

In the Matter of an Arbitration

Between

Algoma Steel Inc.

and

United Steelworkers

Grievance of Michael DiDonato

AWARD

Before: Dana Randall

For the Employer: Jennifer Hodgins, counsel

For the Union: Marino DeGregorio, presenter

Hearings in this matter were held on May 3, June 11, September 24, 25, 26 and November 28, 2019; written submissions thereafter.

AWARD

Introduction

1. This Award addresses a grievance, dated March 20, 2019, filed by USW, Local 2231, challenging the decision of Algoma Steel Inc. (the Employer) to end the employment of Michael DiDonato (the Grievor). From the Employer's perspective, the Grievor was a probationary employee, who was deemed to be unsuitable for continued employment after his having been found asleep in his crane while on duty.
2. The Union challenges the Employer's decision on 3 bases: 1) there is no such thing as a probationary employee under the terms of the collective agreement and the Employer's mischaracterization of his status led to its wrong-headed application of a suitability test rather than a just cause one; 2) even if the Grievor was a probationary employee, the Employer was duty bound to ensure that he had Union representation at the time of his termination. The failure to provide same renders the Employer's decision void ab initio; and 3) and, in any case, even if the Grievor was a probationary employee and his right to grieve the Employer's decision was circumscribed by the case law, which provides that the Employer has a broad discretion regarding suitability, the Union submits that the Employer's decision was discriminatory. The Union argues that the Grievor had a handicap, to wit: alcoholism and that the Employer's decision was therefore a breach of its duties under the OHRC.
3. The Employer accuses the Union of making it up as it goes. 1) and 2) were not pleaded and should not be entertained; in any case, they are without merit. While 3) is clearly pleaded, and the gravamen of the case, the Employer submits that the Grievor and the Union have fallen far short of making out a case of addiction and hence handicap.

The Collective Agreement

4. The following articles are relevant to this matter.

7.02.10 Subject to Articles 7.02.20, 7.02.30, and 7.02.31, an employee shall become established:

a)...

b)...

c) for employees hired subsequent to August 1, 2010 in the bargaining unit effective the employees last date of hire, after the employee has worked 1040 hours;

7.02.40

The purpose of the establishment period is to allow the Company to decide whether it wished to retain an employee in the plant, the department, or the job concerned. When an employee who is established in the Plant is accepted on a job posting and it is the decision of the Company not to retain the employee in the department or job concerned and the employee disagrees with this decision, the Company will justify its position to the employee and to the Union in writing.

9.01.10 Justice and Dignity

When it is the intention of the Company to meet with an employee to discuss any matter relating to discipline, or which may lead to discipline, the employee will be informed that the employee is entitled to be accompanied by the steward or committeeman available on shift.

Supervision shall meet with the employee and, where requested, the steward or committeeman on shift, prior to issuing discipline.

9.01.20

When it is the Company's decision to discharge an employee for the accumulation of 100 demerit points, the Company shall first convene a meeting between Human Resources and the Union.

Except in cases where the final incident that results in the accumulation of 100 demerit points under the Employees' Conduct Rules is an offence involving:

- significant theft, or
- sabotage, or
- a concerted or individual refusal to work, or
- an incident that creates a situation where continued employment would threaten the safety of the disciplined employee, or other employees, or the plant or,
- alcohol and drug abuse;

The employee shall continue working provided their performance is satisfactory, as entitled by their seniority, until a grievance, which may have been filed protesting the intention of the Company to discharge the employee, has been finally resolved through the Grievance Procedure. Notwithstanding the provisions for an employee's return to work, an employee will not be allowed to return to work if the employee would present a danger to the safety of employees or equipment in the plant. The meeting will be convened as soon as possible and will constitute the Step 2 meeting of the Grievance Procedure in the event a grievance is filed. Such grievance must be filed within 5 days excluding weekends and statutory holidays of the meeting on discharge.

The Facts

5. Algoma operates a steel mill in Sault Ste. Marie, Ontario. It employs approximately 3,000 employees in various areas of the Mill. It is a safety sensitive, industrial environment in which heavy equipment is used and employee safety is paramount.
6. On or about September 19, 2018, the Grievor accepted a job at Algoma in the position of Production Operator. He was assigned to operate a crane in the Plate and Strip department.
7. Ms. D'Angelo, the former Manager of Labour Relations, was involved in the Grievor's hiring. She knew him, primarily through his father, who was a long serving and well respected retired Algoma employee. As part of Algoma's due diligence, Ms. D'Angelo was aware that the Grievor had a DUI. She advised the Grievor that he was being hired despite same, but that he had better not let her down or have occasion to deal with her again.
8. I heard detailed evidence about the Plate and Strip Department. The following will suffice. There are multiple bays and numerous pieces of heavy machinery, including overhead cranes and cutting machines. The Grievor operated the 262 overhead crane, which weighs over 30 tonnes and operates along a rail. He was responsible for loading cut material for transfer to another bay and he was assisted by an employee on the floor, called a loader. The Grievor worked 8 hour shifts, including some night shifts.
9. On November 22, 2018 the Grievor was working an 11 pm to 7 am night shift. The Front Line Supervisor, Ian Kokkonen, in the early a.m. hours of that shift, heard the Grievor's 'loader' attempting to contact the Grievor, over the radio, unsuccessfully, 3 times. He went to investigate.

10. To make a long story short, Kokkonen could see that the Grievor had his feet up and seat tilted back. After attempting radio contact repeatedly, without success, and whistling, he used an air horn, 2 times, in order to rouse the Grievor. He then instructed the Grievor to come down and meet with him.
11. The Grievor came down from the crane and advised that he was fine and was keen to return to work, which Kokkonen allowed. The Grievor finished his shift. Kokkonen advised the Grievor that the incident would be documented. He provided the Grievor with an RKS slip, which stands for 'record keeping system'. Mr. Kokkonen testified that he was not issuing discipline, and that same was, in fact, beyond his authority. (I understand that Mr. Kokkonen is in another USW bargaining unit.) In any case, he told the Grievor that he would be sending an email respecting the event to both the day shift supervisor and the Superintendent of Plate and Strip. Mr. Kokkonen had no further involvement in the matter.
12. I heard from Amanda Silverthorn, an 11year Human Resources Advisor at the Company. She testified that the probationary period, for new employees like the Grievor, is called, pursuant to the language of the collective agreement, the "establishment period". She testified that until an employee reaches 1040 hours, they are not 'established' in the bargaining unit. She stated that, as of November 2018, when she first dealt with the Grievor in this matter, he had worked approximately 300 hours and was, therefore, not established. In more common collective agreement language, he was a probationary employee.
13. The Employer met with the Grievor on November 26, 2018. Present were the Grievor, Silverthorn and D'Angelo. The Grievor admitted to falling asleep in his crane and explained that the heat in the crane cab had contributed to his falling asleep. He was advised that that was not an acceptable excuse; that if an employee was already engaging in this kind of misconduct in their first 2 months of probationary employment, his prospects of acceptable performance when his employment was no longer probationary were slim at best.
14. The Employer evidence, which was not rebutted, was that D'Angelo specifically asked the Grievor if he had any substance abuse issues. He unequivocally stated that he did not. D'Angelo raised the fact that some of the Grievor's co-workers had indicated that he at times had smelled of alcohol. She asked why that might be the case. He said that that could only be because he'd had a beer the night before at a Greyhounds hockey game.

15. Both D'Angelo and Silverthorn testified that they sought to eliminate concerns that the Grievor had a substance abuse problem. In their view, that needed to be taken into account in the decision they had to make. If disclosed, they both testified that they would, in accordance with the Employer's long history of assisting employees with same, be governed accordingly. Both D'Angelo and Silverthorn testified that it was not disclosed. Rather, the Grievor denied any substance abuse problem.
16. The Employer evidence was that the meeting with the Grievor on November 26, 2018 was not disciplinary and that the Union representation language in article 9 was, as a result, not a requirement for a probationary employee. That view, submits the Employer, was a long established practice and understanding of the parties, although Ms. D'Angelo acknowledged that if a specific request was made by a probationary employee, she would provide one. The Employer also acknowledged that, while the consistent practice had been to not provide a probationary employee with Union representation, more recently, with the growth of the HR department, it was possible that some individuals in the Department were taking a more liberal approach to union representation.
17. The Union called evidence which suggested that the practice was otherwise; and that non-established employees were always provided with Union representation. I will return to that issue below.

The Establishment Period

18. Article 7.02.10 of the collective agreement sets out something called an 'establishment period'. While the Union argues vigorously otherwise, the term is synonymous with the more commonly used concept of a 'probationary period'. Until an employee is 'established' in the bargaining unit, he or she is considered a probationary employee.
19. This is not a matter of first instance. Arbitrator Silverman in Essar Steel Algoma Inc. and USW, Local 2251, (2013) 117 C.L.A.C. 110, writes, at paragraph 17:

I deal first with whether the Grievor is a probationary employee. I am not persuaded by the Union's argument that because that word is not used in the Collective Agreement, the Grievor is not probationary. The parties in their Collective Agreement chose to use the word 'established' in the plant. Article

7.02.40 sets out precisely the purpose of the establishment period and Article 7.02 sets out when an employee is established in the bargaining unit. As the employer says, what is relevant in Article 7.02.40 in this case is establishment in the plant. A newly hired employee who is not established in the plant is the same as a probationary employee.

20. The collective agreement provides that an employee will become established upon working 1040 hours. The Grievor was let go after 2 months of employment and approximately 300 hours.

21. The purpose of the establishment period is made explicit in article 7.02.40 of the collective agreement which states:

The purpose of the establishment period is to allow the Company to decide whether it wishes to retain an employee in the plant, the department, or the job concerned.

22. Put simply, there is no merit in the Union's first argument. The Grievor was not only a probationary employee, his continuing employment was subject to the Employer's broad discretion "to decide whether it wishes to retain an employee..."

23. To reiterate, this is not a case of first instance. In the aforementioned case of Arbitrator Silverman, she found that the standard set out in article 7.02.40 was consonant with and subject to the well-established probationary employee standard of review.

24. The Employer has complete discretion to end an employee's probationary employment subject only to the requirement that the decision is not arbitrary, discriminatory or made in bad faith; see also: Essar Steel Algoma and USW, Local 2251, [2014] O.L.A.A. No 445 (Rose) and Algoma Steel Inc. and USW, Local 2251, (unreported decision dated January 27, 1999 (Devlin). Put simply, there is no higher standard that needs to be applied to the case and I so find.

Union Representation (Issue #2)

25. The Union appears to take the position that the RKS code 9009, issued by Mr. Kokkomen was disciplinary, the investigation meeting on November 26, 2018 between the Grievor and Silverthorn and D'Angelo was disciplinary and that the

'termination meeting that followed immediately thereafter was disciplinary and that the Employer's failure to provide Union representation at each stage was a breach of article 9 of the collective agreement.

26. Despite numerous opportunities to raise this objection to the Grievor's termination, the Union did not until the first day of hearing. While the Employer objects that it was therefore an impermissible expansion of the scope of the grievance, I need not rule on that. In my view, article 9 clearly does not apply to non-established/probationary employees and I so find. In my view, the delay in pleading same, rather than being an impermissible expansion of the grievance, is evidence of the Union's own view that taking that position was without merit. Certainly, the idea that Union representation was required when Mr. Kokkonen, who has no authority to issue discipline, issued the RKS to the Grievor, is non-sensical.
27. While the submission that Union representation at a meeting to end the employment of a probationary employee is arguable, I reject it for numerous reasons. Article 9, consistent with the evidence of Silverthorn and D'Angelo, clearly contemplates circumstances where discipline is being imposed. In this case, the Grievor was neither being disciplined nor was he being discharged for the accumulation of 100 demerit points. He was being released for unsuitability. While I was open to hearing past practice evidence as a guide to interpretation, in my view, the Union evidence fell far short of establishing a consistent practice in support of its interpretation and I so find.
28. More importantly, again this is not an issue of first instance. There are 2 cases between the parties very much on point.
29. In the aforementioned Devlin Award, supra, the main issue was the standard of review applicable to the termination of a term employee. After finding that it "is akin to that applied to a probationary employee", the Arbitrator went on to find that the employee was not entitled to Union representation under Article 9.01.10 because it was not a matter 'relating to discipline or which may lead to discipline.'
30. In the aforementioned Silverman Award, supra, which involved the termination of a probationary employee, the Arbitrator had occasion to rule on whether 9.01.20 was applicable to a probationary employee. Following the reasoning of Arbitrator Devlin, Ms. Silverman found that:

The instant case did not involve discipline or discharge under Article 9 for the accumulation of demerit points, but was as a result of the Company not wishing to retain the Grievor during the probationary period....the Grievor was probationary. Therefore his termination was not a discharge as contemplated by Article 9...

31. For all of these reasons, the Union's argument respecting Union representation is dismissed.

Discrimination (Issue #3)

32. In the wake of the Grievor's meeting on November 26, 2018, with Silverthorn and D'Angelo, the Grievor asked to meet with D'Angelo alone. They proceeded to have an ambiguous conversation about his seeking treatment. D'Angelo understood the Grievor to be saying that he was going to seek treatment in order to get his job back. D'Angelo testified that she told him that that was not the right reason to seek treatment. The Grievor testified that she had misunderstood him.
33. On or about January 28, 2019, the Grievor entered a 21 day out of town residential program for a substance disorder. He testified that he has remained alcohol free since, and has been committed to regular AA meetings.
34. The Union submits that, on the basis of the totality of the evidence, the Grievor has proven that he has a disability; *to wit*; alcoholism and that his disability contributed to his falling asleep at work. The Union submits that the Employer's decision to terminate the Grievor was therefore discriminatory. In the Union's view, rather than terminating the Grievor, the Employer should have been looking at ways to accommodate him.
35. The Employer submits that the Grievor and Union have not established a case of *prima face* discrimination, and that they have neither proven that the Grievor actually suffered from any disability at the relevant time, nor that the alleged disability played any part in the misconduct (sleeping on the job) which led to his termination.
36. The Employer underscores that the Union bears the onus of proving both that the Grievor was an alcoholic at the relevant time and that his disability contributed to his falling asleep.
37. The Employer submits that, because a claim of discrimination is so consequential, both in this case and more generally, the evidence of the Grievor's alleged disability needs to be made out with clear and cogent evidence. The Employer submits that the Union has not remotely met its burden.

38. For the reasons which follow, I agree with the Employer. I come to that conclusion without giving any weight to his denial of a drinking problem when specifically questioned about it on November 26, 2019. Such a denial can always be dismissed as part of the illness. I come to that conclusion despite his ambiguous remarks to Ms. D'Angelo about his reasons to seek treatment. And I come to that conclusion despite allowing the Union to call post-termination evidence, without restriction, over the strenuous objection of Employer counsel.
39. Despite my giving the Union and the Grievor broad latitude to make out the case of disability discrimination, I agree with the Employer that the Union has proven neither a disability nor a nexus between the disability and the Grievor's misconduct; and I so find.
40. The Union relies on the Grievor's self-declaration and the fact that he was admitted into a residential program to prove both the addiction and the nexus. Neither, together or apart, is persuasive for a host of reasons.
41. I begin with the self-declaration. As a matter of law, it is not enough. The decision of Arbitrator Hinnegan in National Steel Car Ltd. V. USWA, Local 7135 [2006] O.L.A.A. No. 95 is instructive. The grievor, in that case, was terminated for an unauthorized absence. He pleaded that the absence was as a result of drug addiction. The Arbitrator rejected that claim on the basis that there was no objective, medical evidence of same, on the following terms:

While I have no doubt at all that the grievor has been using drugs for the past few years, even relatively excessive drug use is no more evidence of drug addiction than relatively heavy drinking is of alcoholism. As noted, alcohol and drug addiction are now generally considered to be an illness and a disability under the Ontario Human Rights Code. However, claims of alcoholism or drug addiction after an employee has been terminated are looked at by arbitrators with some degree of skepticism. The case law establishes that the grievor must meet a relatively heavy onus and prove, by way of cogent, objective evidence, other than subjective, self-serving declarations, that he suffers from drug addiction. That onus is discharged by producing medical evidence establishing an addiction or compulsive, long-standing drug use as opposed to mere recreational use. That is generally done by calling a credible medical practitioner who has a professional understanding of drug dependency and who has treated the grievor at the relevant time. Self-serving declarations of drug addiction have, almost universally,

been rejected as proof of drug dependency. Even in cases where competent medical professionals have purported to support grievors in their claims of drug dependency, arbitrators have rejected the evidence as having little probative value where the professional opinions were based solely on the grievor's declaration and nothing else.

42. Arbitrator Hinnegan cites the decision of Arbitrator Newman in A & P v. USWA, Local 414 (1997) 65 L.A.C. (4th) 306, wherein the arbitrator states:

Excessive drug or alcohol use does not necessarily imply that the individual is an addict, in whom volition has given way to physical and emotional need for the use. Medical evidence of addiction is mandatory in order for the situation to be viewed as one in which the employee suffers from an illness or a disease. Addiction must be clearly established by the evidence if the union seeks to rely upon illness or disease as the root of the problem.

43. Before turning to the lack of medical evidence in this case, it is important to note that the Grievor's self-declaration evidence was, itself, weak at best. Frankly, I felt compelled to ask him questions because his evidence with respect to his drinking was so poor and antithetical to his claim.
44. The Grievor's evidence is vague regarding the extent of his drinking during the relevant time period; he testified that he would not drink the night before a 7 a.m. shift; that he did not attend work impaired, and that on the night in question, he had not had any alcohol for at least 48 hours before his shift. When I felt compelled to question the Grievor in order to tease out a narrative, he was unable to state with any specificity how much alcohol he typically drank; neither how much nor how often. He gave no evidence tying drinking to inadequate sleep.
45. Given the weakness of the self-declaration evidence, the requirement for objective, medical evidence, becomes even more paramount. But that evidence was not forthcoming. For instance, there is no evidence from the Grievor's general practitioner supporting the Grievor's claim of an alcohol addiction problem. In my view, that evidence was essential. Obviously, that evidence could have provided both a history of the Grievor's problems with alcohol, an opinion that the Grievor's alcohol use or abuse amounted to an addiction and that his falling asleep on November 22, 2019 could reasonably be related to his addiction.

46. Instead, the Union's medical evidence was entirely a function of the Grievor being admitted into a residential treatment program two months later, on January 28, 2020. Leaving aside whether the assessment, at that time, was relevant to the Grievor's alleged alcohol dependency, at the time of his termination, I'm not satisfied to find that the acceptance of the Grievor into the residential program amounts to a finding that the Grievor was an alcoholic.

47. The documentary evidence with respect to the Grievor's being accepted into the program amounted to a letter dated October 29, 2019 from Dr. Stanley Shapiro as follows:

This will confirm that Mr. Michael Didonato (D.O.B.: 21/06/1985) was diagnosed with Alcohol Use Disorder (DSM-5) upon admission at St. Joseph's General Hospital Elliot Lake at the Withdrawal Management Services on January 28, 2019. Mr. Didonato accepted the treatment plan and completed services on March 01, 2019.

48. I ruled that the letter could be filed as an exhibit over the vigorous objection of Employer counsel on November 28, 2019, which was the last of six days of hearing. (The hearing proceeded thereafter by way of written submissions). Dr. Shapiro was not called to testify.

49. In my view, the Shapiro letter does not advance the inquiry. There was no evidence with respect to the meaning of the term "alcohol use disorder", nor was there any evidence with respect to how this diagnosis was arrived at. In the absence of same, it is difficult to conclude that the Grievor was suffering from an alcohol related disability, especially at the relevant time, which was two months earlier; nor does the letter establish any nexus between the Grievor's falling asleep and his "Alcohol Use Disorder".

50. The Union did call the evidence of the Grievor's counsellor, Ms. Robins, who was at the treatment facility in Elliot Lake. Ms. Robins' evidence is succinctly summarized in the Employer's written submission as follows:

Ms. Madelyn Robins testified that she was (i) not involved in the intake process for the Grievor, (ii) she did not know whether or not any pre-January 2019 information, medical or otherwise, was considered as part of the intake assessment process for the Grievor; (iii) she did not feel qualified to make any statement or give any evidence with respect to the Grievor's diagnosis, as this is a difficult thing to assess and is a medical assessment, and (iv) she was unable to comment at all on the length of time the Grievor may or may not have been suffering from any substance abuse issues, such as an alcohol addiction, prior to his entry into the Oaks Centre program. Ms. Robins also testified she did not

feel qualified to answer any question about how long it would take to become addicted to alcohol, although she noted that addiction usually starts with a problem and then crosses a line to becoming an addiction. She testified that when a problem crosses an invisible line into an "addiction", it becomes an "obsession" where the pattern of living revolves around it, and a normal symptom at that point would be an interference with activities of daily living such as attending work and childcare duties.

Ms. Robins also testified that the treatment program itself which the Grievor was in would be the same 21 day program whether or not an individual had suffered from a substance abuse disorder for a couple of weeks or twenty years.

51. In my view, Ms. Robins evidence does not assist the Grievor. Neither her evidence nor the Shapiro letter establishes, on any evidentiary standard, that the Grievor was an alcoholic, as of November 22, 2019 and that his alcohol dependency had an impact on his falling asleep on that date.

52. The most that can be said is that the Grievor was admitted to the program, purportedly to address his 'alcohol use disorder'. The doctor who opined re same was not called to testify about the meaning of that disorder, whether it amounted to an addiction or, most importantly, whether it could have, two months earlier, contributed to his falling asleep while operating a crane.

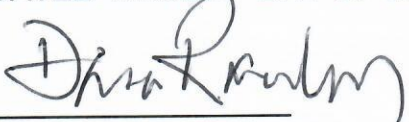
Decision

53. The Grievor was a probationary employee. He fell asleep while operating a crane in a very safety sensitive workplace. The Employer was well within its discretionary assessment to conclude that the Grievor was not a suitable candidate. While the Employer's discretion is broad, it is subject to the requirement to not be discriminatory.

54. While the Union alleges that the treatment of the Grievor was discriminatory, I find that there is no basis for such an allegation. The Union has failed to establish the first step of the analysis: that the Grievor had a disability at the relevant time.

55. For these reasons, the grievance is dismissed.

DATED THIS 21ST DAY OF MAY, 2020 IN BARRIE, ONTARIO.



Dana Randall, Arbitrator