

BRITISH COLUMBIA LABOUR RELATIONS BOARD

ANDRE R.J. HENRI

(the "Applicant")

-and-

MACMILLAN BLOEDEL LIMITED
(FRANKLIN WOODLANDS DIVISION)

(the "Employer")

-and-

INDUSTRIAL WOOD & ALLIED WORKERS OF CANADA
(I.W.A. CANADA) CLC, LOCAL NUMBER 1-85

(the "Union")

PANEL: Michael Fleming, Vice-Chair

COUNSEL: Andre R.J. Henri, on his own Behalf
Gregory J. Heywood, for the Employer
Sandra I. Banister, for the Union

CASE NO.: 35582

DATE OF DECISION: February 17, 2000

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 The Complainant applies under Section 12 of the *Labour Relations Code* (the "Code") alleging that the Union has breached its duty by its failure to advance a grievance arising from the termination of his employment with the Employer.

II. BACKGROUND

2 The Complainant was employed at the Franklin Woodlands Division of MacMillan Bloedel Ltd. with a seniority date of May 1988. In April 1993, he suffered an injury to his shoulder while at work resulting in surgery and a period of rehabilitation. He returned to work and subsequently re-injured his shoulder in the spring of 1994. He then received Workers' Compensation Board ("WCB") wage loss benefits and the WCB provided him with training as a heavy equipment operator.

3 When he finished that training, the Complainant was advised that the Employer did not have any such work available for him and he was unable to secure work as a heavy equipment operator elsewhere in the area. As a result, he returned to work as a "chaser" in May of 1995 but in June 1995, was bumped out of that position as a result of downsizing and layoffs by the Employer. He could not perform the duties of a chokerperson due to his injury and went off work again. He again received wage loss benefits from WCB from that point in time.

4 His doctor advised him not to return to work in the logging industry and accordingly he began looking for other work, eventually going to Edmonton in that endeavor. While he was in Edmonton, on August 9, 1995, the WCB advised him that his benefits claim had run out and would be ended. On September 7, 1995, the Employer wrote to him advising that:

We have been advised by WCB that you have relocated to Alberta. We have also received an inquiry from the Unemployment Insurance Commission from Edmonton, Alberta. We assume that you have decided to abandon your employment with MacMillan Bloedel Ltd. We shall wait until September 22, 1995 before finalizing your employment status. This will give you time to contact us and confirm your status. We shall proceed with your termination if we do not hear from you by September 22, 1995.

5 In early September 1995, the Complainant telephoned Monty Mearns the recording secretary for the Local Union, who had also been assisting the Complainant in relation to his WCB matters between 1994 and 1995.

6 The Complainant says that he told Mearns of the Employer's letter of September
7, 1995 and that Mearns told him that he "had to quit". He says when he reminded
Mearns he was on medical leave, Mearns told him to contact the Employer to advise of
that fact. He says he tried unsuccessfully to do that.

7 On September 22, 1995 a lawyer representing him wrote to the Employer stating
that the Complainant had not abandoned his position and, while he was willing to return
to work, he could not do so because the Employer did not have a steady position which
he was capable of working in, given his permanent restrictions resulting from his
previous injuries.

8 On September 25, 1995 the Employer wrote to the Complainant advising that the
Employer had decided to terminate his employment because, while suitable work had
been available to him, he had not made himself available for work.

9 The Complainant then returned to Port Alberni and made some unsuccessful
attempts to contact Mearns. On November 7, 1995 he wrote to Gerry Stoney, president
of IWA Canada, seeking his assistance. In that letter he stated that Mearns had told
him "the Company was right and I was quitting".

10 Stoney replied by letter dated December 13, 1995 saying he had asked Warren
Ulley, the National Vice President, to look into the situation.

11 On November 20, 1995 the Complainant's lawyer wrote to the Employer seeking
details and particulars of the work the Employer had available and which it was felt was
suitable for the Complainant. The Employer did not provide that information to the
Complainant.

12 On January 15, 1996 Harvey Arcand, the Fourth Vice President of IWA Canada,
wrote to the Complainant setting out information regarding Long Term Disability ("LTD"),
Workers' Compensation Board ("W.C.B.") benefits, Unemployment Insurance disability
benefits, Canada Pension Plan ("CPP") disability benefits and requirements. That letter
also went on to say that his discharge had not been discussed with Local 1-85 and:

I suggest you go back to see the Local Union to assist with all of
the above in any case - you should discuss this with them, as the
effect of discharge is to remove your life insurance which they
cannot do if you are disabled or in receipt of LTD.

13 The Complainant says that having received that letter, he then went to the IWA
Union Hall and met with Mearns asking how it was possible to lose his job while on
medical leave. He asserts that Mearns told him his job was "history" and they also
discussed his entitlement to LTD and medical benefits. The Complainant does not
specify when this meeting is said to have occurred.

14 In June 1996, the Complainant telephoned Mearns to inquire about his
grievance. Mearns replied he had not seen any grievance and that the Complainant
was well beyond the 14 day time limit for filing a grievance. Mearns also advised him

that the Employer was engaged in significant downsizing and, given his disability, there were no job prospects in any event.

15 Mearns made a commitment to provide an information kit on LTD. No grievance was filed by the Complainant.

16 On June 28, 1996, Mearns mailed the kit to the Complainant; however, he did not apply for LTD until February 17, 1997. That claim was approved effective the date of application but was subsequently cut off on March 3, 1998, reinstated on April 27, 1998 and again terminated on August 16, 1998. There is no indication that the Complainant appealed that final decision to end those benefits.

17 On May 21, 1997, he wrote to Arcand again, stating that he had attempted to speak to Dave Haggard of the Local, who had been "too busy" to speak to him. He also indicated that Mearns would not return his phone calls. He went on to say that he should not have been terminated from his job and asked Arcand to "look into" his situation again. On July 2, 1997, the Complainant wrote again to Arcand asking for a reply to his previous letter.

18 On October 20, 1997, he filed his Section 12 complaint.

19 The only explanation provided by the Complainant for the delay in filing the complaint is that he was waiting for a determination of his W.C.B. claim as well as for the president of the IWA to look into his case.

20 The Employer curtailed its operations after 1997 and most employees were laid off as a result. From that point on, senior employees have taken work swamping or chasing. No person with less seniority than the Complainant has worked during the period commencing September 25, 1995 through the summer of 1999.

21 The economic climate has required the few employees who are working, to perform a variety of tasks including swamping, operating a cat, excavator and drill swamping. The only light duties available are being performed by an employee with 27 years seniority. In addition, there are approximately 20 loggers on disability claims from this operation.

III. POSITION OF THE PARTIES

22 The Complainant says in the summer of 1995, the Union should have explored other options without his being required to go off work and onto wage loss benefits.

23 He asserts that when he contacted Mearns after his W.C.B. wage loss benefits had been terminated, Mearns should have advised him of his entitlement to LTD.

24 He goes on to assert that the Union did nothing to protest his dismissal or to attempt to get his job back. Furthermore, the Union did not tell him about the 14 day limit for filing a grievance.

25 Finally, he says the Union did not file a grievance on his behalf and in fact did
nothing to represent him.

26 The Union says the Complainant was discharged September 25, 1995 and did
not file his Section 12 complaint until October 20, 1997 - more than two years later.

27 Furthermore, the Union says his last communication with the IWA was January
15, 1996 with IWA Canada, which is not the Union, and he did not attempt to contact
them again until May 21, 1997.

28 The Union says he never did file a grievance and for his Section 12 complaint to
be timely, he should have filed one when it became apparent to him that the Union did
not intend to pursue a grievance, which based on his assertions, would have been the
fall of 1995. The Union says he must have been aware by January 1996 at the latest,
that the Union did not intend to pursue a grievance.

29 The Union says it was never made aware until June 1996 that the Complainant
had any interest in filing a grievance and by that time it was well beyond the 14 day time
limit under the Collective Agreement.

30 The Union says that on the merits of any grievance, the Complainant made no
effort to contact the Employer to advise that his W.C.B. claim had ended on August 9,
1995 or that he continued to be disabled. While he may have been able to work as a
heavy equipment operator, no such work was available at Franklin River.

31 The Employer says the Complainant never filed a grievance and his Section 12
complaint should be dismissed because of the excessive delay in filing it.

32 On the merits of any grievance, the Employer says the Complainant failed to
make himself available for work and made no effort to inform the Employer of his
medical status or fitness for work. Furthermore, he never contacted the Employer
indicating any wish to return to work, preferring instead to go to Alberta to look for other
work. He made no attempt to contact the Employer prior to September 22, 1995 and
did not even contact the Employer after his termination.

IV. ANALYSIS AND DECISION

33 The Board's inquiry under Section 12 of the Code is limited to determining
whether the Union has acted in a manner that is arbitrary, discriminatory or in bad faith.
The Board's approach to the duty under Section 12 was described in an early decision
of the Board, *Rayonier Canada (B.C.) Ltd.*, BCLRB 40/75, [1975] 2 Can LRBR 196,
which has been followed since that time, in the following terms:

...a union is prohibited from engaging in any one of three distinct
forms of misconduct in the representation of the employees. The
union must not be actuated by bad faith in the sense of personal
hostility, political revenge, or dishonesty. There can be no
discrimination, treatment of particular employees unequally whether

on account of such factors as race and sex (which are illegal under the Human Rights Code) or simple, personal favouritism. Finally, a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory matter [sic]. Instead, it must take a reasonable view of the problems before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations. (pp. 201-202)

Timelines

34 While there is no time limit for the filing of a Section 12 complaint set out in the Code, the Board has consistently required that Section 12 complaints be filed in a timely manner. In general, a delay of 12 months or more will result in the complaint being dismissed as being untimely, unless the complainant provides a persuasive explanation for the delay. The burden of providing that explanation rests on the complainant.

35 In deciding whether a reasonable explanation has been provided for a delay, the Board considers a number of factors, as described in *Joe Frank*, BCLRB No. B236/99:

...In determining whether a complaint is untimely, the Board examines a number of relevant factors including the nature of the grievance, and the potential prejudice to the employer and the union. The factors which often emerge as most important are the actual period of delay and the explanation offered by the complainant: *Balhar Ghuman*, BCLRB No. B21/99 (Reconsideration denied, BCLRB No. B128/99). (para. 15)

36 While the Board recognizes the need, particularly in the context of a lay person who may not be familiar with the Board's procedures, to ensure a sufficient time to compile information for the complaint, the Board has also adopted the view that this period is generally measured in months, not years: See *Julia Kiraly*, BCLRB No. B8/95 at p. 3.

37 The need to provide some parameters for ensuring Section 12 complaints are filed in a timely manner is based on the consequences of a complaint brought a long time after the incidents upon which it is based have occurred. In the absence of a timely application, parties will have conducted themselves on the basis of there being no application. That may result in evidence not being kept or at the very least memories will have faded, people may have moved to other locations and employers, or may have retired, etc.

38 In *Joe Frank (supra)* the Complainant was terminated from his employment but did not file a Section 12 complaint for approximately two years after the Union had advised him it did not intend to proceed with his grievance. He offered a number of explanations including that he had been under considerable personal stress of which

both the Union and Employer were aware. The Board dismissed the complaint on the basis that the delay was excessive.

39 In this case, the Complainant was terminated on September 25, 1995 but did not file his Section 12 complaint until October 20, 1997, more than two years after his termination. Moreover, the Complainant has never filed a grievance.

40 Accepting for the purposes of this decision both that a meeting with Mearns occurred at the Union Hall after the Complainant had received the letter from Arcand dated January 15, 1996 and the Complainant's assertions as to what was said during that meeting, it should have been apparent to the Complainant in that meeting, and certainly no later than June of 1996, that the Union did not intend to proceed with a grievance relating to the termination of his employment. The delay in filing the Section 12 complaint is therefore, at the very least, 16 months.

41 The explanation advanced by him for the delay was that he was waiting for the W.C.B. to correct its decision regarding his injury and provide him with a written decision, and for the IWA Canada President to look into his situation. In my view, it is not apparent that the receipt of the W.C.B. decision has any relevance to the matters which form the basis of this complaint. Accordingly, the explanation for the delay on this point is not at all persuasive. Second, it is simply not credible that the Complainant was waiting for the assistance of IWA Canada. The President had already sent the Complainant a letter stating he was referring the matter to other representatives of the IWA Canada who had themselves been in contact with the Complainant.

42 Balanced against the Complainant's explanation for the delay is the consideration of the effect on the availability and reliability of evidence because of the delay. I do not find the explanation for the delay to be persuasive and the complaint is dismissed accordingly.

LABOUR RELATIONS BOARD

"MICHAEL FLEMING"

MICHAEL FLEMING
VICE-CHAIR