4-22-1970

Re United Steelworkers and Vulcan Containers (Canada) Ltd

Innis Christie

C Gareau

N E. Wrycraft

RE UNITED STEELWORKERS AND VULCAN CONTAINERS (CANADA) LTD.

I. Christie, C. Gareau, N. E. Wrycraft. *April 22, 1970.*

EMPLOYEE GRIEVANCE alleging unjust discharge. Determination of quantum of damages.

T. Wohl and others for the union.
P. De Cruze for the company.

AWARD

In an award dated November 21, 1969, this board ordered the grievor to be reinstated in employment with compensation for loss of income except for wages she would have received in the first two weeks following her discharge by the company. Mr. Wrycraft dissented. The majority award stated that the grievor was subject to a duty to mitigate her losses so that any actual earnings and an amount equal to any earnings that she could have had if she had made a reasonable and prudent effort to find other work during the period of her discharge were to be deducted from her compensation. The working out of the exact amount of compensation was left to the parties, with the board remaining seized of the matter. The parties were unable to agree on the proper amount of compensation and the board reconvened.

The facts

The grievor, Theresa Baldessara, was discharged on August 1, 1969. At the time she was classified by the company as a general labourer at a wage of $2.35 and was working a 40-hour week. She is 48 years old, she has three years of elementary education in Italy and speaks so little English that an interpreter was required at the hearing. The grievor came to Canada in 1958 with her husband. Since her arrival Mrs. Baldessara has worked briefly as a dishwasher in a restaurant, as a general labourer in a chocolate factory and for the past seven years at Vulcan Containers.

Mrs. Baldessara lives in the country, near Bolton, some thirteen or fourteen miles from the company's plant. Vulcan Containers is, however, a convenient place for her to work because it is directly en route to her husband's job with Consumer Gas in the Rexdale area. The grievor herself does not drive a car which makes it important for her to be able to travel to work with her husband.

The crucial evidence was that relating to the grievor's efforts to find other employment. She testified that she was advised by "the lawyer" to write down names of any companies that she approached for work. At the hearing the grievor submitted a list with the names of three employers approached on August 4th, two on August 11th, three on September 3rd and two others on unspecified dates. The first employer approached was the Skyline Hotel. All the others were manufacturing operations somewhat similar to Vulcan Containers and in roughly the same area of the city. There is no corroboration for the grievor's testimony that she did in fact approach these companies other than her husband's testimony that he dropped her in the area on the days stated and picked her up on his way home from work in the evening. The grievor testified that she applied to a great many companies in addition to those on her list but that she "got sick and tired" of writing down their names. In my view this statement casts some doubt on her credibility, at least with regard to her job hunting efforts.

Even if we are to give Mrs. Baldessara the benefit of the doubt and assume that she did on several occasions go from manufacturing plant to manufacturing plant asking for work, the fact remains that such an approach seems unlikely to be an effective one. She testified that at no time did she read the job advertisements in either Italian or English language newspapers. It should be noted that the grievor has a son in grade 13 who speaks fluent English and who, I assume, could have checked advertisements for her if asked to do so. Except for the one visit to the Skyline Hotel, at no time did the grievor consider taking work other than the type that she had been doing at Vulcan. Apparently she did not consider the possibility of a job in some other part of the city, to which she would have to travel by the public transportation system.

On about August 21st, Mr. Baldessara applied on his wife's behalf to the Unemployment Insurance Commission. Application forms were subsequently mailed in and the grievor received five cheques of $76 each and one of $36. These payments were, apparently, for a period of 11 weeks, the last of which was just before her return to work at Vulcan on or about December 22nd. The grievor never made any specific request for job references at the offices of the Unemployment Insurance Commission nor did she ever go to the Canada Manpower Centre seeking work.

As directed by the parties I have made inquiries with regard to the relationship between the Unemployment Insur-

ance Commission and the Canada Manpower Centre. I am informed that the Commission sends that part of an applicant's claim form which bears his name and address and details of the last job he has held to the Manpower Centre. If there is a job available for which the claimant appears qualified he is called by Manpower. In addition, it is quite normal for applicants and recipients of unemployment insurance to go to the Manpower Centre looking for work, and officials of the Unemployment Insurance Commission encourage this. Their view is that an applicant has a better chance of getting a job through Manpower if he has been personally interviewed there. I am informed that every recipient of unemployment insurance payments receives a printed notice of the Canada's Manpower Centre's employment services, in which it is pointed out that assistance in the finding of a job may be obtained at the Canada Manpower Centre. Of course where jobs are scarce or an applicant is poorly qualified Canada Manpower can be of little assistance.

The issue

The task of this board is to determine the amount of compensation to which the grievor is entitled, in light of her efforts to find employment after her unjustified discharge. The general principle, as stated at the end of the majority award on the merits of this matter is that "the grievor is subject to a duty to mitigate her losses so . . . any earnings that she could have had if she had made a reasonable and prudent effort to find work may . . . be deducted."

Decision

The general principle that under collective agreements in Ontario the grievor must act reasonably to mitigate his losses has been accepted by several arbitrators although there has been little reported discussion of the principles. See *Re Int'l Ass'n of Machinists, Lodge 1740, and John Bertram & Sons Co. Ltd.* (1966), 17 L.A.C. 250 (Sheppard, Co.Ct.J.); *Re United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Industry and Fraser-Brace Engineering Co. Ltd.* (1968), 19 L.A.C. 312 (Christie); *Re U.A.W., Local 397, and Barber-Ellis of Canada Ltd.* (1968), 19 L.A.C. 163 (Schiff). American arbitrators have considered more fully the application of the doctrine of mitigation in discharge cases, (See for example, *Continental Can Co. Inc.* (1962), 39 L.A. 821 (Sembower).) In both jurisdictions the prevailing view appears to be that the general principles of the common law doctrine of mitigation are applicable to damage awards by

labour arbitration boards. The common law doctrine of mitigation has been stated by Duff, J. [as he then was], in the Canadian case of *Cockburn v. Trusts and Guarantee Co.* (1917), 37 D.L.R. 701 at p. 702, 55 S.C.R. 264 at pp. 266-7:

> The principle upon which the appeal ought to be decided is expounded at length in the judgment of Lord Haldane in *British Westinghouse Electric Co. v. Underground Electric Railways Co.*, [1912] A.C. 673, at pp. 689 and 690. After stating the general principle that when a contract is broken the injured party is entitled generally to receive such a sum by way of damages, as will, so far as possible, put him in the same position as if the contract had been performed — the damages being limited to those that are the natural and direct consequences of the breach — his Lordship proceeded as follows:—
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> > "But this first principle is qualified by a second, which imposes on the plaintiff the duty of taking all reasonable steps to mitigate the loss . . ."
> >
> > ". . . this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business."

The difficulty lies, of course, in applying this general principle to the facts of the particular case before us.

In the first place, in my view an employee whose discharge is proceeding to arbitration is not required to accept work of a substantially lesser type than that from which he has been discharged. A time comes when he must do so but I do not think that reason and prudence would require him to lower his working status significantly until the discharge grievance is finally disposed of. Where compensation is the issue the employer is, after all, the wrongdoer and as such he can hardly insist that an employee should readily accept a sharp drop in his status in the working force. Mrs. Baldessara's inability to speak English and her lack of education might well have made it very difficult for her to find another job as good as the one she had at Vulcan but I do not think that she was required to accept work of a lesser status.

Mrs. Baldessara's direct approaches to potential employers apparently involved some considerable effort up to September 4th. As I have already indicated I am not prepared to accept her testimony that she continued to make a similar effort after September 4th and simply did not mark down the names of the companies visited. Moreover, the effort that she put forth in this way seems to me to have been largely mis-spent. The test is an objective one; did she do what could be expected of a reasonable and prudent person? It seemed obvious from her description of the way in which she approached potential employers that her chances of success by this means were

slim. It may well be that where jobs are scarce the successful applicant is the one who makes individual efforts to seek out employment opportunities, but surely the first recourse should be to the public employment agencies. In my view, the duty to mitigate losses in a case of unjust dismissal is probably discharged by one who exhausts the regular and public means of finding employment.

We are still faced with the problem of determining whether the grievor in this case can be said to have made a reasonable effort to find an alternative job. In my view she acted reasonably in applying for unemployment insurance on August 21st. In not visiting the Canada Manpower Centre she most certainly did not. Nor did the grievor act reasonably in disregarding newspaper advertisements. There is no way of knowing whether she would have found a job in any of these ways; but the fact remains that the public agencies would seem to afford the best chance, and since she did not try them it cannot be assumed that no jobs would have been available.

Apparently the grievor received her first Unemployment Insurance payment around October 1st. She got her last of 11 payments on about December 21st. I am prepared to find on the grievor's behalf that up until she started receiving her Unemployment Insurance payments she might have thought that her work situation was being actively considered by the Unemployment Insurance Commission. After October 1st, in light of her failure to read the newspaper advertisements, go to Canada Manpower or do anything at all that could possibly find her the kind of employment that she aspired to, I must find that she did not act reasonably and prudently in attempting to mitigate her losses. It is obviously quite arbitrary to say that the grievor acted reasonably until October 1st and not thereafter but in my opinion we must draw a line somewhere in the case of Mrs. Baldessara. She obviously did something to find another job but equally obviously she did not act as a reasonable and prudent person throughout the whole period of her unemployment.

The award of the board on the merits of this matter was that Mrs. Baldessara should be treated as having been justly suspended for the two weeks following August 1st. I now hold that she has failed to establish that she made reasonable efforts to mitigate her losses after about October 1st. Thus she is entitled to be compensated for loss of wages for seven weeks from about August 15th to about October 2nd. The grievor's weekly pay is $94 so she is entitled to $658.

The only other matter raised by the parties was the question of the grievor's unemployment insurance payments. In that regard I can do no better than restate my position in *Re United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Industry and Fraser-Brace Engineering Co. Ltd.* (1968), 19 L.A.C. 312, which is referred to above in connection with the general principle of mitigation [at p. 313]:

> The matter of benefit payments from the Unemployment Insurance Commission does not appear to have received careful attention from arbitrators in this jurisdiction. In the United States there is a lot of arbitral authority holding that such payments are to be deducted from compensation awarded for improper dismissal, but a number of arbitrators have held that such payments are collateral and not deductable. The result appears to be dependent, to some extent, on the legal nature of unemployment benefits under the legislation of the state in question. (See *Hawaiian Telephone Co.* (1965), 45 LA 337 (Tsukiyama, arbitrator), in which both lines of cases are considered.)
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> Under our law an employee who is subsequently paid for a period during which he drew unemployment insurance is required to reimburse the Unemployment Insurance Commission. (*Unemployment Insurance Act*, 1955. (Can.), c. 50, ss. 103 and 56, and P.C. — 1955-1491, SOR/55-392 (as amended), ss. 172(1) and 173(8)). Accordingly, in our view, the company must reimburse [the grievor] with no deduction for any unemployment insurance benefit that he has received, and we direct the company to advise the Kingston office of the Unemployment Insurance Commission of the fact that [the grievor] has been paid his wages for the stated period. The Unemployment Insurance Commission may then take such action as it sees fit.

In similar terms this board directs the company to advise the Toronto office of the Unemployment Insurance Commission that Mrs. Baldessara has, in accordance with this award, been paid for the weeks from August 15th to October 2, 1969.

In summary, the grievor made some efforts to find employment, which may be considered to have been those of a reasonable and prudent person, up to about October 1st. Her efforts thereafter fall short of the standard demanded by the doctrine of common law and arbitral jurisprudence which requires one who seeks to recover damages to demonstrate that he made a reasonable and prudent effort to reduce his losses. The grievor is to be paid $658 by the company.

[Mr. Wrycraft dissented]