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Case Name:

**Tolko Industries Ltd. (Quest Wood Division) v. United
Steelworkers of America, Local 1-424
(Speer Grievance)**

IN THE MATTER OF an Arbitration
Between
Tolko Industries Ltd. (Quest Wood Division)
("the company"), and
United Steelworkers of America, Local 1 -424
("the union")

[2005] B.C.C.A.A.A. No. 107
Award No. A-085/05

**British Columbia
Collective Agreement Arbitration
R.B. Blasina (Arbitrator)**

Heard: (Quesnel, B.C.) May 2, 2005.
Award: May 4, 2005.
(6 paras.)

Re: Leslie Speer - Grievor

Appearances:

Counsel for the Union: Sebastien Anderson

Counsel for the Company: Michael Wagner

AWARD

I

¶ 1 The arbitration hearing began on May 2, 2005 in Quesnel, B.C. with some six days in total having been scheduled. Both Counsel for the Company and Counsel for the Union made the most extensive of opening statements, each referring to a number of documentary exhibits which were entered by consent. The opening statements were informative to my understanding the facts, including the areas of dispute, and to my understanding the legal issues which would be presented. In addition, the opening statements amounted to able advocations of the respective merits of each party's case, for which I thank

Counsel because I was given good cause to engage the parties in "without prejudice" mediation discussions, which then resulted in a settlement of the dispute. Counsel for the Union argued forcefully that, technically, a factual basis existed that supported the Grievor's right to reinstatement. Nevertheless, given the status of the Grievor's employment record, it did not appear that reinstatement would be in the Grievor's interests in the long-term.

¶ 2 The terms of settlement include an agreement on confidentiality, and therefore it is not my intent to summarize the terms in this award. However, I can confirm that I am aware of the terms. I would conclude that the settlement is one which, in all of the circumstances of this case, is reasonable and serves the future interest of the both the Company and the Grievor, Ms. Speer. Further, the Company, Ms. Speer personally, and the Union have all consented to the terms.

II

¶ 3 The parties also understood that I would write a "consent" award ordering their compliance with the terms of settlement, and that I would make some comment on the matter of non-culpable discharge. There seems to have been some lack of awareness among employees at the workplace of the very existence of this well-established legal doctrine. This is probably not unusual. I would think that most working people simply and erroneously believe that in this day and age an employer cannot fire an employee for being sick or injured.

¶ 4 The doctrine of non-culpable discharge is founded on the understanding that the continuity of the employment contract requires continuity in the exchange of consideration between the employer and the employee. In other words, the employee provides his/her labour, and the employer pays compensation. In the unionized environment this exchange is governed by the collective agreement. Nevertheless, if an employee is unable to provide his/her labour, even though it is for a reason which is not his/her fault, then the employer may be able to terminate the employment contract in appropriate circumstances. In other words, if the employee cannot deliver his/her side of the bargain, the employer may terminate the relationship. Hopefully the terminated employee would be eligible for some insurance or Workers' Compensation benefits, but not necessarily. Even though the termination would not have been because of a wrongful act, such as in the case of theft, the employee would still have been fired.

¶ 5 Excessive absenteeism can therefore be problematic. Implicit in the employment contract is the expectation that an employee will maintain reasonable attendance at work. However, if an employee demonstrates a pattern of excessive absenteeism and therefore an unreasonable level of absenteeism, this again suggests the employee is and will be unable to deliver his/her side of the bargain. The employer may again terminate the employee on non-culpable grounds unless the employee can prove that the situation is only temporary, and that there will be a recovery and regular reasonable attendance will resume. This may be easy where, for example, the employee has had a heart attack or a broken limb, and simply needs time to recover. However, there are cases where "if its not one thing, it's another", and the times being taken for recovery may be longer than one would expect. Doctors' notes saying that the person is fit to return to work would eventually lose any weight of reliability. A person could find himself/herself fired, and without any disability upon which to claim any insurance coverage or any accommodation. There is an obligation upon an employer under human rights legislation to accommodate an employee's disability, but the duty is a reasonable one and the employee has an obligation to facilitate an accommodation; and, what does the employee do if he/she does not actually have a disability? Repeated absenteeism can be a slippery slope to unemployment.

III

¶ 6 In conclusion, the parties are ordered to comply with the terms of settlement.

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