Date Issued: February 10, 2020

IN THE MATTER OF AN ARBITRATION PURSUANT TO THE *LABOUR RELATIONS CODE*
R.S.B.C. 1996, c. 244 (as amended)

B E T W E E N:

Tolko Industries Ltd. (Lakeview Lumber Division)

(The "Employer")

A N D:

United Steelworkers, Local 1-2017

(The "Union")

Re:
GK (The "Grievor")

Preliminary Issue - Timeliness

Arbitrator: Robert B. Blasina

Counsel for the Union: Colin Gusikoski

Counsel for the Employer: Michael Kilgallin

Written Submissions: January 10, 29 and February 7, 2020

I INTRODUCTION

[1] The Employer raises a preliminary objection to the grievance on the ground it was taken in breach of the time limit for Step 1 of the grievance procedure. The Employer submits the grievance is deemed to be abandoned. It submits relief against the breach of the time limit should be denied.

[2] Article XIII of the collective agreement provides:

> **<u>Article XIII – Grievance Procedure</u>**
> **Section 1:**
> ...
> Step 1
> The individual employee involved with or without the Job Steward shall first take up the matter with the Foreman directly in charge of the work within fourteen (14) days from the occurrence of the event or events giving rise to the grievance or from the time when the employee has knowledge or may be reasonably presumed to have knowledge of such event or events.
>
> Step 2
> If a satisfactory settlement is not then reached, it shall be reduced to writing by both parties when the same employee and the Committee shall take up the Grievance with the Plant Superintendent. If desired the Union Business Agent shall accompany the Committee.
>
> Step 3
> If the grievance is not then satisfactorily solved, it shall be referred to the Local Union and the Management.
>
> Step 4
> If a satisfactory settlement is not then reached it shall be dealt with by arbitration as hereinafter provided.
>
> **Section 2:**
> a) If a grievance has not advanced to the next stage under Step 2, 3, or 4 within fourteen (14) days after completion of the preceding stage, then the grievance shall be deemed to be abandoned, and all rights of recourse to the grievance procedure shall be at an end. The fourteen (14) day limit may be extended by mutual consent of the parties.

[3] The Union submits the deemed abandonment clause, Article XIII(2)(a) of the collective agreement, does not apply to Step 1 of the grievance procedure. It submits the

effect of Step 1 is merely to provide the individual employee an opportunity for discussion with his/her foreman. In the alternative, the Union requests relief against the breach of time limit.

[4] Section 89(e) of the *Labour Relations Code* provides:

> **Authority of Arbitration Board**
> 89 For the purposes set out in section 82, an arbitration board has the authority necessary to provide final and conclusive settlement of a dispute arising under a collective agreement, and without limitation, may
> ...
> (e) relieve, on just and reasonable terms, against breaches of time limits or other procedural requirements set out in the collective agreement, ...

II BACKGROUND

[5] The Grievor (by consent of the parties identified as "GK") has been employed by the Employer since September 1, 1980. The Employer alleges he committed a lock out violation on June 27, 2019. The Employer then conducted both a lock out and a post-incident investigation which led to the Grievor being tested pursuant to the Employer's Alcohol and Drug Policy ("A & D Policy"). The Grievor tested positive for marijuana. It is not alleged that he consumed marijuana on the job.

[6] There was an investigation meeting on July 5, 2019. The Employer says Terry Tate, Union Business Agent, requested copies of the A & D "flow chart", and suggested to the Grievor he should request a copy of the Substance Abuse Professional's report. The Employer says Krista Niquidet, Human Resources, responded that these documents would be provided through the grievance process, if there were a grievance.

[7] On July 11, 2019, the Grievor was assessed by a Substance Abuse Professional who concluded he did not have a substance abuse disorder, and no clinical intervention or monitoring was necessary.

[8] On July 15, 2019, via a letter from Derrick Smith, Sawmill Superintendent, the Employer disciplined the Grievor with a three day suspension for breach of the lock out requirements, and a five day suspension for breach of the A & D Policy. The Employer submits the Grievor had until July 29, 2019 to initiate Step 1 of the grievance procedure. The Union says Mr. Tate clearly stated at the end of the meeting on July 15, 2019 that

the Union would be grieving both suspensions. The Employer denies the Union advised it prior to August 9 it would be grieving the discipline.

[9] The Employer says there was a Union Plant Committee and Management meeting on July 18. It says the Union did not raise the subject of the Grievor's suspensions, nor did it request a time extension for filing a grievance.

[10] On August 9, 2019, the Employer says, the Plant Chair, Mitch Van Dale, submitted or attempted to submit a grievance. The Employer says Mr. Van Dale approached Jamie Shepherd, Shift Supervisor, but Mr. Shepherd was not the Grievor's foreman on June 27. It says Mr. Shepherd advised Mr. Van Dale that the Grievor had to take up the matter with his foreman within 14 days, and the grievance was out of time. The Employer says August 9 was when it first understood a grievance was being raised in relation to the suspensions issued on July 15.

[11] The Employer says, on August 9 after Mr. Van Dale's failed attempt to initiate a grievance, Mr. Tate sent a text message to Jason Favel, Plant Manager, stating:

> Had Mitch try and process [GK] grievance was told time lines I informed everyone at the first meeting we would be grieving was signed by [GK] July 15 th I thought it was filed my mistake however I hope we are not going to get into pissing match on this as we are all guilty one time or another (as written)

[12] On August 20, 2019, Mr. Tate wrote Mr. Favel requesting disclosure of the investigation documents and the Substance Abuse Professional's report in order to decide whether to proceed to the next step of the grievance procedure. Mr. Favel responded on August 27, 2019 that a grievance had not been presented in time, and the Employer considered the matter abandoned under the collective agreement.

III SUBMISSIONS FOR THE EMPLOYER

[13] The Employer submits Article XIII is forceful in its wording, and expresses the Parties' agreement that a failure to process a grievance in time results in its being deemed to be abandoned. It submits the Union could have raised the grievance at the July 18 Union Plant Committee and Management meeting, but did not. The Employer submits the Union is obliged to seek relief under s.89(e) of the *Labour Relations Code*,

and such relief should be denied. The Employer cites: *Pacific Forest Products Ltd. (Sooke Logging Division) -and- International Woodworkers of America, Local 1-118*, [1984] B.C.C.A.A.A. No. 235 (D.R. Munroe) ("*Pacific Forest Products*"); *Allied Hydro Council v. Columbia Hydro Constructors (Underground Work Grievance)*, [2008] B.C.C.A.A.A. No. 212 (V.L. Ready); *Compass Group Canada v. Hospital Employees Union (Halliday Grievance)*, [2010] B.C.C.A.A.A. No. 118 (J. I. McEwan); *British Columbia Public Service Agency v. Professional Employees Assn. (Prodanuk Grievance)*, [2011] B.C.C.A.A.A. No. 151 (R. Germaine); *Lafarge Canada (Coquitlam Sand and Gravel) -and- Teamsters, Local 31 (Clement Grievance)*, [2013] B.C.C.A.A.A. No. 136 (R. Coleman); and, *United Food and Commercial Workers, Local 1400 v. P & H Milling Group, a Division of Parrish & Heimbecker*, [2014] CLAD No. 215 (T.F. Koskie, B. McGrath, B. Humeny). The Employer submits relief against time limits under s.89(e) is a matter of arbitral discretion, and the Union bears the onus of persuading the arbitrator to exercise that discretion.

[14] The Employer says it has suffered prejudice as relates to fading memories and to potentially being denied the bargain it has with the Union under Article XIII.

[15] The Employer says it will generally agree to extend a time limit under the grievance procedure in circumstances where, within the time limit, the Union gives notice it intends to file a grievance and provides a reasonable explanation for its need for an extension. It submits none of these circumstances were present in this case. The Employer submits the Union has not provided any reasonable explanation for the failure to comply with Step 1, which it submits militates against relief regardless of the length of the delay.

[16] Regarding the impact on the Grievor, the Employer says he was not discharged, and the two suspensions are subject to a "sunset clause" whereby the record of discipline is removed after 24 months. It submits the grievance should be dismissed.

IV SUBMISSIONS FOR THE UNION

[17] The Union disputes there was a practice of the Employer agreeing to time-limit extensions only in limited circumstances. The Union submits the Employer has not

required strict adherence to the 14-day time limits. It says it concluded the Employer would not do so in future. The Union says the Employer has not given notice it strictly would rely on the time limits going forward.

[18] The Union disputes the Employer had no prior knowledge or indication a grievance would be raised. It says Mr. Tate advised the Employer at the conclusion of the discipline meeting on July 15, 2019 that the Union would be grieving both suspensions.

[19] The Union takes issue over the interpretation of Article XIII. It cites *C.E.P. Local 777 v. Imperial Oil Strathcona Refinery*, (2004), 130 L.A.C. (4th) 239 (Alta. Arb.) for the "modern principle of interpretation". It submits Step 1 of the grievance procedure merely provides the affected employee with an opportunity to work out the issue with his/her supervisor. It submits Article XIII(2)(a) does not include Step 1 of the grievance procedure, and therefore a breach of the time limit under Step 1 does not mean the grievance is "deemed to be abandoned." It submits the grievance can only be deemed to be abandoned if the Union fails to advance it under Step 2, which according to the time limits expressed in Article XIII would be 28 days.

[20] The Union submits Step 1 has its own time limit, because it is not covered by Article XIII(2)(a). It submits Step 1 does not require the Union to be involved in the discussion between the employee and the supervisor, and the failure of the employee to invoke Step 1 should not prejudice the rights of the Union generally, or the Union's ability to advance its own grievance.

[21] The Union also cites *Pacific Forest Products*. In the alternative, it invokes s. 89(e). It submits the issues of the timeliness of the grievance and the merits of the case should be conjoined and considered after the arbitration hearing.

IV DECISION

[22] This is not a decision on the merits of the grievance. I will not need to make findings over factual assertions in dispute.

[23] There is no dispute the present matter is a grievance against two disciplinary suspensions meted to the Grievor; a three-day suspension for an alleged lock out

violation, and a five-day suspension for an alleged breach of the A & D Policy. The suspensions were issued under a letter from the Employer on July 15, 2019, based on events which occurred on June 27, 2019. When the Parties speak of the passing of time, they both start with July 15, the date of discipline. When they refer to the Grievor, they mean GK. Although the Union, as the exclusive bargaining agent, may within its duty of fair representation decide whether or not to advance the grievance, this is an individual rights grievance protesting that the discipline to GK was unfounded or excessive.

[24] There may be other issues, possibly including significant policy issues, collateral to whether the discipline to the Grievor was just and reasonable. Firstly, the presence of such issues does not relieve the individual employee from the obligations expressed in Step 1 of the grievance procedure. Secondly, the Union's position in future or in any other case is not prejudiced by a dismissal of an individual employee's grievance on the basis that the grievance was untimely.

[25] The Parties join issue over the interpretation of Article XIII(2)(a). The collective agreement between the Parties is adopted from a master collective agreement for the Northern Interior of B.C. It provides a special procedure for the arbitration of interpretation issues, and I have not been appointed as an Interpreter of the collective agreement.

[26] Indeed, I find that an interpretation of Article XIII(2)(a) is not needed here. Within itself, Step 1 expresses certain requirements:

> Step 1
> The individual employee involved with or without the Job Steward shall first take up the matter with the Foreman directly in charge of the work within fourteen (14) days from the occurrence of the event or events giving rise to the grievance or from the time when the employee has knowledge or may be reasonably presumed to have knowledge of such event or events.

[27] The Grievor did not comply with Step 1. If Mr. Van Dale is accepted as having approached Mr. Shepherd on behalf of the Grievor, he did not comply with Step 1. It is the timeliness of the presentation of the grievance which gives particular concern.

August 9 is 25 days after the date of the event giving rise to the grievance; i.e. July 15, 2019, the date of discipline.

[28] If the propriety of the Employer's very demand for a test is in dispute, this would be a different event than the discipline which flowed from the result of the test. The date of occurrence for a grievance against the demand itself would be June 27, 2019.

[29] Section 89(e) of the *Labour Relations Code* endows an arbitrator with discretion to relieve against time limits expressed in the collective agreement. The onus is on the party seeking or requiring relief to persuade the arbitrator to exercise that discretion. In the oft-cited case of *Pacific Forest Products*, Arbitrator Munroe stated:

> In my view, a determination of whether the burden under s. [89(e)] has been satisfied should proceed on the following considerations: (a) the degree of force with which the parties have given contractual expression to the time-limits; (b) whether the breach of the time-limits was in the early or later stages of the grievance procedure; (c) the length of the delay; (d) whether the applicant for relief has a reasonable explanation for the delay; (e) the nature of the grievance – i.e. the impact on the grievor of a refusal to grant relief against the time-limits; (f) whether the employer would suffer prejudice by the granting of such relief; and (g) any other factors peculiar to the circumstances at hand. (para. 13)

[30] Step 1 is a substantive provision. It requires the individual employee to pursue his/her complaint diligently. There was non-compliance with the 14-day time limit expressed in Step 1, and, the Employer has been denied the comfort of knowing there is no potential litigation pending.

[31] There would always be prejudice to an employer when relief is sought, or granted, under s.89(e). However, such prejudice is not necessarily determinative, lest s.89(e) become redundant.

[32] The Employer argues it would be prejudiced because of fading memories. Without a foundation in fact, this is a speculative argument.

[33] The breach of time limits occurred at the commencement of the grievance procedure. It was not followed by further steps from which it could be said the Employer effectively waived its objection to the breach.

[34] As a principle of workplace safety, no employee should come to work under the influence of any substance causing material detriment to the employee's sense of awareness or ability. Although the particularity of the substance may be material to such variables as the metabolization rate or the appropriate cautionary measure of concentration in the blood, it otherwise would be immaterial whether the substance is legal or illegal; doctor-prescribed, over-the-counter, or otherwise obtained; or is consumed medicinally or recreationally. At the same time, the employee is not subject to unreasonable search or invasion of privacy.

[35] The Grievor was not discharged – a penalty which arbitrators have sometimes referred-to as "the capital punishment of the workplace". Although, seven days of disciplinary suspension is significant, there is a 24 month sunset clause in the collective agreement. This case should have no impact on the Grievor's ability to grieve in the event of future discipline or discharge. The analysis described by the B.C. Labour Relations Board in *Wm. Scott & Company Ltd. -and- Canadian Food and Allied Workers Union, Local P-162,* [1977] 1 Can. LRBR 1 would apply, in the context of the circumstances at the time.

[36] The Grievor was originally tested following a post-incident investigation. He tested positive for marijuana, but he was found not to have a substance abuse disorder. This case should have no impact on the Grievor's ability to grieve in the event of a future drug test demand.

[37] The Parties disagree on the circumstances where in the past the Employer may, or may not, have granted extensions, or, where the Employer may not have insisted on strict adherence to the time limits. The Union does not expressly assert estoppel, although it submits the elements are present. The doctrine of estoppel is an equitable doctrine, and the authority of an arbitrator under s. 89(e) of the *Labour Relations Code* is discretionary.

[38] The Parties' disagreement does not compel a hearing of these matters. The Union's argument that the Employer has not insisted on strict adherence in the past is not itself an explanation for why a timely grievance was not initiated in this case. Its argument that Mr. Tate advised the Employer the Union would be taking a grievance is

not an explanation why the grievance was not taken in time. There is an onus on the Union, on behalf of the Grievor, to explain why there was a delay. Failing a reasonable explanation, it is not the arbitrator's default position to exercise discretion under s.89(e) and relieve against the time limit.

[39] Grievance arbitration is a user-pay justice system. It should, as reasonably possible, be an economic and efficient method for bringing a dispute to conclusion. I do not think an adjournment to a conjoined hearing on the merits of the grievance and the timeliness of Step 1 is in order in this case. The grievance procedure was not invoked in proper time, and I am not persuaded that I ought to exercise the discretion granted an arbitrator under s.89(e) of the *Labour Relations Code* to relieve against the 14-day time limit expressed in Step 1 of the grievance procedure.

VIII CONCLUSION

[40] The matter in issue concerns the timeliness of an asserted grievance by or on behalf of GK protesting a three-day suspension for an alleged lock out violation, and a five-day suspension for breach of the Alcohol and Drug Policy. This decision is not the product of a juridical process concerning the merits of the case, including the merits of any collateral issue other than the timeliness issue itself.

[41] Step 1 of the grievance procedure was not invoked within the 14-day time limit mandated in the collective agreement for this step. I am not persuaded to exercise the discretion to grant relief under s. 89(e) of the *Labour Relations Code.* The grievance before this arbitrator is dismissed.

Robert B. Blasina, Arbitrator