IN THE MATTER OF AN ARBITRATION
UNDER THE *LABOUR RELATIONS CODE*, RSBC 1996 c. 244

Between

CARIBOO PULP AND PAPER COMPANY

(the "Employer")

- and -

UNIFOR, LOCAL 1115

(the "Union")

(Cody Crick: Discharge)

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| ARBITRATOR: | Kate Young |
| APPEARANCES: | Craig Bavis, for the Union<br>Donald J. Jordan, Q.C., for the Employer |
| DATE OF HEARING: | June 18, 2016 |
| PLACE OF HEARING: | Williams Lake, British Columbia |
| DATE OF AWARD: | July 5, 2016 |

## I. Introduction

On March 17, 2016 Cody Crick was approximately two hours late for work, having slept through his alarms, and a phone call from his supervisor. The Union grieves his discharge.

Lateness is contrary to the Collective Agreement:

> When a tour begins, each Tour Worker is required to be in their place.

As recently as November 2015 all employees, including Mr. Crick, were personally given a document entitled Attendance Management Guideline which stated:

> …all employees are required to report for work on time, as scheduled, fit for duty and prepared to work.

The Employer says discipline is justified and relies upon a Consent Award, dated February 2, 2016, which arose from previous discipline imposed upon Mr. Crick.

The Consent Award followed grievances filed respecting a three day suspension (for failing to wear personal protective equipment while cleaning a filter on November 15, 2015) and a dismissal from employment on December 21, 2015 (for sleeping on the job and falsifying the results of tests he should have performed). I was appointed to hear the matters. Prior to the conclusion of the hearing, the parties agreed to a settlement, and I issued a Consent Award on the following terms:

> The three shift suspension for the events of November 15, 2015 is upheld.
> The termination of the Grievor is reduced and shall be recorded in his employment file as an eight shift suspension.
> The Grievor shall not receive any back pay.
> In the event of any proven employment offence during the next two years of active employment, the Grievor's employment shall be terminated.
> Arbitrator Young shall be seized in the interpretation and application of this Award.

At that time, I advised Mr. Crick that this was indeed his last chance to show the Employer he could be a productive and responsible employee, and that the investment it had made in his training was worthwhile. With vacation time, Mr. Crick had worked less than one month before he was late for work.

On its face, this is a compelling case for discharge.

The Union's defense is that at this Employer lateness is not a disciplinary offence, and accordingly the "last chance" agreement is not invoked. In the alternative, the agreement is only one factor to consider when determining whether, in all the circumstances, termination was excessive.

## II. The Evidence

The Employer operates a mill, 24 hours a day, seven days a week. Employees work twelve hours shifts. They rotate through day and night shifts. Employee cannot leave their post until the employee who is to relieve them (their mate) has reported to work.

Mr. Crick, employed since October 2012, works in the Bleach Plant. He was scheduled to work the early morning shift on March 17, 2016. Mr. Crick had chosen to work a different shift than usual, with a different supervisor. The co-worker he was scheduled to relieve, Luke Johnstone, was someone he did not normally work with.

It is common ground that employees for the day shift arrive between 4:50 and 5:20am. Mr. Crick testified that he set two alarms before he went to bed, one on his electric clock, and one on his cell phone, and that he went to bed at a reasonable hour. The alarms did not awaken him. Mike Riley, the Shift Supervisor, (an excluded employee) was contacted by Mr. Johnstone at 6:05am, and told that Mr. Crick had not yet shown up. Mr. Riley phoned Mr. Crick. There was no answer at either Mr. Crick's cell phone or land-line, and he left messages.

A co-worker, Derald Horutko, was able to contact Mr. Crick at 6:20am. Mr. Crick awoke in a panic, got up and drove to work. He arrived at his locker, got changed, and was in the control room by 6:50am. Mr. Crick reported to Mr. Riley that he had slept through his two alarms and he did not know why.

At 7:13am that same day Mr. Riley sent an email to Dan Wilson, the Operations Superintendent, and reported what had occurred. He related that Mr. Crick told him he had slept through a couple of alarms.

Mr. Wilson immediately forwarded the email to Brooke Backlund, the Human Resources Coordinator. They discussed the situation and considered the facts. Mr. Crick had recently reviewed the Attendance Management Guidelines with management, and he had committed an employment offence as contemplated by the Consent Award. They made the decision to dismiss Mr. Crick.

Mr. Wilson contacted the President of the Union, Glen Barker, and advised that Mr. Crick was to be terminated because of lateness. Mr. Barker and another Union representative, Cam Leeson, attended a meeting with Mr. Wilson and Ms. Backlund just before 1pm on March 17.

Mr. Barker challenged the decision to terminate Mr. Crick, as no one has been disciplined for lateness before. Mr. Wilson explained it was different for Mr. Crick. People can be disciplined differently on the basis of their record, and he had been given his last chance. Mr. Barker said that Mr. Crick should not be picked upon.

Mr. Crick was called into the meeting and told he was terminated. A short letter was read to him and he was escorted out.

Mr. Crick testified that he was nervous that morning because he knew that being late for work was unacceptable, and that he was on a last chance agreement. When he returned home after his termination he noticed all his clocks were flashing. He did not testify he had observed this when he awoke that morning, and he could not be sure if a power outage had affected one of the alarms he had set. He was aware there were frequent power outages in his neighbourhood and acknowledged he should not have relied upon an electric clock. If reinstated, Mr. Crick said he would get a battery operated clock.

## III. Background

Mr. Riley has been employed for nineteen years at the mill, and 4 ½ years as an excluded Supervisor in the Bleach Plant. He testified that if that an employee is late, the employee on shift will contact his/her mate to find out what is happening. The employee will then stay until his/her relief arrives. The two employees normally make an agreement that when they next work together, they will make up the time worked by the other. He was "not sure it always happens, but it has happened". Mr. Riley testified he has never heard of anyone being disciplined for showing up late.

Mr. Riley said that since he has been a Supervisor, no employee has ever reported to him that his/her mate was late. The first time was when Mr. Johnstone reported Mr. Crick on March 17, 2016.

In his 36 years of employment at the mill Mr. Wilson could not recall any situation where someone has been disciplined for sleeping in and being late for work. Ms. Backlund was also unaware of anyone being disciplined for sleeping in, although she has been at the mill only a short time.

Doug Carey, an employee who started with the Employer in February 1976, works in the Steam Room Recovery Department. He described what happens when an employee is not relieved as scheduled. The employee on shift reports to the Shift Supervisor that the relief employee is late. The Supervisor attempts to contact the relieving employee, and if unable to do so will call in someone to work overtime. His evidence was that this happens about once a month in his Department, although he could not recall specifically if this had happened since November 2015 (when the Attendance Management Guideline was introduced).

Mr. Carey has personally stayed late on occasion until relief arrives. He will make an arrangement with his mate to claim a credit in time, or he will be paid overtime, usually the former. He once slept in himself, and was not disciplined. Mr. Carey is an *ad hoc* member of the Union Standing Committee and did not know of any Union member ever being disciplined for sleeping in and being late for a shift.

Mr. Barker, has been an electrician for the Employer for 21 ½ years in the Maintenance Department. He testified that as Union President since 2009, and also because of his long involvement with the Union, he is aware of what discipline has been imposed at the Mill. Prior to Mr. Crick, no employee has ever been disciplined for lateness, and even to the date of this hearing no one has been disciplined. When an employee is late in Maintenance, the foreman will call the relief employee. The employee will get paid overtime while he waits, or he can make an arrangement with his mate. Mr. Barker was once late and was not disciplined.

Mr. Barker agrees that employees have always been required to be at work on time. He was present in November 2015 when the Employer sent out the Attendance Management Guideline and met with all employees. Mr. Barker testified he was not told that the past practice respecting discipline for lateness would change.

## IV. Positions of the Parties

### A. The Employer

The Employer says that there is an obligation for employees to report to work on time. This is clearly stated in the Collective Agreement. The Attendance Management Guideline, issued in November 2015, re-iterates this obligation. Mr. Crick acknowledges he knew he was on “thin ice” and that lateness was unacceptable. He testified that the Attendance Management Guidelines were reviewed with him in November 2015 and he took it seriously.

The Employer says there is no evidence it has been aware that employees have been late, and certainly no evidence this has occurred since the Collective Agreement obligations were restated in November 2015. If the Employer has been aware of isolated incidents of lateness, there may have been very good reasons why discipline was not imposed in all the circumstances. The evidence of Mr. Barker and Mr. Carey was from Departments other than the Bleach Department where Mr. Crick worked. The evidence that Mr. Carey and Mr. Barker were late for work at some time in the past, does not diminish the impact of Mr. Riley's evidence that in the 4 ½ years he has been a Supervisor, no employee has reported that his/her mate is late.

The onus is upon the Union to establish that the Employer was both aware that employees have been late, and has made a decision that this does not constitute an employment offence which attracts discipline. The Union has failed to meet this onus.

The Employer concedes Mr. Crick was treated differently than an employee with a clear discipline record, lengthier service, and no Consent Award mandating termination.

B. The Union

The Union says Mr. Crick's actions did not constitute a disciplinary offence as required under the last chance agreement. If it does, I have discretion, notwithstanding the last chance agreement, to substitute a lesser penalty then termination, and I should do so in light of the evidence that lateness has never been disciplined. The Union says the evidence from Mr. Barker and Mr. Carey establishes that Supervisors are aware that employees are periodically late, they work it out between themselves, and there has been no discipline imposed.

The existence of the last chance agreement does not permit the Employer to elevate to a disciplinary offence something that has never been defined as such. It is not new that a relief employee has failed to show up, and what occurs when this happens is set out in the Collective Agreement (that is the employee on shift can be required to work overtime).

An arbitrator has the authority to refuse to apply a last chance agreement, and should do so where there are mitigating circumstances. This was unplanned and inadvertent. Mr. Crick said he went to bed at a decent time and slept through two alarms. He did not act capriciously. Further lateness is at the low end of the scale of serious offences. Mr. Crick has acknowledged he has an obligation to be timely. The last chance agreement was negotiated in response to quite different employment offences.

C. Reply

The Employer says the Union has failed to establish that the Employer was aware of an employee being late in circumstances where discipline is warranted.

The Employer says this is not a last chance agreement, it is a Consent Award, and the cases cited by the Union in support of an arbitrator exercising a discretion not to enforce an agreement are inapplicable. Further, the offence of sleeping on the job, which was addressed in the Consent Award, is similar to the offence of sleeping in.

## IV. Analysis

The threshold issue is whether Mr. Crick committed an "employment offence" when he turned up almost two hours late on March 17, 2016.

There is no question that lateness is, in the normal course, an employment offence. In *Re BHP Utah Mines Ltd. and OTEU Local 15* [1990] BCCAAA No. 233, Arbitrator R. Bird stated:

> When an employee is scheduled to work, it is up to the employee to either turn up for work or have a valid excuse for not doing so. There are many valid excuses including an incapacitating illness…. It is up to the grievor to show up for work or provide a valid excuse in advance, if possible. Otherwise the failure to report to work could properly attract discipline. (para 53)

A quote from Brown and Beattie, *Canada Labour Arbitration*, 3rd edition:

> In the absence of some legitimate justification an employee who fails to report to work punctually may be disciplined and if his tardiness persists, he may be discharged.

is confirmed as an accurate statement of the law in *Brinks Canada Ltd. and Teamsters Local 979*, 11 L.A.C. (4th) 395 (Freedman, Manitoba, 1990) at para 61.

If there is any doubt, the Collective Agreement and the Attendance Management Guideline, makes it clear that all employees are required to report for work on time. Mr. Crick acknowledges he was expected to be at work on time.

Arbitrators have held that sleeping through an alarm, even where there is evidence of a power outage does not provide a valid excuse for lateness. In *Re BHP Utah Mines Ltd. and OTEU Local 15,* the grievor's employment was already in jeopardy and he was aware

that if his attendance did not improve he would be dismissed. The grievor slept in, explaining that an ice storm caused a power outage in his home, and his electric clock alarm did not function. Arbitrator Bird rejected this as a legitimate excuse:

> Whether the electricity of his residence was interrupted or not makes no difference in the circumstances. The Grievor's testimony that he would use a back-up alarm to safeguard against a future power failure indicates that he knew that the alleged failure of his alarm to work, even if true, was not an acceptable excuse. Given his many disciplinary warnings and suspensions for poor attendance and timeliness, it is difficult to accept that a reasonable person in the Grievor's shoes would not already have secured a back-up alarm to ensure he would fulfill his responsibilities. (para 13)

In *Canada Post Corp. v. Canadian Union of Postal Workers, Local 739-91-70007* [1993] C.L.A.D. No. 639 Arbitrator R. Blasina considered a discharge imposed upon an employee for being 15 minutes late for work. The grievor claimed his alarm clock did not go off because of a power failure. The arbitrator stated this was a "facile" explanation which did not cleanse him of responsibility, and concluded that he was not persuaded on a balance of probabilities that his lateness "was innocent and reasonably beyond his control".

In *P & H Foods and UFCW Local 175*, [1996] O.L.A.A. No 327, 42 C.L.A.S. 286, Arbitrator T. Sargaeant considered an excuse for lateness following a power outage. The grievor admitted that he had made no special arrangements to have a clock that was not dependent on electricity or made arrangements with some other person to made sure that he was awake in time. The arbitrator upheld the discipline saying:

> Power outages, even of a brief nature, are known to occur from time to time. In these circumstances where the grievor had been disciplined numerous times in such a short space of time, he must have been aware that this was a problem and should have had an appropriate backup procedure available to him. I am thus of the opinion that in these circumstances there was a culminating incident that did give rise to appropriate discipline. (para 34)

Mr. Crick was honest in his evidence that he could not establish that a power outage had occurred and caused him to sleep through one of his alarms. He did not testify that he noted any telltale signs, such as a flashing time on his digital clock, when he awoke.

But if an electrical outage contributed to his sleeping in, through his cell phone alarm and a call from his supervisor, it would not provide a valid excuse. He was aware there were frequent power outages in his neighborhood and took no steps to obtain a battery operated alarm, a step which he acknowledged would be reasonable in the future. I conclude that Mr. Crick had no valid excuse for being late that morning.

The more significant issue here is whether lateness is a disciplinary offence at this Employer. The evidence is uncontradicted. No employee has ever been disciplined in the past for lateness. Has the Employer abandoned or waived its right to discipline for lateness?

I accept the Employer's argument. The Union must establish not only that management was aware that employees were late, but that the Employer had considered the infraction and expressly or by implication decided discipline would not be imposed for what would otherwise be an employment offence.

The evidence establishes that in the past, in departments other than the Bleach Plant, management must have been aware that employees were late on occasion. The Supervisor would be notified in the Department where Mr. Carey worked, and the Supervisor would try to contact the relieving employee. If an employee was not relieved he could claim overtime rather than work it out with his/her mate (presumably management would be aware of a claim for overtime).

In cross examination, Mr. Carey acknowledged that the practice in the Bleach Plant may be different, and that Mr. Riley would be aware of that practice. He said that it may well be that, since he became a Supervisor, Mr. Riley is unaware of arrangements made between employees if the mate does not turn up as scheduled.

Mr. Barker testified the foreman would be told if a relieving employee was late. He was unaware of a recent situation when an employee had told their supervisor his mate had not arrived to relieve him/her. Mr. Barker also acknowledged that lateness may be treated differently in different Departments.

Mr. Riley stated he was aware that "it has happened" that an employee was late and the employees would work it out themselves. But, he provided no details of whether this occurred when he was working as a bargaining unit member, in which Department he was working, or whether he was aware of this happening since becoming a Supervisor.

Even if I were to find Employer knowledge of, and acceptance of, lateness in the past, these were in areas where Mr. Crick did not work. Witnesses for the Union acknowledge different practices may exist in different Departments.

I have no evidence that these incidents of lateness in other Departments were not the subject of some inquiry by management at that time. If aware of the incidents, the Employer may have considered all the circumstances, and decided discipline was not warranted. I do not infer from the evidence that management concluded that lateness would never attract discipline.

It is also apparent that Mr. Crick was not lulled into assuming that he would not be disciplined for lateness. There is no evidence he was aware that others had been late without repercussions. His evidence was clear that he knew that lateness was unacceptable, and said that if reinstated he would make further efforts to ensure there would be no recurrence of this behaviour.

Even if there was a general practice that employees would not be disciplined for lateness, I find this was brought to an end with the publication of the Attendance Management Guideline in November 2015, and its review with Mr. Crick. Mr. Carey could not recall an employee being late in his Department since the distribution of the Guidelines. Mr. Crick recalled the Guidelines were reviewed with him and he said he took them seriously.

As noted in *Collective Agreement Arbitration in Canada* ($4^{th}$ ed.), R.M. Snyder "… the failure to enforce a rule, unless notice is given, may prevent its subsequent enforcement" (para 10.101). I accept Mr. Barker's evidence that no one specifically stated to him that employees would in the future be disciplined for lateness, but the Policy itself answers that question. It reads:

> … Employees will cause themselves to be subject to disciplinary action if they fail to comply with the Attendance Management requirements, …

Is there latitude to waive the provisions of the Consent Award and reinstate Mr. Crick to employment? The Employer says the status of the Consent Award is different than that of a last chance agreement. I find I do not have to address this question.

I accept the Union's statement of the law, that a "last chance" agreement is not absolute, but a factor to be applied within the *William Scott* test, not instead of the test: See *Heather Steele and Summit Logistics and Retail Wholesale Union Local 580*, BCLRB No. B546/98 (reconsideration of BCLRB No. 313/98, appeal of [1998] B.C.L.D.A. (Kelleher); adopted in *Louisiana-Pacific Canada Ltd. and C.E.P. Local 448,* [1999] BCCAAA No. 231 (MacIntyre, Q.C.); and *Skeena Cellulose Inc. and PPWC Local 4,* [2001] BCAAAA No. 106, 95 L.A.C. ($4^{th}$) 289 (R. McDonald). As noted in *Heather Steele and Summit Logistics and Retail Wholesale Union Local 580:*

> A termination under a last chance agreement is not a typical discharge; it is one step beyond a typical discharge. Assuming the earlier termination was valid, the grievor would not be working at all but for the agreement of the parties.
>
> The result is that while the first and third questions of *William Scott* continue to apply without modification, the second question must be posed in the specific context of a last chance agreement. In determining whether the

> 'decision to dismiss' was 'an excessive response in all the circumstances of the case', one of the key circumstances will be the last chance agreement. We agree with the current arbitral approach that an arbitrator requires 'strong and compelling reasons in order to vary the result which flows from a breach of the agreement' and to mitigate the agreed-to disciplinary penalty. (page 3)

Is there strong and compelling reasons to conclude that dismissal is excessive in all the circumstances? While it first appears that Mr. Crick may have been singled out for discipline, this has not been established. The Employer is entitled to treat Mr. Crick differently than it would employees who do not have the same employment history. Mr. Crick has been employed since 2012. During these four years he has received two disciplinary suspensions. Mr. Crick's past infractions indicate a relaxed attitude about his obligations to this Employer: for instance, his failure to wear safety gear, to stay awake at work, and to truthfully own up to the consequences of missing a required test. Of most significance is the Consent Award. Mr. Crick was very aware of the reservations the Employer expressed about his reinstatement. I made it clear to Mr. Crick that he was getting one last chance to establish that he could be a responsible and productive employee. In very short order he gave cause for the imposition of discipline. Mr. Crick's past record and this current infraction establish that the discipline imposed was not excessive in all the circumstances.

I have considered the other forceful arguments of counsel for the Union. The lateness was unplanned and inadvertent, and Mr. Crick took steps to attend on time, he went to bed at a reasonable hour and set two alarms. Lateness is at the low end of seriousness. Mr. Crick has accepted responsibility for his actions, and recognized the Employer's cause for concern. The Union argues the evidence does not establish Mr. Crick's inability to live up to his obligations in the future, nor that he cannot be rehabilitated, as his past record was not for similar offences.

In this case, Mr. Crick knew that he was "on very thin ice". He had committed a serious employment offence, sleeping at work and falsifying a record. He had been reinstated in February 2016 on the agreement that his employment shall be terminated "for any proven employment offence". The circumstances of his reinstatement should have been fresh in his mind on March 17, 2016. I do not find the decision to terminate the employment of Mr. Crick excessive in all the circumstances.

I am not without sympathy for Mr. Crick's inability to wake up with a cell phone call and a telephone call. But production at the mill, and the relief of his co-workers requires that Mr. Crick take whatever steps are necessary to ensure he is awake on time, and reports to work as scheduled. He is responsible for the consequences of his actions. I regret, as I am

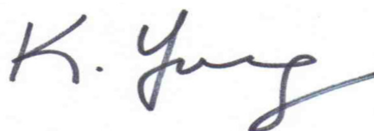
sure do many, the consequences of my decision to uphold the discharge of Mr. Crick, but as noted in *Skeena Cellulose Inc. and PPWC Local 4,* citing *Re De Havilland Inc. and CAW, Local 112,* (1998), 74 LAC ($4^{th}$) 125 (Rayner).

> Although one can have the utmost sympathy for the grievor, sympathy alone cannot carry the day. There is a strong policy reason to honour the terms of a 'last chance' agreement. …the foremost consideration that should be in the mind of the arbitrator when asked to consider such letters should be the integrity of the letter itself. If these types of agreements are subject to modification except in the most limited of circumstances, they simply will not be made. As a result future employees who might have received the benefit of one of these letters will be denied that opportunity. Hence the policy of supporting these letters transcends the case of the individual grievor who has failed to abide by the terms of the letter. (para 101).

## V. Conclusion

The termination of the employment of Mr. Crick is upheld, and the grievance is dismissed.

Dated at the City of Victoria, British Columbia this 5th day of July 2016.



Kate Young, Arbitrator