

IN THE MATTER OF AN ARBITRATION

BETWEEN:

Teamsters Local Union No.230 (the “Union”)

and

Holcim (Canada) Inc. (the “Company”)

Regarding the Grievance of Eduardo Dos Santos (the “Grievor”).

Before: Brian McLean

Date of Award: July 24, 2014

Appearances:

For the Union: M. McCreary et al

For the Employer: S. Mortimer, T. Shaw et al.

This is a discharge grievance. The Grievor is a cement truck driver. He was involved in a number of accidents over a relatively short period of time. To his credit, he and the Union acknowledge that he was at fault in each of the accidents. Accordingly, in the grievance the Union accepts that there was just cause for some discipline, but asserts that discharge was, under all of the circumstances, too harsh a penalty. The Union argues that I should substitute a suspension for the penalty of discharge and reinstate the Grievor to his employment. In making this argument the Union relies mainly on certain personal circumstances of the Grievor which are described in detail below. The Company argues that the discharge should be upheld and the grievance dismissed.

The background facts are largely agreed and are as follows.

The Company provides cement to a variety of customers in Toronto. It operates out of a number of yards. At the time of his discharge, the Grievor was operating out of the Company's Keele street yard in Toronto.

The culminating incident occurred on March 11, 2014. The Grievor was leaving the yard in his truck and edged onto Keele street. His truck was struck by a vehicle driving south on Keele street as the Grievor was about to turn onto the road. The damage to both vehicles was relatively minor as the southbound car barely clipped the Grievor's truck. The parties called evidence about precisely what happened. It is unnecessary to review that evidence in any detail because there is agreement that the accident occurred because the Grievor was not careful enough when he edged onto Keele street and he did not see the southbound car coming.

Immediately after the accident occurred the Grievor ensured that the passengers in the other vehicle were not injured and then went back to the Company's office in the yard. There he met Tony Varone to advise him of what had happened. Before doing so, he told Mr. Varone: "Tony, I just lost my job".

The reason that the Grievor was of the view that he had just lost his job was that he had a significant record of at fault accidents and he understood that if he had another one- which he did-he would likely be discharged.

The collective agreement between the Union and the Company contains a 24 month "sunset" clause. The incidents relied on by the Company, which took place within the time period permitted by the "sunset" clause, are as follows.

On January 22, 2013 the Grievor was involved in an accident and was ticketed by the police for an unsafe lane change. By letter dated February 5th, 2013 the Grievor was given a two day suspension. It was not grieved.

Following the suspension the Grievor was given an eight hour in cab assessment in order to assist him with driving more safely. The assessment was administered by a third party provider and took place on February 13, 2013.

On April 18, 2013 the Grievor was involved in another at fault accident. The Grievor was given a five day suspension by letter dated May 2, 2013. The Union

grieved the suspension and the parties agreed that the suspension should be reduced to three days. The parties also agreed to amend the suspension letter so that it reads (in conclusion): “If you are found to be at fault in another vehicle accident, you will unfortunately cause yourself to be subject to further disciplinary action up to and including discharge”.

Following the April 18 accident the Grievor was obliged to take a defensive driving course through a third party provider. The course was paid for by the Company. The Grievor was registered on May 9, 2013 and completed the one day course on June 25, 2013.

On July 9, 2013 the Grievor was involved in another accident. The Company suspended the Grievor for five days by letter dated July 10, 2013. The concluding two paragraphs of the suspension letter state:

Despite these efforts, on July 9, 2013 you were involved in another accident which resulted in damage to a Dufferin Ready-mix truck. We advised you that your performance had created an unacceptable safety risk for you, fellow employees, our customers and the public. It would be irresponsible for the company to retain you as an employee if you cannot achieve and maintain a reasonable standard of safe work performance.

Mr. Dos Santos, this is your **FINAL WARNING**. If you continue to work in an unsafe manner and/or be involved in another at fault vehicle accident, we will have no other choice but to determine you unsuitable for the job and be obligated to terminate your employment. We trust you will take this warning very seriously and take all necessary steps to improve your safety work performance.

The July 10, 2013 discipline was not grieved. The Grievor was then involved in the March 2014 accident which resulted in the Company terminating his employment.

The Union, properly, does not take issue with the steps taken by the Company in imposing progressive discipline on the Grievor. The Union and the Grievor recognize that he was at the end of the progressive discipline line when he had the accident in March. However, the Union argues that I should exercise my discretion to reduce the penalty of discharge to a lengthy suspension because of the Grievor's personal circumstances which it argues caused the Grievor to be inattentive at work and which contributed to the accidents.

The personal circumstances relied on by the union involved three issues. The first was a gambling issue and the resulting financial strain to the Grievor and his family, when his gaming losses began to pile up with dire consequences. The second was concern the Grievor had about his son's behaviour at school. The third were concerns the Grievor had about his partner's health. I describe these issues as follows.

Mr. Dos Santos is 51 years old and has been working with the Company since 1998. Mr. Dos Santos traces his problems back to 1993 when he won nearly one million dollars in Lotto 6/49. He was married at the time to C.

Prior to winning the lottery, the Grievor had been an intermittent gambler since about age 17. He testified that he enjoyed the feeling that he got when gambling, especially when he won. He and C would occasionally take trips to Niagara Falls, Windsor or Atlantic City to visit the casinos. He played black jack and also placed bets with a sports bookie. However, he had had a full time job since he was twenty years old and was cautious about losing his hard earned salary. In his mind he did not have a gambling problem. C also had her own business as a hair dresser and was an equally avid but cautious gamer, at least at that time.

After the Grievor won the lottery his gambling habits changed. He and C gambled far more often and with bigger amounts. They would go to the casinos four to five times a week. Although the pair bought a new house after winning the lottery, they had gambled the full amount of the lottery winnings away over the course of seven years, by 2000. In fact they sold the house to cover gambling debts and to game more. During much of this time the Grievor was employed full time at another ready mix company. However, that company was lenient with the Grievor's attendance. It, according to the Grievor, permitted him to call in at the last minute to say he would not be coming to work because he was gambling. After the cash ran out the Grievor turned to credit and ran up about \$100, 000 in debt to pay for gambling. In or about 2001 the Grievor filed for a bankruptcy proposal.

Despite that, the couple continued to gamble using money from C's business and the Grievor's salary. However, the frequency and intensity of their gambling was, by necessity, reduced. Nevertheless, C and the Grievor's marriage suffered and they separated.

By 2004 the Grievor was living with a new partner, G. The Grievor felt that G was a great influence on him, in part because she was not a gambler and in fact despised it. Over time, the Grievor's gambling decreased markedly. The Grievor testified that he was happy at that time. Between the years 2005-2006, apart from a couple of casino trips, he had almost stopped gambling altogether. However, he acknowledges that part of the reason for the decrease was that he did not have that much money.

He testified that this state of affairs continued until 2011 when he and G separated. He was upset by the breakup and took out his emotions at the casino. After 2011 he went to the casino 2-3 times per week to play blackjack. That lasted until mid-2013. By that time the Grievor had depleted his RRSP account and accumulated credit card debt. The Grievor had no more money to gamble, so he stopped again.

The last time the Grievor gambled was in July 2013. Beginning in late March or early April 2014, after he was discharged, he started to attend Gambler's Anonymous and has consistently attended weekly meetings as of the date of hearing. He believes the meetings are benefiting him immensely and he intends to continue attending regardless of whether he is reinstated to his employment.

The Grievor also attended therapy sessions under the Company's Employee Assistance Program in April 2014. However, he did not feel comfortable with the service provider and only went three times.

Another stress on the Grievor was G's health. She was diagnosed with a disease in 2008. From 2008 to 2010 she had three or four attacks associated with the disease. Her health suffered in many ways. Eventually, in 2010, G went to Italy for special treatments which were designed to relieve the symptoms of the disease. Following that treatment she suffered no attacks, although the Grievor says there was one close call in 2013.

As of May 22, 2014 G's health status was said by her doctor to be stable. G and the Grievor live together in the same house in order to provide a family atmosphere for their son. However, and while they do get along, they are not a couple.

Finally, the Grievor was also, over this time period, concerned about his son who was six at the time of the hearing. He started school in September 2013. His teachers advised the Grievor that he was struggling with school and the Grievor was frequently given reports of his son's poor behaviour. On January 21, 2014 the Grievor's son was suspended from school for one day.

On March 19, 2014 the Grievor's son was again suspended for a behavioural issue involving another student.

The Grievor testified that his son's issues really upset him. He did not know how to react. He wondered what was going to happen when his son got older. He and

G took their son to see their family doctor who advised that there was nothing medically wrong with him. This opinion brought the Grievor great relief. The Union introduced evidence that the Grievor's son's behaviour has improved markedly since May 2014.

The Grievor testified that because of these stresses his "head was not fully into the job".

Under cross examination the Grievor acknowledged that he has never received a medical diagnosis of a gambling addiction and had never raised his gambling issue with the Company prior to his discharge. He also had never advised the Company that he was feeling distracted, inattentive, or that "his head was not into the job".

The Grievor also acknowledged that he stopped gambling in 2013 after he was suspended for five days. He said he went to Gamblers Anonymous after he was fired in March 2014 because he had hit "rock bottom".

Further, the Grievor acknowledged that the issues with his son started in September 2013. He agrees they had no impact on him during the occasions in 2013 when he got in accidents. He also agrees that after the January school suspension his son's behaviour appeared to improve.

Finally, he agrees that G's issues had been much better since 2010.

The Grievor obtained a job with a different ready mix company following his discharge from the Company. He has not had an accident in the few months that he has worked there. However, he makes less money than he did at the Company and would very much like a second chance.

Decision

There is no doubt that the number of accidents which the Grievor was responsible for in a very short period of time was considerable and excessive. In response to these accidents the Company twice trained the Grievor in order to assist him to avoid accidents and become a safer driver. Over that time, the Company appropriately applied progressive discipline in order to bring home the importance of safe driving. On one occasion the Company agreed to reduce the length of a suspension, the practical effect of which was to give the Grievor another chance. Finally, in July 2013 the Company gave the Grievor a final warning. If he had any further accidents his employment would be terminated. This was not grieved. The effect of the final warning was that the Grievor would have to remain accident free for two years or lose his job.

I have considerable sympathy for the Grievor's personal circumstances. It took great courage to confront his problems and testify about those problems before me. In assessing this situation, and despite any specific medical finding, I have little hesitancy in believing that the Grievor had a gambling problem. Whether that

problem amounted to a disease or not is not, in my view, especially relevant. It is obvious that gambling had, from time to time, a significant hold on the Grievor's life and caused the Grievor considerable financial strain. The fact that the Grievor has possibly resolved his gambling problem (that being difficult to assess after only a few Gamblers Anonymous meetings) is a factor that weighs in his favour.

I also have no doubt that the issues regarding his son and G also placed stress on the Grievor. Any parent would be concerned about the type of behavioural issues that the Grievor's son faced. The Grievor clearly loves his son deeply. Similarly, G has been and is an important part of the Grievor's life. The Grievor was understandably troubled by her health issues.

Having said that, I am not at all convinced that whatever stresses the Grievor was facing because of these situations was at all responsible for his poor driving record. I have come to that conclusion for a number of reasons.

The first reason is that while the Grievor testified generally that his "head was not in the job" he did not give evidence (or say during the grievance process) that at any of the four accidents in particular he was directly affected by his personal circumstances. The Grievor did not, for example, say that he was thinking about his financial difficulties when he drove onto Keele street in March 2014.

Moreover, he did not testify specifically about his state of mind on any of the occasions in which he had accidents. The Grievor's evidence about his state of mind are general and "in the air" rather than being said to have led specifically to

poor driving. I am unable to, on the evidence, “connect the dots” between the Grievor’s personal issues and the accidents which he was responsible for.

This difficulty is reinforced by the timing of the accidents. In his evidence the Grievor seemed to blame all of the accidents on his personal issues (although, not, as I pointed out, directly). However, there does not seem to be any real connection between the timing of the accidents and events which caused stresses in the Grievor’s personal life. The most obvious example of this is issues with the Grievor’s son. The first three accidents occurred before the Grievor’s son had even started school. The last accident occurred at a time six weeks after the boy’s suspension and prior to the date when he was suspended again. The Grievor’s evidence was that things started to get better for his son after the January suspension. It is difficult to see therefore how his son’s situation would have affected the Grievor at that time.

Similarly, G’s health was markedly improved after 2010, well before the first three accidents that constitute his discipline record for the purposes of this matter. I see no temporal connection between her illness and the accidents, making it not so likely her health situation was to blame for the accidents.

I therefore conclude that the Grievor’s concern for his son and G played no role in the accidents. In fact, the Grievor’s reliance on these issues detracts from my accepting the Grievor’s evidence that he has taken full responsibility for the accidents and acknowledges they were his fault.

That leaves the Grievor's financial circumstances. There is no doubt that the Grievor had financial problems. However, as with the other issues, the Grievor did not point to any specific financial event which occurred at the time of the accidents. It is difficult to attribute the Grievor's financial problems to his lack of attentiveness or carelessness.

There is another problem in accepting the Grievor's financial issues as an excuse. If I were to do so, and reinstate the Grievor to his employment, I would need confidence that the Grievor could return to work and drive safely. The difficulty is that, despite the admirable steps the Grievor has taken to turn his life around, these steps have done little or nothing about his financial situation. That will remain difficult for the foreseeable future. Therefore, the necessary confidence that the Grievor will drive safely with "his head in the job", that I require to reinstate him to his employment, is not present. If he is correct, and he lacked focus because of his financial situation, there is no assurance that will change if he is reinstated, since the same financial circumstances that existed in March 2014 and in 2013 are largely present today.

There is no doubt that the Grievor has factors which operate in his favour which might in some circumstances result in reinstatement with a lengthy suspension being substituted for discharge. He is a long service employee. However, because of the "sunset" clause neither party was permitted to adduce evidence of his driving history from more than two years ago reducing the impact of length of service as a factor. In addition, also operating in his favour is that after he had the

accident he immediately took steps to ensure that the persons in the other vehicle were not injured and he then advised the Company of what occurred without “sugar coating” what had happened or deflect responsibility. He acknowledges that he is responsible for each of the accident which led to his discharge. However, the significance of these admissions are reduced by the fact that he also provides excuses for the accidents which I do not believe, on the evidence, had any material bearing on his driving.

On the other hand, the sheer volume of at fault accidents that the Grievor has been involved in over a short period of time is disturbing. Employees driving large vehicles, like ready – mix trucks, have an obligation to follow strict standards of safety, not only for the protection of employees, but for other drivers and pedestrians using the roads. The Company worked with the Grievor in an effort to improve his driving record and prevent more accidents. However, these efforts were not apparently successful in making the Grievor more attentive and careful as on each occasion he was provided further training, the Grievor was involved in another accident within ten weeks.

In addition to the training, the Grievor was progressively disciplined. The object of the progressive discipline was to bring home the necessity of improvement and to warn that further safety issues would jeopardize his employment. There can be no doubt that all parties understood that if the Grievor caused another accident his employment would be terminated. While the culminating accident resulted in relatively minor damage, it affects the Company’s insurance and exposes it to other risks. Finally, the circumstances of the final accident give me significant pause.

Essentially what happened was that the Grievor inattentively drove his ready mix truck onto Keele street, a very busy road, without ensuring that the traffic was clear. It is difficult to understand how a professional driver could do that, even one affected by issues in his personal life. The Grievor (and the passengers of the oncoming car) were lucky that the accident was not much, much worse.

For the foregoing reasons, I am not convinced, on the balance of probabilities, that the Grievor's personal circumstances played any role in his accidents. In fact, the Grievor's reliance on these facts gives me concern that he will not address his issues regarding inattentiveness and carelessness, which is his real driving problem and which, in my view, will not be resolved through conquering his gambling issues. I also cannot find, even if he was correct about the effect of his financial issues on him, that these issues will not continue to affect him. In these circumstances and, given the point he was in the progressive discipline scale, I have little option but to dismiss the grievance. I truly hope that the Grievor maintains the programs that will assist him deal with his problems for the benefit of him and his family. However, I am unable to reinstate him to employ in this Company.

For all of the foregoing reasons the grievance is dismissed.

Brian McLean

Brian McLean

Toronto, Ontario