

IN THE MATTER OF AN ARBITRATION

BETWEEN:

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA,
ONTARIO PROVINCIAL DISTRICT COUNCIL AND LABOURERS'
INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183

(Hereinafter referred to as the "Union")

- and -

AECON INDUSTRIAL, A DIVISION OF AECON CONSTRUCTION
GROUP INC.

(Hereinafter referred to as the "Employer")

AND IN THE MATTER OF THE GRIEVANCE OF DAVID WYNNE
ALLEGING UNJUST TERMINATION

JOSEPH D. CARRIER

Sole Arbitrator

Appearances for the Union

Maheen Merchant
Ricardo Teixeira
David Wynne

Counsel, LIUNA Local 183
Staff Representative, LIUNA Local 183
Grievor

Appearances for the Employer

Carl Peterson
Jason Campbell
Fred Milko

Filion Wakely Thorup Angeletti LLP
AECON Inc.
AECON Inc.

A videoconference hearing in this matter was held in Toronto on September 30, 2020

DECISION

In the matter presently before me Mr. David Wynne a member of LIUNA Local 183 grieves that his termination by AECON Industrial on April 30, 2020 was unjust.

In brief, the Mr. Carl Peterson, counsel for the Employer, explained that the Grievor had exhibited COVID-19 signs and had been instructed not to report to work until contacted by the Company nurse. He nonetheless did show up for his next scheduled shift. In the circumstances, taking into consideration the Grievor's recent past disciplinary record and the serious nature of the current issue respecting safety it was the Employer's position that he was terminated with just cause.

Ms. Maheen Merchant, counsel for Local 183 did not challenge that discipline was warranted in the circumstances but took the position that the Grievor's termination was excessive.

The parties proceeded by way of an Agreed Statement of Facts together with supporting documents as follows:

AGREED STATEMENT OF FACTS

THE PARTIES

1. *Labourers' International Union of North America, Ontario Provincial District Council ("OPDC") and its affiliated bargaining agent Labourers' International Union of North America, Local 183 (collectively referred to herein as the "Union") are trade unions within the meaning of sections 1 and 126 of the Labour Relations Act, 1995.*
2. *Aecon Industrial, a Division of Aecon Construction Group Inc. ("Aecon" or the "Employer") is a contractor performing work at the Darlington Nuclear Generating Station (the "Darlington Plant").*
3. *The Union and the Employer are signatory to and bound by the collective agreement between OPDC and the Electrical Power Systems Construction Association effective May 1, 2015 to April 30, 2020 and continue thereafter in*

accordance with its terms and by statute (the "Collective Agreement") and attached hereto at **TAB 1**.

4. David Wynne (the "Grievor"), was at all material times, a member of Local 183 and employed as a Labourer by the Employer at the Darlington Plant. At all material times the terms and conditions of the Grievor's employment were governed by the Collective Agreement.

GRIEVOR'S BACKGROUND AND EMPLOYMENT HISTORY

5. The Grievor is 64 years old and has been a member of Local 183 since 2001.
6. The Grievor has been employed by the Employer at the Darlington Plant since April 2015.
7. In accordance with the Collective Agreement, the Grievor's total hourly wage package including pension and benefit fund contributions, at the time of his termination was \$47.63.
8. The Grievor had no disciplinary record until March 9, 2020.

Discipline dated March 9, 2020

9. While working in the protected area of the Darlington Plant, employees are required to carry Electronic Personal Dosimeters ("EPDs") to monitor radiation dosage.
10. On March 9, 2020, the Employer issued discipline to the Grievor for failing to return EPDs on several occasions at the end of the workday (the "First Discipline"). The First Discipline consisted of a verbal warning and a one-day suspension. Attached at **TAB 2** is the Disciplinary Action Form the Employer gave to the Grievor with respect to the First Discipline.
11. No grievance was filed with respect to the First Discipline.
12. The one-day suspension from the First Discipline was served on March 5, 2020.

Discipline dated March 30, 2010

13. On March 30, 2020, the Employer issued discipline to the Grievor based on an employee observing the Grievor sleeping at work (the "Second Discipline"). The Second Discipline consisted of a written warning, a one-week suspension, and a meeting with management to review expectations going forward. Attached at **TAB 3** is the Disciplinary Action Form with respect to the Second Discipline.
14. No grievance was filed with respect to the Second Discipline.
15. The one-week suspension from the Second Discipline was served from March 23, 2020 to March 27, 2020

Grievance Dated May 13, 2020

16. *The Union's grievance dated May 13, 2020 (the "Grievance") arises out of the termination of the Grievor on April 30, 2020. Attached at **TAB 4** is a copy of the Disciplinary Action Form issued by the Employer to the Grievor with respect to his termination.*
17. *On April 9, 2020, the Grievor called his foreman, Ken Porter, just before the Grievor's start time of 7:00 a.m. to advise that he was experiencing diarrhea and that he would wait a couple of hours before attending work to ensure that the diarrhea passes.*
18. *Mr. Porter advised the Grievor that he could not attend work because diarrhea was a symptom of COVID-19 and that the "company nurse" would contact him.*
19. *The Grievor called the Employer on the same day being, April 9, 2020, around 10:00 a.m. and again around 12:00 p.m. because he had not yet been contacted by the company nurse. The Grievor was told both times that the Employer would contact him and not to come into work.*
20. *The Grievor stopped experiencing diarrhea by late morning on April 9, 2020.*
21. *The Grievor was not scheduled to work for the next four days (from April 10, 2020 to April 13, 2020) which were the Easter long weekend. The Grievor's next scheduled workday was on April 14, 2020.*
22. *On April 14, 2020, the Grievor attended work at the Darlington Plant. He had not been contacted by the Employer prior to attending work on that day. The Grievor thought that he may have been overlooked by the Employer and feared that if he did not attend work, he may be subject to discipline for non-attendance.*
23. *As part of its response to the COVID-19 pandemic, the Employer had implemented a screening questionnaire that had to be answered prior to entering the workplace each day. The questionnaire is attached at **TAB 5** and asked the following questions:*
 - *Do you have a new or worsening cough?*
 - *Do you have any new or worsening difficulty breathing?*
 - *Do you have a fever?*
 - *Do you have sore throat?*
 - *Do you have headache?*
 - *Do you have muscle aches?*
 - *Do you have fatigue not explained by any event?*
 - *Do you have runny nose?*
 - *Do you have new or worsening joint aches?*
 - *Do you have diarrhea?*
 - *Does anyone in your household have any of the above symptoms?*
 - *Have you been in close contact with anyone who has been confirmed positive for COVID-19, is under quarantine, or is currently being evaluated for the virus?*
 - *Have you travelled internationally in the last 14 days?*
 - *Has anyone you live with travelled internationally in the last 14 days?*

24. *The Grievor was asked all of these questions at the entrance of the workplace on April 14, 2020. He responded in the negative to all of them.*
25. *After answering the screening questions, the Grievor attended morning meeting that each workday began with. After the meeting, Mr. Porter asked the Grievor if he had been cleared to return to work. The Grievor replied that he had not been contacted by the Employer. Mr. Porter asked the Grievor to wait in the lunchroom while he determined next steps. The Grievor told Mr. Porter that he had a runny nose which he attributed to his seasonal allergies.*
26. *The Grievor and Mr. Porter were then joined by the Employer's EHS Advisor, Tara Grimsditch, and the Grievor was told to go home and isolate.*
27. *On April 30, 2020, the Employer terminated the Grievor's employment.*
28. *The Union filed the Grievance on May 13, 2020 in respect of the termination of the Grievor's employment.*
29. *The parties agreed to the hearing of the Grievance before Arbitrator Joseph Carrier.*

I extend to Ms. Merchant and Mr. Peterson my appreciation for their care in the preparation of that Agreed Statement of Facts.

Based on those facts, Mr. Peterson argued that the culminating incident being the Grievor's attempt to return to his regular shift on April 14, 2020 was deliberate and not simply a careless or reckless incident. When he reported having diarrhea he was told specifically by his supervisor to stay home because he was exhibiting a significant symptom of COVID-19 which would pose a risk to the safety of his co-workers as well as the Company operations. On two additional occasions, in spite of his earlier instructions, he inquired about returning to work. Again on both those occasions he was reminded not to report to work due to his COVID symptoms and to await further instructions from the Company nurse.

Notwithstanding those directions, the Grievor did show up for his next scheduled shift. Further, he deliberately reported in the negative to all questions posed in the COVID

questionnaire. Significantly, he did not volunteer to the questioner that he had been told to stay away from work due to his COVID symptoms. Mr. Peterson argued that the sequence of events shows unequivocally that the Grievor sought to circumvent the COVID safety restrictions the Company had put in place for the protection of its workplace. Worse still, he attended in the pre-work team meeting exposing all there to potential infection.

Given the Grievor's past disciplinary record involving two safety related discipline issues, Mr. Peterson submitted that the Grievor's termination was not only just but the appropriate response by the Company in the circumstances. Indeed, he pointed out that safety in the workplace has become one of the most important aspects of concern for employers in assessing continuity of employment and that this approach has gained respect within the arbitral community.

In support of his submissions Mr. Peterson relied on the following authorities:

1. *Stericycle Inc. and TC, Local 847 (Allen), Re*, 314 L.A.C. (4th) 427
2. *Unifor, Local 24 v Ruetgers Canada Inc. (McDonald)*, 2018 CarswellOnt 1106
3. *Unifor, Local 707A and Suncor Energy Inc. (Robinson), Re*, 2019 CarswellAlta 1739
4. *ConAgra Ltd. v USWA, Local 6034*, 2008 CarswellAlta 843
5. *USWA, Local 862 v Canadian General Tower Ltd*, 2003 CarswellOnt 5575
6. *North Bay General Hospital v. OPSEU*, 2006 CarswellOnt 8751
7. *Imperial Tobacco Canada Ltd. and BCTGM, Local 364 T (Lambert), Re*, 2001 CarswellOnt 10355

8. *Tonolli Canada Ltd. and USW, Local 9042 (Marsiglia), Re, (2013), 114 C.L.A.S. 89*
9. *Winners Merchants Intl. LP and Workers United Canada Council, Local 152 (Lewis), Re, 2013 CarswellOnt 19119*

Ms. Maheen Merchant, counsel for LIUNA Local 183, did not argue that Mr. Wynne's actions deserved less than significant discipline. Instead, she took the position that his course of conduct be viewed not as defiance of the Employer's directions and COVID concerns, but that his conduct be seen in the terms explained by the Grievor himself. More precisely, his intention and attempt to return to work represented a legitimate concern for his job given his recent disciplinary record. He believed his failure to show up for work as next scheduled would be more perilous to his job than his failure to abide by the Company's directions to stay away from the Company's operations. That explanation, it was argued, makes imminent sense in view of the fact that the Grievor had been told that he would be contacted by the Company nurse respecting his return to work, yet, there was no contact whatsoever from the Employer for the several days leading up to his next shift.

In the circumstances Ms. Merchant argued that the Grievor should be given the benefit of the doubt as to his intent upon reporting to work April 14th.

In assessing the appropriate penalty, Ms. Merchant noted that the Grievor was 64 years of age and would have difficulty in the current commercial market finding alternative employment.

In support of her submissions Ms. Merchant relied upon the following authorities:

1. *William Scott & Co. v. C.F.A.W., Local P-162*, [1976] 2 W.L.A.C. 585
2. *Dufferin Concrete and TC, Local 203, Re*, 236 L.A.C. (4th) 239
3. *Coca-Cola Bottling Co. and CAW-Canada, Local 973 (Casalda), Re*, [2006] O.L.A.A. No. 47
4. *Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees (International Brotherhood Of Teamsters, Local Union 647) v. Agropur Division Natrel*, 2012 CanLII 42467 (ON LA)
5. Ontario Ministry of Health COVID Screening Tool for Workplaces

THE DISCUSSION AND DECISION

I have considered the factual presentation, the able submissions of counsel and the authorities referred to and have concluded that there is no sound basis to overturn the Employer's decision to terminate the Grievor. While I appreciate counsel's excellent review of relevant arbitral authority, I am satisfied here that the ultimate determination turns upon the facts themselves.

My reasons for upholding the termination are as follows:

1. There is no question that the culminating incident whereby the Grievor reported to the Company's operations to try to work that day was a deliberate attempt to circumvent his instructions with total disregard to the risks he posed to his co-workers and the Company's operations. The sequence of events defies any other conclusion. He was told to stay home on three separate occasions because he posed a potential COVID-19 risk at work. It simply defies credulity that, in the midst of the current pandemic, he would not understand the risks he would pose at work or that he would be a significant risk requiring a period of self-isolation. The suggestion that he believed

that the Employer might have simply forgotten to contact him over the Easter weekend is unacceptable. Surely if there is any weekend in the year, aside from Christmas, that the Employer or rather its nurse might not be vigilant in following up on such issues, it would be the Easter weekend as was the case here.

When the Grievor, in spite of those instructions did report to work, he went through the screening questionnaire without a hitch. That is he denied any symptoms whatsoever. Although, technically the Grievor might not have had diarrhea on April 14th, it was more than a simple equivocation for him not to have flagged that concern during the questionnaire. Similarly, as it turned out, the Grievor during that questioning routine failed to report having a runny nose which was one of the specific questions. Most importantly, however, was the Grievor's failure to alert the COVID screener that he had been told to stay away from work due to his COVID symptoms. That failure can't be seen as anything but deliberate and totally unacceptable.

2. Finally having failed to be forthcoming at that stage of his report to work, he went on to create a dangerous situation which those Company precautions were designed to eliminate, that is, he attended the team meeting for the day thereby exposing all persons present to the possible COVID risks he represented.

In all I am satisfied that the Grievor merited very significant discipline. He put his personal interest in returning to work ahead of the risks he knew he posed to his co-workers and the Company's operations at large, and, he did so notwithstanding specific instructions to the contrary.

3. There was little in the way of mitigating circumstances to assist Mr. Wynne here. Although he was 64 years old he had been with the Company only 5 years. Worse still, his recent past disciplinary record is significant and not unrelated to the current issues. Rather both incidents in March involved safety related offences.

In the first instance, the Electronic Personal Dosimeter (EPD) is not a simple badge. Rather it is a safety sensor that records the daily radiation exposure experienced by the individual employee. Tracking that exposure is for the safety of the employee himself as well as others in the event the worker has experienced some level of radiation over exposure.

The Grievor's failure to turn in his EPD daily left the Company without the information it needed to monitor his exposure and to complete its required quarterly reports.

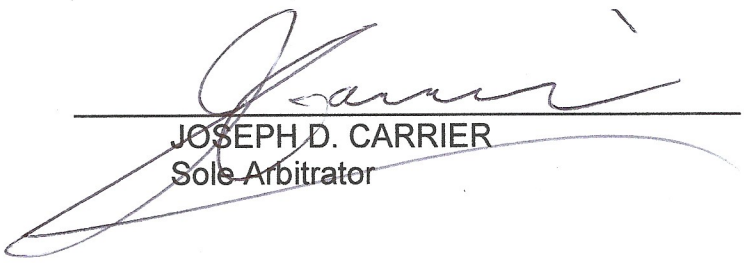
The parties agreed that in the short few months from December 2019 to the beginning of 2020, the Grievor had failed to turn in his badges on no less than ten occasions. When the Company sought to recover those badges, the Grievor was able to provide only seven of the missing EPDs. Three were never recovered.

4. Finally, with respect to the second incident just two weeks before the culminating matter here, the Grievor neglected his assignment to clean washrooms and instead was found sleeping in a cargo container. As in the case with the EPD badge this too was a safety issue especially during this COVID era when the cleaning of washrooms is a significant element in limiting possible spread or exposure to the risks of the virus.

Taking into consideration those two earlier safety issues, the Grievor's deliberate and cavalier attitude toward the COVID safety risks he represented both to his co-workers and in turn to the Company's obligations to protect the workplace was unconscionable, unreasonable and totally unacceptable. In all the circumstances, I am satisfied that the Grievor here could not be trusted to avoid engaging in unsafe conduct in the future.

The Employer's decision to terminate his employment must stand and the grievance is therefore dismissed.

DATED at Toronto this 9th day of November, 2020.



JOSEPH D. CARRIER
Sole Arbitrator