

Cited as:

**Weldwood of Canada Ltd. v. Industrial Wood and Allied  
Workers  
Union of Canada, Local 1-525 (Bilkhu Grievance)**

IN THE MATTER OF An Arbitration  
Between  
Weldwood of Canada Limited (Williams Lake Division)  
(the "Employer"), and  
I.W.A. Canada Ltd., Local 1-525 (the "Union")

[2000] B.C.C.A.A.A. No. 92  
87 L.A.C. (4th) 438  
Award no. A-066/00

**British Columbia  
Collective Agreement Arbitration  
D.C. McPhillips, Arbitrator**

Heard: (Vancouver, B.C.) December 10, 1999 and  
February 2, 2000.  
Award: March 7, 2000.  
(29 paras.)

(Tony Bilkhu Grievance)

**Appearances:**

Kim Thorne, for the Employer.  
Sandra I. Banister, for the Union.

---

AWARD

¶ 1 The parties agree this board has the jurisdiction to determine this matter. Tony Bilkhu, an employee at Weldwood plywood mill in Williams Lake, has grieved both the Employer's refusal to grant him compassionate leave for a period of six months when he was incarcerated and the Employer's subsequent decision to terminate his employment on May 11, 1999.

FACTS

¶ 2 Many of the facts in this case are not in dispute and were set out in an Agreed Statement of Facts. The grievor, Tony Bilkhu, has worked for Weldwood of Canada (Williams Lake Division) since October 11, 1985. He is 34 years old. He was born in India, and has lived in Williams Lake since 1975, when he immigrated to Canada. He has a grade 12 education and possesses no trade qualifications or certificates. The Grievor is presently estranged from his wife and two children (aged 4 and 10), who are

now on welfare. Mr. Bilkhu currently has no income and is presently not eligible for welfare. The evidence is that in the Williams Lake area, there are approximately 30,000 people and the unemployment rate is approximately 15%. The Grievor served as a member of the Plant Committee in 1991, 1993, and 1995 and was Chair of the Plant Committee in 1996 and 1997. He was also on the Safety Committee from 1988 to 1990.

¶ 3 Mr. Bilkhu was charged with trafficking in cocaine in December, 1998, with respect to an incident which had occurred on May 7, 1998 when he sold one ounce of cocaine (worth \$1800) to an RCMP undercover officer, Constable Jasvinder Basi, at the weigh scales in Williams Lake. In anticipation of his impending incarceration, he applied for a leave of absence from the Company on April 13 or 14, 1999, pursuant to Article IX, Section 4 of the Collective Agreement between these parties. That provision states:

#### ARTICLE IX - LEAVE OF ABSENCE

...

##### Section 4: Compassionate Leave

By mutual agreement leave of absence will be granted to a maximum of six (6) months without pay to the employees for compassionate reasons or for education or training or extended vacation purposes, conditional on the following terms:

- a) That the employee apply at least one (1) months in advance unless the grounds for such application could not reasonably be foreseen.
- b) That the employee shall disclose the grounds for application.
- c) The Company shall grant such leave where a bona fide reason is advanced by the applicant or may postpone leave where a suitable replacement is not available.
- d) That the Company will consult with the Shop Committee in respect of any application for leave under this Section.
- e) The Company will only be obliged to grant leave of absence for educational and training purposes to employees who intend to take training that will assist the individual in obtaining skills related to the industry.
- f) It is agreed that employees requesting leave of absence for extended vacation during the months June 15 to September 15, shall only be granted such leave once every three (3) years, and that a record be kept for the purpose of rotating such leaves.

¶ 4 Ross Cameron, the Human Resources Manager at the Williams Lake mill, testified Mr. Bilkhu called him in April, 1999 and asked for leave of absence as Mr. Bilkhu expected to be sentenced to jail on May 3 for 18 months but that he also expected he would be out in six months. Mr. Cameron inquired as to why he was going to jail and Mr. Bilkhu responded that it was for trafficking in cocaine. Mr. Bilkhu told Mr. Cameron that he had done it because his wife had left him and "cleaned him out" and that he had been drinking at the time.

¶ 5 Mr. Cameron informed Mr. Bilkhu that he would have to consider the request but indicated it "would be difficult to grant it". He told Mr. Bilkhu he would provide the Company's response prior to the May 3 sentencing date. Around April 19, Mr. Cameron discussed the matter with his superior, Roland Rheault, who is the Human Resource Manager for British Columbia and Alberta for Weldwood Canada. Mr. Rheault and Mr. Cameron both testified that they decided Mr. Bilkhu's pending incarceration was not a bona fide reason to grant compassionate leave. They each testified that they felt that given the seriousness of the likely sentence (i.e., 18 months) that Mr. Bilkhu must have been involved in serious drug dealing and that with Weldwood employing 350 employees in Williams Lake, it would be naïve to think that "he would not be selling to our employees". Mr. Rheault and Mr. Cameron each agreed under cross-examination, however, that there was no direct evidence that Mr. Bilkhu had sold drugs to Weldwood employees. Moreover, Mr. Bilkhu was never asked if that was the case.

¶ 6 Mr. Cameron also testified that he did not take into account the fact that it would have been easy to replace Mr. Bilkhu while he was in jail. The parties agree that at the time of his termination, the Grievor was a posted patch line patcher in the plywood mill, a position he had held since April 20, 1998. This is an entry-level position for which it is easy to find replacement employees. The Local Union has approximately 1500 members and currently has 35 members on full layoff and another 150 members working on call. The Employer currently has employees with up to 5 years seniority working less than full-time.

¶ 7 On April 20, 1999, the Employer denied Mr. Bilkhu's leave request. In a letter to Mr. Bilkhu, Mr. Cameron stated that "We do not consider your request to be a bona fide one under the terms of our Collective Agreement." A grievance was filed by the Union on May 3, 1999, and presented at the first and second steps of the grievance procedure on May 4, 1999. On May 3, 1999, the grievor was sentenced to one year in jail and two years probation. As a result, on May 11, 1999, the Employer terminated the Grievor's employment for being away from work without leave. The termination letter signed by Mr. Cameron states "(p)lease be advised that your employment is terminated due to your continued inability to come to work".

¶ 8 On October 30, 1999, Mr. Bilkhu was released from jail on probation. The terms of the probation order required the grievor to:

- a. keep the peace and be of good behaviour;
- b. appear before the court when required to do so by the court;
- c. advise the court or probation officer of any name change, address change, or change in employment or occupation;
- d. take substance abuse counselling as directed; and,
- e. abstain absolutely from the consumption of non-prescribed drugs.

¶ 9 The parties agreed in their Statement of Facts that Mr. Bilkhu has a prior criminal record with the following convictions:

- a) 1983 - possession of a narcotic for the purpose of trafficking;
- b) 1986 - driving while having a blood alcohol level over .08;

c) 1987 - possession of narcotics and possession of a restricted drug.

¶ 10 Following his release from prison in October, Mr. Bilkhu voluntarily enrolled in a residential Drug and Alcohol Rehabilitation Program at St. Patrick's in Prince George. The program commenced on November 11, 1999 and concluded on December 23, 1999.

¶ 11 Mr. Rheault testified that leaves of absences are generally not granted by the Company for incarceration but that each case must be looked at individually. He agreed with Ms. Banister that some leaves have been granted for that purpose "where they do not affect the workplace". He stated that if the reason for the incarceration reflected badly on the Company image, then the leave would not be granted.

¶ 12 Mr. Rheault testified that he subsequently read a copy of the sentencing report which indicated that Mr. Bilkhu was a repeat offender and that Mr. Bilkhu had told the RCMP Undercover Officer that he normally dealt in larger quantities of the drug (e.g. 1/4 lb.). Under cross-examination, Mr. Rheault stated that having a drug dealer working in the mill would impact negatively on the image of the Company. He testified that there were alcohol and drug problems in the workplace and it was obvious to him that some of the drugs sold by Mr. Bilkhu would have been used by employees of the Company. He agreed that the Company had given leaves for impaired driving convictions but that this "were not as bad as drug trafficking", particularly given the serious level of dealing involved with Mr. Bilkhu.

¶ 13 The Employer also called Constable Basi to give evidence. The Union objected to his evidence and this Board ruled it would hear the evidence and deal with its admissibility in this decision. In essence, Constable Basi's evidence was that he was referred to Mr. Bilkhu by a known drug dealer in Williams Lake. Mr. Bilkhu met with Constable Basi twice on May 7, once to make the deal and then once to deliver the drugs. Constable Basi testified that Mr. Bilkhu told him he normally dealt in 1/4-1/2 lb. amounts but that in this case Mr. Bilkhu would agree to sell him an ounce of cocaine for \$1800. Constable Basi also testified that Mr. Bilkhu did not appear to be intoxicated or under the influence of alcohol during their two meetings on May 7.

## DECISION

¶ 14 At issue here is Section 4 of Article IX of the Collective Agreement and whether the Employer was in breach of that provision in failing to grant Mr. Bilkhu compassionate leave. In *Coast Mountain Hardwoods Inc.*, [1998] B.C.C.A.A.A. No. 355, supra, Arbitrator Larson dealt with this language and how it should be applied. He stated, at pp.15-16:

As I stated earlier, what I think is that s. 4 is a kind of residual provision that applies to all absences that are not covered by the other types of absences specified in Article XXI. In those terms I think that the word 'compassionate' must be taken to refer less to the reason for the absence and more to the nature of the decision that must be made. It means that management will have to use its discretion in determining whether to grant a leave of absence which is, in that sense, an exercise of compassion but it does not mean that employees can only get a leave of absence if they have done something that is deserving of respect, sympathy or charity.

The control on the decision that is expected to be made by management is expressly set out in ss. (c), that the reason advanced by the applicant must be 'bona fide' which, in my view, means that it must meet the requirements set out in the jurisprudence. In that

respect, whether incarceration is a bona fide reason to be absent cannot turn on whether the crime committed by the employee is reprehensible, since all crimes are blameworthy by nature, but whether the operations of the Company were detrimentally affected by the actions of the employee in some manner.

¶ 15 In considering applications for compassionate leave, "employers are required to consider all the relevant facts and make their decisions whether to grant leaves of absence fairly and reasonably": *Coast Mountain Hardwoods Inc.*, July 16, 1998 (Larson), at p.7; see also: *Canadian Pacific Forest Products Ltd.*, 15 L.A.C. (4th) 442 (Kelleher); *Re Alcan Canada Products*, 6 L.A.C. (2d) 386 (Shime). In *Re Payette & Simms Inc. and Syndicat Des Arts Graphiques*, (1978) 18 L.A.C. (2d) 330, Arbitrator Frumkin stated, at p.334:

It does remain clear, however, that a requirement for an employee to serve a jail term pursuant to a conviction is not of itself a valid ground for obtaining a leave of absence to serve the term. Having examined the authorities, this tribunal is inclined to accept the view that an employer must base its decision to refuse a leave of absence, even for such purpose, on a fair and reasonable consideration of all the circumstances relevant to such a determination, and would not be entitled upon the basis of the intended incarceration itself, without further consideration, to refuse the leave. Indeed, it may well be, in a particular circumstance of an employee possessing extensive seniority and with an otherwise unblemished work record who has been condemned to a relatively short period of imprisonment, and where company production would not be significantly affected, that a refusal to grant a request for leave to serve the term of imprisonment could not be justified upon reasonable grounds.

¶ 16 Therefore, it is generally expected that the employer must balance its interests with those of the employee, particularly the right of the company to have its production free from disruptive effects of an employee's absence and the rights of the employee who wishes to protect his employment but who may find it necessary to absent himself from the workplace.

¶ 17 In assessing the Company's decision in this case, there are a number of considerations to be reviewed. First, there is the issue of whether the nature of the offence had a direct bearing on the business of employer or on the other employees: *Coast Mountain Hardwoods Inc.*, supra; *Weyerhaeuser Canada Ltd.*, 14 L.A.C. (4th) 140 (Vickers); *Canadian Pacific Forest Products Ltd.*, supra; *Re Irving Oil Ltd.*, 2 L.A.C. (4th) 211 (Filliter); *Canada Safeway Ltd.*, 1 L.A.C. (4th) 435 (McCull). In other words, can one create a causal nexus between the acts of the Grievor and the interests of Weldwood of Canada? In this case, the evidence is that the connection established in management's mind was that Mr. Bilkhu's conviction would hurt the Company's image by them having a drug dealer working in the mill and, more importantly, that it would be "naïve to think" that Mr. Bilkhu was not selling to fellow employees. The facts in *Canadian Pacific Forest Products Ltd.*, supra, bear some similarity to those in our case in that the grievor served a six-month sentence for trafficking in cocaine. Leave was not granted by the employer in that case and Arbitrator Kelleher upheld the Company's decision. There were, however, a number of factors that were different between that situation and the one with Mr. Bilkhu. First, in that case, *Canadian Pacific Forest Products Ltd.* employed 85-90% of the work force in a town of 900 people. Second, the grievor had candidly admitted that he was selling cocaine to employees of the company. Third, the grievor made comments to the company when the leave was being discussed that management took as threats and which Arbitrator Kelleher characterized as "somewhat desperate (and altogether inappropriate)..." In upholding the company's decision, Arbitrator Kelleher observed, at pp.447-48:

The nature and circumstances of the offence, however, preclude relief in this case. Cocaine abuse is a serious problem in this isolated community. Mr. Darvault concedes that his customers included employees of the company. That in itself establishes that the employer was detrimentally affected: *Re General Motors of Canada Ltd. and U.A.W.*, Loc. 222, (1985), 21 L.A.C. (3d) 445 (Palmer). When there is a connection between drug trafficking and the employer's work-force, arbitrators have shown real reluctance to restore the employment relationship: *Re Emergency Health Services Com'n and Ambulance Paramedics of B.C., C.U.P.E.*, Loc. 873, (1987), 18 L.A.C. (3d) 77 (McColl), and *Overwaitea Foods, A Division of Jim Pattison Industries Ltd. and U.F.C.W.*, Loc. 1518, unreported, June 23, 1989 (MacIntyre).

¶ 18 In *Re Ocean Steel*, 31 L.A.C. (4th) 188 (MacLean), which was a case dealing with discipline (an indefinite suspension was upheld) as opposed to the denial of a leave, the grievor was trafficking in cocaine and the evidence was that he had missed his shift in order to sell the cocaine. That fact alone was sufficient to create the nexus to the employment of the grievor. It was also found that the employee had been dishonest with the employer and with the arbitration board.

¶ 19 In *Weldwood of Canada*, February 13, 1990 (MacDonald), dealt with the identical contractual provision in a case between these specific parties. The case involved an employee who was sentenced to fifteen months in jail for violating the Criminal Code, specifically the sections dealing with sexual intercourse with a stepdaughter etc. (S.153) and gross indecency (S.157) and who was not at all forthright with the Company in explaining the reasons for his requested leave of absence. This was considered a reprehensible crime but there was no connection established to the employment. Arbitrator MacDonald concluded the Company had imposed an excessive penalty when it discharged the grievor for being absent after the leave expired.

¶ 20 In *General Spring Products Ltd.*, 19 L.A.C. 392 (Weatherill), an employee with six years' seniority was discharged because he was convicted of the criminal offence of being in possession of stolen property. Arbitrator Weatherill stated, at p.395:

No doubt the fact of the grievor's conviction would indicate to the company and to the community at large that the grievor was not a man of good character. The company, however, is not the custodian of the grievor's character, and while there may no doubt be some jobs in which the character and reputation of the employee is an important element, the grievor's was not one of them.

¶ 21 In my view, with regard to an argument concerning the impact on the company image, it takes more than simply proving that an employee has done something illegal. If that were the case, a criminal conviction of any sort would always be grounds for dismissal and that is not the case. One must clearly separate the role of an arbitrator from that of the criminal courts. In *Municipality of Metropolitan Toronto*, 19 L.A.C. (4th) 353, Arbitrator Brent stated, at p.360:

In considering an employer's decision whether or not to participate in T.A.P. arbitrators have generally been consistent in measuring the reasons for the decision against relevant factors. Such factors are those which generally relate to the employment situation, to the employer's business or undertaking, and to any hardship which T.A.P. might impose. Arbitrators generally recognize that it is not an employer's function to act as guardian of the public morality; that is a function which the courts

fill. Therefore, it is inappropriate for an employer to deal with an employee differently based on the employer's determination of whether or not the employee has learned his lesson. No one condones impaired driving; however, it is up to the courts, not the employer, to reflect society's disapproval when the offence is not work-related and has no impact on it.

¶ 22 In our case, it is not clear how Mr. Bilkhu's activity affected the Company or its employees. While it is certainly possible that Mr. Bilkhu's dealing in drugs involved the Company's employees, there is insufficient evidence for this Board to conclude that is the case. Indeed, if that was the conclusion here based on this evidence, one would have to assert that an employer would never have to give leave for a drug trafficking conviction. That is not what the arbitral jurisprudence establishes as the law.

¶ 23 It is also within this context that Constable Basi's evidence before this Board must be addressed. At the end of the day, it is my opinion that his evidence does not address the issue which is before this Board, namely, the appropriateness of the Company's refusal to grant a leave. The Employer submits that his evidence demonstrates that Mr. Bilkhu was a serious drug dealer and, therefore, the connection to his job becomes more apparent. In my respectful opinion, the question of the degree of the seriousness of Mr. Bilkhu's drug dealing is really an issue for the criminal courts. Indeed, if Mr. Bilkhu's sentence had lasted any longer than six months, this refusal to grant leave would not have been grieved by the Union. In my view, the Constable's evidence does not create any more of a causal nexus with Mr. Bilkhu's employment and, as such, his evidence is not helpful to this deliberation.

¶ 24 A second consideration is whether the granting of the leave would cause the Company's production to be affected, that is, that there was an actual prejudice to the Company. It is a particularly relevant consideration whether a company is easily able to replace an employee during a requested leave or whether there would be an appreciable loss of efficiency or production for the company: *Coast Mountain Hardwoods Inc.*, supra; *Corporation of Borough of York*, 1 L.A.C. (3d) 304 (Beatty); *Weyerhaeuser Canada Ltd.*, 14 L.A.C. (4th) 140 (Vickers). For example, in *Canada Safeway Ltd.*, 1 L.A.C. (4th) 435, Arbitrator McColl dealt with the denial of a leave for incarceration for impaired driving and criminal negligence resulting from a car accident in which one teenager was killed and the other suffered severe and permanent injuries. In that case, Arbitrator McColl concluded there was no relationship to the employment and also observed, "there was no evidence that the grievor was a necessary or integral part of the workforce or that other employees could not fill in quite adequately in his absence. His absence, in my view, would create a minimal disruption to the operation." (p.447).

¶ 25 Where there are problems in replacing an employee, that fact will operate to the grievor's detriment. In *Re Alcan - Price Extrusions Ltd.*, 52 L.A.C. (4th) 435 (Ponak), the arbitration board found it would have been difficult to reintegrate the employee due to changes in the work processes which had been implemented during his absence. In *Smoky River Coal Ltd.*, 53 L.A.C. (4th) 347 (Hawco), it was found there was difficulty in acquiring skilled tradesmen and that the overtime costs would have been prohibitive.

¶ 26 In the case of Mr. Bilkhu, as was the case in *Coast Mountain Hardwoods Inc.*, supra, the evidence is that there were numerous employees available to replace the Grievor but the Employer never considered that fact when considering the leave application. The Employer candidly agreed at the hearing it would have had no trouble in accommodating Mr. Bilkhu's absence in this case.

¶ 27 A final consideration is whether the employee was honest with the company when he made his request for a leave of absence: *Coast Mountain Hardwoods Inc.*, supra; *University of Western Ontario*,

48 L.A.C. (4th) 73 (Stewart); Re Ocean Steel, supra. In this case, the evidence is Mr. Bilkhu was forthright with Mr. Cameron as to the reason for his leave request, and indicated not only that it involved a criminal matter but that it involved trafficking in cocaine. Mr. Bilkhu was also candid about the likely length of the sentence to be imposed.

¶ 28 Therefore, given that there is no evidence of a causal nexus between Mr. Bilkhu's conduct and his employment at Weldwood, that there was no detriment to the Company in having the Grievor away on leave and the fact the Grievor was candid with the Employer as to the reasons for the leave request, this Board concludes that Mr. Bilkhu's request for a leave in April, 1999 was unreasonably denied by the Employer.

#### AWARD

¶ 29 For all these reasons, the grievance of Mr. Bilkhu is upheld. The Employer breached the Collective Agreement in denying Mr. Bilkhu's leave request and, therefore, he is to be reinstated with full seniority. With regard to compensation, Mr. Bilkhu was not available to return to work until December 23, 1999 and, therefore, he is to be compensated only from that date to the present.

QL Update: 20000403  
qp/d/qlmmm/qlhcs