IN THE MATTER OF THE LABOUR RELATIONS CODE SECTION 93

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN:

CATALYST PAPER, PORT ALBERNI DIVISION

(the "Employer")

AND :

COMMUNICATIONS, ENERGY & PAPERWORKERS UNION OF CANADA

(the "Union")

(BRETT CAIRNEY GRIEVANCE)

ARBITRATOR:	Karen Nordlinger, Q.C.
FOR THE EMPLOYER:	Robert Sider
FOR THE UNION	Donald W. Bobert
DATES OF HEARING:	December 4, 2012 and December 17, 2012
PLACES OF HEARING:	Nanaimo, B.C. and Vancouver, B.C.
DATE OF DECISION:	January 21, 2013

AWARD OF THE ARBITRATOR

The Grievor was employed as a probationary employee at the Employer's mill in Port Alberni from August 20, 2012 to September 18, 2012, when he was terminated. The Grievor seeks reinstatement into his probationary period and payment of back wages, subject to mitigation for wages received from new employment.

The probationary period as set out in the Collective Agreement is 40 calendar days or 30 working days in a 90 calendar day period. The first two weeks of the period are spent in the classroom, where the probationary employee is trained on corporate policies and safety policies as well as on the operation of various machines that are used in the mill, including fork lifts and overhead cranes. The classroom time is from 8:00 a.m. to 4:30 p.m. each day for the first two weeks. Thereafter, the probationary employee works normal shifts in the mill as a trainee. The mill is in continuous operation and there are two 12-hour shifts per day.

Mr. Dave Badovinac is a long-term employee of the Employer responsible for training coordinating and operations support. His evidence was that the corporate policies and safety policies would have been provided to the Grievor within the first week of training. The mill is an inherently dangerous place, given the movement of large rolls of paper and the number and size of the machinery involved. There is no dispute that both the Employer and the Union recognize that safety in the workplace is a priority. Mr. Badovinac was

the supervisor of the Grievor, particularly in the first two weeks of his employment. There is no dispute that the Grievor fulfilled his attendance obligations during the first two weeks and received good evaluation reports dated August 24, 31 and September 7, 2012. Interestingly, the September 7th report states his attendance and punctuality as excellent.

In the third week, when he was in the mill, the Grievor was not under constant supervision, but worked with a trainer to learn the job. Mr. Badovinac testified that the usual shifts at the mill were 5:30 am to 5:30 pm and 5:30 pm to 5:30 am. However, he also stated that the contract said the shift started at 6 o'clock, either am or pm, but that ordinarily employees arrive at 5:30 to relieve. There was no documentary evidence of a 6 o'clock shift start.

In terminating the Grievor's employment, the Employer relied on four incidents, three related to the Grievor's ability to work as scheduled and one incident of alleged alcohol on his breath. The facts are not much in dispute, although their characterization is.

The first incident was on September 5, 2012. The Grievor was suffering from a bad cold, and he was advised by Mr. Badovinac that it was alright if he wanted to go home early. The Grievor did so. Mr. Badovinac's evidence is corroborative of the Grievor's evidence, as Mr. Badovinac admits that he sent the Grievor home. While the actual words used are somewhat in dispute, I accept that the Grievor left early on that occasion as the result of the direction of Mr. Badovinac.

The second incident on September 7, 2012 was as the result of an error at the Grievor's bank, which was not depositing his paycheque from the Employer properly into the Grievor's account. He raised the issue with Mr. Badovinac, who advised him to leave early in order to deal with his bank. The Grievor did so. The amount of time he lost was one-half hour according to his time sheet. Again, I accept that the Grievor left work early on that occasion as the result of the direction or permission given to him by Mr. Badovinac.

The third incident was on September 17th. The Grievor was due to work at 5:30 am. He did not clock in until 6:05 am. On that date he also, later in the morning, requested time off for personal reasons.

The fourth incident was again on September 17, 2012. There was a report made to the Grievor's superiors that the Grievor had alcohol on his breath at work on the morning of September 17.

These four incidents informed the Employer's consideration of the Grievor's suitability for permanent employment and formed the basis for his termination.

With regard to the third incident, the Grievor gave evidence that he left his home at approximately 5:15 am on September 17, 2012 and at approximately 5:25 am he was on the street on which the mill is situate when he realized that he had forgotten his swipe card, which he needed to clock in. He turned around, went back home, retrieved his card and clocked in at 6:05 am. He then arrived at his machine in the mill at approximately 6:15. He made no

attempt to contact the Employer to advise that he would be late. He gave two reasons for this decision:

1. He did not know the telephone number; and

2. He believed from something another more senior employee had told him, that the actual shift time was 6:00 am, and that because he was not relieving anyone on the machine, he could come in at that time. Thus, he believed he could go back for his card and still be at work "on time".

It was put to the Grievor that he could have obtained a temporary card at the guard shack when he reached the mill and thus he would have been on time. The Grievor testified that he was not aware of that at the time. He knew that his original temporary card had been issued by the guard shack before he received his permanent card, but did not realize he could at any time obtain a temporary card. He indicated that, had he known, it would have saved him a trip back home and he would have done it.

Krista Tremblay, the Human Resources Manager for the Employer, testified that the guard shack would issue a temporary card if the employee had misplaced or forgotten their card, and that that was a common occurrence. However, she was unable to say whether or not the Grievor had ever been told that. He had been advised by her, however, during the hiring process that it was important that he be available for work as and when needed. The Grievor

agreed to that condition, and signed a document titled "Labour Pool Scheduling" which states

> "If you are unable to report for work as scheduled due to sickness or other valid reasons you should contact the Supervisor of the department you are scheduled to work in directly. This should be done via pager/cell phone. You must keep trying to contact your supervisor until you are successful in making direct contact with them."

It also states:

> "Supervisors are responsible for monitoring attendance, for investigating attendance problems and taking corrective action as required."

In addition, the corporate policy on attendance and lateness was provided to the Grievor, which again emphasized being on time and the accessing and contacting supervisors if there is a problem.

With regard to his failure to contact the mill, the Grievor's evidence was as above. Ms. Tremblay testified that all the supervisors have the same phone number and that, had the Grievor gone into the guard shack, the guards would have been able to make contact for him. However, she did not know if the Grievor had been given the supervisors' number previously.

In cross, it was put to the Grievor that it should not have taken him the time it did to go back to his home to retrieve his card and to return to work. The Grievor did not resile from his position that indeed it did. Although a Google map quest query stated that the trip should take eight minutes, the Grievor stated there were stop signs and six lights on the way that weren't accounted

for in that query and that it did not take less than ten minutes to drive from his home to the mill.

The Grievor admitted that he knew that he was supposed to be at the mill at 5:30 am. He understood that he was to be available for an entire shift. He admits that he was late on that occasion, albeit only, in his view, by five minutes.

The fourth incident arose on the same morning the Grievor was being trained by Laura Hamelin on paper machine 4. Ms. Hamelin has been employed by the Employer for 17 years. She became concerned around 6:00 am that morning because the Grievor was absent. She called her supervisor, Gord Fisher, and he confirmed that the Grievor was supposed to be at work. Shortly after, the Grievor arrived and she began training him, which required her to be in close proximity to him because the mill is noisy. She became concerned because she smelled alcohol on his breath. She told the others she was working with about her concern. She was not comfortable working with the Grievor because she was using heavy equipment, such as the crane and the fork lift. As the result of her concern, she decided not to allow the Grievor to drive the fork lift or the crane. She felt that if something were to happen as the result of what she believed was the Grievor's consumption of alcohol, she would be responsible. She referenced the corporate policy that employees are supposed to look out for each other.

In cross-examination, Ms. Hamelin testified that she was sure it was alcohol that she smelled and not some other substance, such as after shave or

chewing gum. She admitted that she did not know if he was impaired by alcohol, that she did not see him unsteady on his feet or slurring his words, and that he did not seem emotional or inappropriate.

After approximately one and a half hours of work, the Grievor advised her that he needed to speak to Dave Badovinac about something and left to speak to Mr. Badovinac. When he returned, he worked another 45 minutes to an hour before he again left. Ms. Hamelin denied that she had made any telephone call to Mr. Badovinac with regard to the Grievor that morning. She stated that she had told Tom Burton of her concern and he told her that he called Mr. Badovinac.

Mr. Badovinac testified that he received a call from the floor of the mill that morning. The caller did not identify themselves, but he recognized the voice as that of Laura Hamelin. He was advised by the person on the telephone that he should smell the Grievor's breath. At the same time he was on the telephone, the Grievor came to his door to request time off during the day to attend a Court matter involving his brother. Mr. Badovinac granted permission for the Grievor to leave early. Mr. Badovinac was standing approximately two feet away from the Grievor and he smelled alcohol on the Grievor's breath. Mr. Badovinac did not say anything about that to the Grievor. After the Grievor left his office, Mr. Badovinac took steps to set up a meeting with shop stewards, Gord Fisher and the Grievor for later that morning.

The Grievor attended that meeting, which lasted approximately five minutes. When Mr. Badovinac asked him if he had been drinking, he said "no".

Mr. Badovinac advised him that he had smelled alcohol on his breath, and the Grievor indicated that he had had a couple of beers the night before. Mr. Badovinac then said that he had concerns that the Grievor was unfit to work. The Grievor was then escorted from the work site.

On September 18, 2012, the Grievor was terminated. The decision was made based on the incidents above. At the termination meeting, Ms. Tremblay testified that the Grievor offered no explanation for his lack of contact to his supervisor with regard to his lateness, nor for the alcohol on his breath. He was provided with a termination letter based only on "not successfully meeting our expectations during this probation period."

The Grievor testified that on September 16, he and two roommates were doing yard work at his home. They shared a case of beer. In response to the allegation that he had alcohol on his breath at the meeting on September 17 he stated that he had had a couple of beers the day before. He denied drinking alcohol on the morning of September 17. He testified that he was shocked and confused at the meeting, which lasted approximately five minutes. On cross-examination, he said he was not sure how many beers he had on September 16 but at the maximum it would be four, as the three men split a case of 12 beers. He did not drink alcohol after approximately 4:00 – 5:00 pm when they finished the yard work. He took a shower that evening, not in the morning and normally chews gum.

At the termination meeting on September 18, when told he was being let go based on his performance, the Grievor's response was to ask "Did I do a

bad job?". He testified that the Employer's response was that it wasn't the time or place to talk about it. This evidence was not put to the Employer's witnesses. He estimated the meeting lasted approximately five minutes.

Mr. Gord Fisher, a foreman at the Employer and a member of management, gave evidence on behalf of the Union. In the morning of September 17, he spoke to Tom Burton, who told him that the Grievor smelled "like booze" and that Mr. Fisher should "check him out". Mr. Fisher went to the winder machine and observed the Grievor working for approximately five minutes. He did not observe anything out of the ordinary. When the Grievor came into the winder booth, a space of about five feet by ten feet, he shook his hand and introduced himself. A brief conversation followed and Mr. Fisher could not smell alcohol on the Grievor. He smelled chewing gum that the Grievor was chewing. He did not ask the Grievor if he had been drinking and did not believe he had been drinking. Mr. Fisher attended the meeting later that morning with the Grievor and was one of the escorts of the Grievor off the premises. Mr. Fisher testified that he did not feel good about the decision.

Tom Burton was working on September 17 as a bark tender. He introduced himself to the Grievor in the winder booth. He did not smell alcohol on the Grievor. He testified that he advised Gord Fisher of the crew's concern but did not tell Fisher that the concern was alcohol. He further stated that it was mainly a concern of Laura Hamelin, whom he described as honest and forthright.

Ron Tardiff was working as a winder man on September 17 and was one of the shop stewards in attendance at the meeting with the Grievor. He testified that he sat next to the Grievor and did not smell alcohol. He was approximately two feet from the Grievor. He did not notice if the Grievor was chewing gum.

Doug Lalonde was working on the salvage winder and went over to introduce himself to the Grievor, whom he knew to be a new employee. The conversation was brief, perhaps 30 seconds. He smelled no alcohol and saw no signed of impairment. He admitted that the trainer, Laura Hamelin, would be in the best position to observe the Grievor.

Warren Lee, a winder man, was working on the same machine as the Grievor on September 17. He asked the Grievor why he was late and was told by the Grievor that he had forgotten his swipe card and went home to get it. Mr. Lee believes he told the Grievor that he could obtain a temporary card at the guard shack. The conversation took place in the confines of the winder booth and lasted approximately five minutes. Mr. Lee did not smell alcohol on the Grievor and he did not note anything out of the ordinary in the Grievor's appearance or conduct.

The Employer submits that, while the incidents of time from work on September 5, September 7 and as requested on September 17th but not taken, were non-culpable, they are evidence of a pattern that indicate an inability to work in accordance with the job requirements that he be available for all shifts as and when necessary. There is no dispute that the Grievor understood that to

be a term of his employment. The Employer submits further that the September 17 incident where the Grievor was late for work and allegedly smelled of alcohol was culpable and provides further basis for discipline.

It is trite to say that the standard of review to be applied in a termination case involving a probationary employee is lower than that of an employee who is past the probationary period. The Employer refers to *Sauder Industries Ltd. and I.W.A. Canada, Local 1-217* 1996 CLB 13273 in which Arbitrator Sanderson referred to *Re Government Employee Relations Bureau and B.C.C.E.U.* (1984), 15 L.A.C. (3d) 177 at page 8, which set out five conditions to be met for the termination of a probationary employee, as follows:

> "1. that there are legitimate standards of work performance;
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> 2. that the standards have been conveyed to the employee and that proper and ample direction has been provided;
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> 3. that the employee has been given the opportunity to meet the standards;
>
> 4. that the employee has been properly evaluated; and
>
> 5. that there have been no unreasonable or discriminating acts.
>
> The consistent element in all of these cases is that legitimate standards be conveyed to employees; that they be provided proper direction and an opportunity to meet the standards; and that the evaluation be carried out properly in a manner that is in good faith, reasonable and without discrimination. As well, all of the cases address the issue of suitability of the employee. Will she be compatible with the rest of the

> work-force; will she accept supervision and the reasonable rules of the work place?"

In that case, there was evidence of the Grievor's poor work attitude, which the arbitrator found were "real and present".

In *Le-Ron Plastics Inc. and C.A.W., Local 3014*, 2000 CLB 12666, Arbitrator McEwen dealt with the termination of a probationary employee which resulted from her unsuitability for employment as the result of her absenteeism/tardiness record. Arbitrator McEwen found that an employer's duty of fairness towards probationary employees includes warning a probationary employee in the event that the employer perceives, for example, performance difficulties to have surfaced. In that case, it was found that the absenteeism was non-culpable and thus a warning would have been of no effect. The failure of the employer to provide a warning was thus not fatal to its case. The absenteeism was persistent, not approved, and provided grounds for termination in that case.

In this matter, there is no evidence of any warning given to the Grievor. He believed that his performance was good, based on his evaluations and comments made to him by Mr. Badovinac. He was provided with permission from the Employer on all of the occasions he left work early or asked to leave work early as in the last instance. Even after the September 5th incident when he left early, his evaluation report rated his attendance as "excellent". The absenteeism/tardiness of the Grievor was not persistent and

was supported by the Employer in each instance. These facts distinguish this case from the facts in *Le-Ron Plastics*, supra.

The Employer also relies on *Westfair Foods Ltd. and U.F.C.W., Local 777*, 15 L.A.C. (4th) 199 in which the Arbitration Board found that there was an absence of standards against which the Grievor's conduct could be measured and that the evaluation of her performance was "ad hoc and lacked any clear assessment or constructive criticism", but went on to find that, even so, the Grievor was unsuitable for the employment, given compelling evidence of her incompatibility with other employees. Again, the facts of that case are distinguishable from the case before me. The only employees who had a concern with the Grievor were Laura Hamelin and Dave Badovinac as the result of smelling alcohol on his breath. But several other employees gave evidence to the opposite effect and there was no evidence of any concern raised with regard to the Grievor's attitude or nature that made him incompatible with others by any of the witnesses.

The Employer urges upon me that it is common sense that an employee should show up for work on time and therefore there really is no need for a specific standard. Such things as a positive attitude, compatibility with others are not matters that need to be explicitly explained to a probationary employee. If the employee fails in those regards or any of them, the employer is entitled to take them into account on the issue of suitability. I accept that submission, but find that, for the reasons above, the evidence does not support

a finding of unsuitability based on his attendance relating to the first two incidents or his general attitude.

The Collective Agreement provides no guidance with regard to standards to be met by a probationary employee or for the termination of a probationary employee. I accept the law as set out above is to be applied in such situations.

The Union does not dispute that the standard of review is different for a probationary employee, or that the factors to be considered are those as set out in the Employer's authorities above. The issue, it says, is whether or not there was a fair assessment of the Grievor. The Union has referred to several cases, all of which I have considered. I will not refer to all of them, but I found the comments in *Skeena Cellulose Inc. and Pulp, Paper and Woodworkers of Canada (Watson Island Local No. 4)*, a decision of Arbitrator Bird, helpful in determining the considerations that must go into whether or not a fair assessment of the employee has been made.

He stated, at page 12:

> "I also accept the line of authorities relied upon by Counsel for the Union to the effect that an employer must draw to the attention of a probationary employee that his performance falls short of the required standard for the job. The employer should give details and give the employee a reasonable time in which to meet the employer's standard, assuming it to be a proper standard under the terms of the collective agreement, that there is sufficient time left in the probationary period to meet the standard, and the shortfalls are of a relatively minor nature. To point out shortcomings is not only fair to the probationary

> employee, but it also tends to protect the interests of the employer because it has the potential for revealing misunderstandings between the employee and the supervisors about the employer's standard and the employee's performance relative to the standard. ...
>
> Where the company decides a probationary employee is unsuitable by drawing inferences from a number of minor incidents and then discharges the employee, the company must be prepared to prove that the probationary employee was properly made aware of the performance standards set by the employer, that the incidents were drawn to the employee's attention promptly, that he was made aware his performance in each incident was unsatisfactory in relation to the employer's standard, and that the employee was given a reasonable opportunity, subject to the limitations of the probation period, to improve his performance." (at page 13)

To the same effect is the comment of Arbitrator McColl in *Pacific Press v. Vancouver/New Westminster Newspaper Guild*, [1987] B.C.C.A.A.A. No. 29 at paragraph 51, where he stated:

> "It is clear, however, that those disturbing reports were a factor in the conclusion to terminate the Grievor. Those factors were improperly considered, as they had never previously been brought to the Grievor's attention. He was not given the opportunity to test the truthfulness of such allegations. I find as a fact that there was a reliance upon unproven previous incidents in the determination to discharge the Grievor."

In *British Columbia (Ministry of Forests and Range) v. British Columbia Government and Service Employees' Union (Peel Grievance)*, [2008] B.C.C.A.A.A. No. 205, Arbitrator Ready stated the issue as follows:

> "The duty to warn argument is best summarized in

> *Government of B.C. and B.C.G.E.U.* in which Arbitrator Hope states that the onus is on the employer to establish 'it had advised the Grievor of the standard expected of him, that he was not meeting the standard, and that he had been made aware that a continued failure to meet the standard could result in his removal from the position.' I accept that a 'fair opportunity' includes the duty to warn."

It is undisputed in the matter before me that the standards to be met were clearly set out to the Grievor in his training sessions and by his supervisors. I accept that he understood the standards and that he knew he had breached the standards when he was late for work on September 17th. With regard to the first two instances of September 5th and September 7th, I find that it is not reasonable to take into account those two instances in assessing the Grievor's suitability.

With regard to the incidents on September 17th, the Grievor provided an explanation for his lateness and for his lack of contact with the Employer. The Employer could not establish that he knew that the guard shack would provide him with a temporary card, nor that he was given the phone number of his supervisor. The Grievor's conduct on that date arose on that date from a misunderstanding that could have been corrected upon a warning to him as the result of his late arrival. I do not accept, as the Employer has urged upon me, that the Grievor simply made up a story to account for his lateness. He told the same story to Warren Lee that morning and I cannot find that his evidence was any kind of recent concoction.

The evidence with regard to whether or not the Grievor smelled of alcohol on the morning of September 17th is more problematic. There is contradictory evidence on this issue. However, even putting it in the worst light for the Grievor, and accepting Laura Hamelin and Dave Badovinac's evidence that he smelled of alcohol does not assist the Employer in this case. There was no evidence that the Grievor was impaired in any way on the morning of September 17th. There is no evidence that he drank alcohol in the morning of September 17th. I accept his evidence that he got up at approximately 4:15 am, proceeded to get ready for work and left his home at approximately 5:15. It is unlikely, in my view, that he would have been drinking alcohol at that time of the morning, particularly as there was no evidence of impairment. If, as submitted by the Employer, he had been drinking later than he testified the day before and was hung over, that would be cause for concern. But there is little, if any, evidence of that, and an absolute denial by the Grievor, which is supported by the evidence of other employees as to his breath and by the lack of any evidence of impaired performance. I accept that Laura Hamelin and Dave Badovinac believed he may have been impaired and that they were right to raise the concern. However, the Employer did not raise the alcohol issue with the Grievor in any way prior to his expulsion from the work place and certainly not in a way that allowed him the opportunity to show that alcohol was not a problem. This is not a case where there was an immediate need to terminate as the result of evidence of impairment by alcohol.

The real problem with the Employer's case is the failure to warn. The Grievor was not given the opportunity to understand and respond to the Employer's concerns before he was terminated. In my view, the Grievor was not provided with a fair assessment in all of the circumstances of this matter due to the Employer's failure to warn and to provide an opportunity for the Grievor to remedy his deficiencies or to correct any misapprehensions or misunderstandings.

I would allow the grievance, reinstate the Grievor into his probationary period. As he is to work out his remaining probationary period, subject to the satisfaction of the Employer, and would have been paid in full to September 18, 2012, I assume there are no back wages. But if I am wrong in this, counsel may make further submissions on this, if necessary. I will remain seized in the event that there are any issues or disputes in this regard.

KAREN F. NORDLINGER, Q.C.
ARBITRATOR