying for a position doing counselling work in Surrey. He told Mr. Toor that while the position was a voluntary one, it could lead to full time employment.

¶ 12 Ms. Moleschi gave evidence about a conversation she had with Mr. Sidhu in July of 1993. He told her that he could not return to the sawmill and that ICBC was retraining him for other employment.

He told her he would let her know if there were any changes in his plans.

¶ 13 On November 8, 1993, CU&C advised the Company and Mr. Sidhu that the Trustees of the Plan had decided to grant a further 90 days of benefits. The letter read as follows:

We are writing about Mr. Sidhu's wage indemnity claim for the period of disability beyond May 5, 1991.

The Trustees of the Plan have reviewed the claim and have agreed to allow payment outside the terms of the contract.

It has been agreed to allow a benefit payment of 90 days to represent a period of work hardening or rehabilitation after his expected return to work date of May 6, 1991.

However, as Mr. Sidhu was in receipt of U.I.C. sick benefits until August 31, 1991, we have calculated the 90 days from September 1, 1991.

Please note that this payment has been allowed on an exception basis and no further benefits will be considered by the Trustees.

Enclosed is his cheque.

¶ 14 On November 10, 1993, Ms. Moleschi received a message on her voice mail from Mr. Sidhu, asking her to mail the cheque to him. She did so.

¶ 15 On January 28, 1994, Ernie Wah, the Plant Manager, wrote to Mr. Sidhu, terminating his employment. The letter read as follows:

You have been off work since November 07, 1990 due to an automobile accident. On July 30, 1993 you telephoned Diane Moleschi (Personnel) and told her that you could not handle your job as a result of the accident and that I.C.B.C. was retraining you for other employment.

You also informed her that you had severe medical and psychological problems and were seeing five specialists. You also indicated you were suffering from depression and were physically unwell.

On November 08, 1993, CU & C Health Services settled your claim for wage loss benefits on the basis of payment for - 90 days of work hardening from September 01, 1991 to November 29, 1991.

On November 10, 1993, you left a message requesting your CU & C cheque without indicating your medical status.

It is our view that you have been absent without leave since November 10, 1993. You have made no effort to return to work nor have you given us any medical documentation which indicates your current status.

Therefore, in view of the above, you are hereby terminated as of Friday, January 28, 1994.

¶ 16 Mr. Wah testified that he decided that termination was appropriate for two reasons. Once the Company heard from CU&C that the claim had been resolved he did not consider that Mr. Sidhu had a legitimate reason for being absent: if he was not legitimately entitled to CU&C, there was no reason for his absence. Second, he had advised that he was being retrained. The Company did not expect him to return to work.

III

¶ 17 Two provisions of the Master Agreement are relevant to these proceedings. Article XX, Section

8 provides that seniority is forfeited when an employee is absent without leave for more than three days:

Section 8: Absence Without Leave

Any employee who is absent without leave for a period of more than three (3) consecutive working days shall forfeit all seniority rights. This shall not interfere with the employer's right to discharge for proper cause.

¶ 18 Article XXI, Section 1 addresses leaves of absence for injury or illness:

Section 1: Injury or Illness

The Company will grant leave of absence to employees suffering injury or illness for the term of this Agreement, subject to a medical certificate if requested by the employer. The employee shall have a reasonable period of time to present such medical certificate. The employee shall report or cause to have reported the injury or illness which requires his absence to the Company as soon as may be reasonably possible.

¶ 19 The Company's case is that Mr. Sidhu was absent without leave. As Mr. Wah testified, the Employer inferred from the decision of CU&C that there was no longer any justification for the grievor's absence.

¶ 20 I am not aware of any authority for the proposition that an employee who is not receiving Weekly Indemnity benefits is not entitled to be absent from work due to injury. In fact, Article XXI, Section 1 indicates the contrary: if an employee is suffering from an injury or illness, he or she is entitled to a leave of absence. See also Doman Forest Products Ltd. and International Woodworkers of America, Local 1-80, unreported, October 23, 1985 (Bird).

¶ 21 The difficulty with the Employer's position is that the letter from CU&C does not purport to reach any conclusion about Mr. Sidhu's current state of health. Rather, it addressed a claim made in 1991 and 1992. Moreover, it is not as if the Company misconstrued this letter. Part of the Company's decision was based on the fact that Mr. Sidhu had told the Company that he was being trained for other work. If he here fit to return to work, there would be no need for such retraining.

¶ 22 The Employer has shown a great deal of patience with Mr. Sidhu. When the Carrier announced its decision in November, 1993, the Company could have taken steps to ascertain Mr. Sidhu's current state of health. It could have instructed him to provide current medical evidence of his medical condition. It might even have told Mr. Sidhu that in the absence of medical evidence he would be considered absent without leave.

¶ 23 None of this occurred. Instead, the Company simply terminated Mr. Sidhu's employment two and one-half months after the letter from CU & C.

¶ 24 Counsel for the Employer argued that the grievor's actions were tantamount to resigning. He suggested that it could be considered a "constructive quit": Mr. Sidhu had advised the Company that he was not returning and that he was being trained for other types of work. In the circumstances the Employer was entitled to consider that he was leaving his employment.

¶ 25 I do not agree. Mr. Sidhu may not be able to return to work in the foreseeable future. I do not know what the prognosis is. There is no evidence, however, that he has any intention of severing the

employment relationship. The Company continued to pay his benefits until his termination; he continued to accept them. When the discharge took place, he launched a grievance within the time limits. In these circumstances it cannot be said that he has quit in either an actual or a constructive sense.

¶ 26 Finally, Counsel argued, if the dismissal was not upheld, the arbitration board should address the ongoing underlying issue between the parties. It was argued that I should order an independent medical examination of Mr. Sidhu. In that way the parties will learn from an independent specialist exactly what the grievor's prospects are for employment at Mill & Timber.

¶ 27 There is some force to this submission. The Company's concerns about Mr. Sidhu's attendance record are entirely legitimate. However if I were to accede to this suggestion I might well be initiating a process which could lead to the termination of Mr. Sidhu for non-culpable cause. To date the Employer has not proceeded in this manner. In my view it would be inappropriate to become involved in the employment relationship in this way.

IV

¶ 28 To answer the first question posed at the beginning of this Award, Mr. Sidhu did not engage in conduct meriting discipline. The second and third questions are therefore not applicable.

¶ 29 The grievor is entitled to reinstatement with seniority and the benefits to which he was entitled before the discharge.

¶ 30 I retain jurisdiction to address any dispute arising from the implementation of this Award.

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