

**BRITISH COLUMBIA LABOUR RELATIONS BOARD**

ABBOTSFORD TIMES, A DIVISION OF CANWEST  
MEDIWORKS PUBLICATIONS INC. PUBLICATIONS  
CANWEST MEDIWORKS INC.

(the "Employer")

-and-

COMMUNICATIONS, ENERGY AND PAPERWORKERS  
UNION OF CANADA, LOCAL 2000

(the "Union")

PANEL: G.J. Mullaly, Vice-Chair

APPEARANCES: Michael H. Korbin, for the Employer  
Donald G. Crane, for the Union

CASE NO.: 55864

DATE OF DECISION: April 21, 2009

## DECISION OF THE BOARD

### I. INTRODUCTION

1 In *CanWest Mediaworks Publications Inc.*, BCLRB No. B13/2009 (“*CanWest*”) the Employer was found to have violated Section 54 of the *Labour Relations Code* (the “Code”) when, on October 2, 2006, it issued layoff notices to a significant number of bargaining unit employees to whom a collective agreement applied (the “Production Work Employees”) without giving the Union notice of the layoffs at least 60 days before they were to take effect. By way of a remedy I ordered that the Employer put the laid off employees “in the financial position they would have been in if they had been permitted to work until December 1, 2006” (para. 100). I also retained jurisdiction to deal with any dispute that might arise between it and the Union “with respect to the amount of money each of the Production Work Employees is entitled to be paid” (para. 100).

2 In the event, although the parties were able to agree how many Production Work Employees the order made in *CanWest* applied to (five), they were not able to agree on the amount of money each of those five employees was entitled to be paid. This decision deals with that issue. In deciding it I have had the benefit of written submissions from both parties.

### II. POSITIONS OF THE PARTIES

3 In large measure the dispute between the parties turns on the interpretation of two related decisions of the Board: *Pacific Pool Water Products Ltd.*, BCLRB No. B43/2000 (“*Pacific Pool No. 1*”) and *Pacific Pool Water Products Ltd.*, BCLRB No. B324/2000 (“*Pacific Pool No. 2*”). Both parties rely on these decisions but they disagree on what they stand for. According to the Union, the *Pacific Pool* decisions stand for the proposition that:

...the obligation to mitigate damages for a breach of s. 54 is triggered by the giving of Section 54 notice. A late notice delays the moment at which the employees come under a duty to mitigate. By the same logic, it is submitted that in a case in which *no* notice is given, the principles of mitigation do not come into play. (emphasis in the original).

4 Thus, according to the Union, since in this case no Section 54 notice was ever provided:

...the obligation to mitigate did not apply to [the Production Work Employees] in the months of October and November of 2006. They are entitled to the full amount of the damages ordered in [*CanWest*], without deduction on account of mitigation earnings or other income [including the severance pay they received from the Employer].

5 The Employer submits that *Pacific Pool No. 2* supports its position that "all  
income earned by [the Production Work Employees] wherever earned, must be  
deducted" from the Section 54 damages they would otherwise be entitled to.

### 6 III. ANALYSIS AND DECISION

Section 54 of the Code provides that:

54. (1) If an employer introduces or intends to introduce a measure, policy, practice or change that affects the terms, conditions or security of employment of a significant number of employees to whom a collective agreement applies,

(a) the employer must give notice to the trade union that is party to the collective agreement at least 60 days before the date on which the measure, policy, practice or change is to be effected, and

(b) after notice has been given, the employer and trade union must meet, in good faith, and endeavour to develop an adjustment plan, which may include provisions respecting any of the following:

(i) consideration of alternatives to the proposed measure, policy, practice or change, including amendment of provisions in the collective agreement;

(ii) human resource planning and employee counselling and retraining;

(iii) notice of termination;

(iv) severance pay;

(v) entitlement to pension and other benefits including early retirement benefits;

(vi) a bipartite process for overseeing the implementation of the adjustment plan.

(2) If, after meeting in accordance with subsection (1), the parties have agreed to an adjustment plan, it is enforceable as if it were part of the collective agreement between the employer and the trade union.

(3) Subsections (1) and (2) do not apply to the termination of the employment of employees exempted by section 65 of

the Employment Standards Act, from the application of section 64 of that Act.

7 In my view the reasoning in the *Pacific Pool* decisions supports the position the Employer is taking in this case. In that case an employer gave all its employees notice of layoff only seven days before the notices became effective. Later, the employer sold all its assets and inventory to a company that hired some, but not all, of the laid off employees. The conclusions reached in *Pacific Pool No. 1* were described in *Pacific Pool No. 2*:

In B43/2000, I concluded that the Employer had not complied with the notice requirements arising under Section 54 of the *Labour Relations Code* (the "Code") and that the 60 day notice period commenced from the date notice should have been provided i.e. October 7, 1998. The Employer did not provide the appropriate notice until October 23, 1998 and a meeting pursuant to Section 54 was not held between the parties until November 23, 1998.

The last day worked for most employees was October 30, 1998 and consequently, I concluded that the appropriate remedy for the Employer's failure to comply with Section 54 was an order for lost wages for the period encompassing the last day worked to December 7, 1998. Accordingly the Employer was directed to pay wages pursuant to the terms of the collective agreement for the period of October 30, 1998 to November 23, 1998 less required statutory deductions. Damages payable for the remainder of the notice period, i.e. November 23, 1998 to December 7, 1998 were to be dependent on the application of the principles of mitigation. (paras. 3-4)

8 It is apparent from this passage alone that the Union's interpretation of the *Pacific Pool* decisions is unsustainable in at least one respect. The Union maintains that those decisions stand for the proposition that "[a] late [Section 54] notice delays the moment at which the employees come under a duty to mitigate." If the *Pacific Pool* decisions stood for that, the employees in that case would not have had their Section 54 damages reduced by any amount they earned between October 7, 1998 (the date the Board found Section 54 notice should have been provided) and October 23, 1998 (the date such notice was provided). However, it is clear from the passage above that the Section 54 damages the *Pacific Pool* employees were held to be entitled to did not include any damages for the period they worked for *Pacific Pool* between the date Section 54 notice should have been provided and the date it was later provided; entitlement to Section 54 damages was held to begin on the last day worked by most employees (October 30, 1998).

9 In my view *Pacific Pool No. 1* stands for the proposition that while principles of mitigation are generally applicable to a claim for Section 54 damages, in certain circumstances employees claiming such damages may be relieved of the duty to mitigate:

In my view, the principles of mitigation are applicable in relation to an order for damages resulting from a breach of Section 54... The employees are required to establish they took reasonable steps to mitigate their losses; however, the duty to mitigate may be balanced against the Employer's conduct in providing the notice required. Under the circumstances, including the timing of the Section 54 notice by the Employer, the principles of mitigation will apply only to the period following the Section 54 discussions on November 23, 1998 when the options available to employees became apparent. (para. 61)

10 In *Pacific Pool No. 2* the Board dealt with the significance of the fact that the employer had direct knowledge that some of its employees who were owed Section 54 notice had mitigated their losses even though they had not been under an obligation to do so. The Board concluded that in those circumstances the Section 54 damages the laid off employees would otherwise be entitled to should be reduced by the amount of the monies they had been paid during the Section 54 notice period:

Damages are an appropriate remedy for a breach of Section 54 so as to compensate for the loss of any wages resulting from the failure to provide the required notice. The purpose of an award of damages is to ensure an individual is returned to the position he or she would have been in, had no breach occurred...

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In this case, wages were in fact paid for the period from October 7, 1998 (when notice should have been provided) to October 28, 1998 - the last day worked for most employees.

The concept of mitigation involves a duty on an employee to make reasonable efforts to reduce the monetary loss an award of damages is intended to compensate. The employee is therefore obliged to establish the position he or she would have occupied, its rate of pay and total hours likely to have been worked, the fact they were available for work and to show what reasonable efforts have been undertaken to obtain other employment. The onus then shifts to the employer to establish the employee could have avoided all or at least part of the loss and that the efforts undertaken by the employee were not reasonable under the circumstances. If no efforts are made by the employee or the efforts are not found to be reasonable, any award for damages may be reduced or even completely offset as a result.

In B43/2000, I concluded that in this case, the principles of mitigation were of limited application in that they did not apply for the period of November 2, 1998 to November 23, 1998. By virtue of the Employer's failure to provide the required notice, employees lost a valuable right arising under Section 54, i.e. the right to be assured of income for a period of two months. The conclusion that

the principles of mitigation did not apply for the period of November 2, 1998 to November 28, 1998 means employees were under no obligation or duty to take steps to reduce their losses or to establish what steps they had taken in order to be entitled to damages to compensate for wages they would have otherwise earned had proper notice been provided. *However, the Employer in this case had direct knowledge of money paid as severance to employees under the terms of the Collective Agreement as well as the fact that certain employees successfully obtained employment with the purchaser. While there was no duty to mitigate for those employees, nonetheless, some secured employment with the purchaser while others received severance pay and consequently their "loss" is reduced by the amount of those earnings.*

*...Consistent with the principles underlying a remedy of damages, both wages earned from employment with the purchaser as well as severance pay from the Employer, will reduce the damages for which the Employer is liable. Accordingly, those employees are only entitled to the difference between money they did in fact earn with the purchaser or money paid as severance, and money they would have earned for work with the Employer calculated on the basis of hours worked in September 1998. (paras. 21, 23-26, emphasis added)*

11 The result in *University of British Columbia*, BCLRB No. B371/94, 26 C.L.R.B.R. (2d) 33, is consistent with this reasoning. In that case, the University, without previously providing any Section 54 notice, successfully applied on June 3, 1994, for the appointment of a Receiver-Manager to administer the assets of the University Faculty Club. Although on the same day the Receiver-Manager sent a notice to the Club's employees advising that their employment would be terminated it asked them to continue to report to work as usual to assist in an orderly winding up of the Faculty Club. In the event the employees continued to work until August 9, 1994. In the course of discussing the appropriate remedy for the University's failure to provide timely Section 54 notice the Board stated:

The employees at the Faculty Club were entitled to at least 60 days' notice before the change affecting their terms and employment occurred. I have found the change occurred June 3rd and that no notice was given. It is my understanding that *no monetary loss was suffered by any employee by reason of this insufficient notice as no employee was laid off by reason of the closure prior to August 9, 1994. If the facts had been otherwise I would have ordered the Employer to make whole any employee who had suffered damages by reason of the Employer's failure to provide notice. (p. 65, emphasis added)*

12 Although the Union has not taken this position, it might be argued that the facts in *Pacific Pool No. 2* are distinguishable in that, in that case, the employer had direct knowledge that employees claiming Section 54 damages had received monies during the period they were maintaining they were entitled to Section 54 notice. In this case the

Employer seeks production of documents and particulars to ascertain whether the Production Work Employees received monies between October 2 and December 1, 2006 that they would not have received had the Employer given Section 54 notice.

13 In my view it would not be consistent with the purpose of an award of damages—to ensure an individual is returned to the position he or she would have been in had no breach occurred—to rely on such a distinction to refuse production of the documents and particulars sought by the Employer. Accordingly, I order that the Union produce to the Employer particulars and all potentially relevant documents with respect to any earnings the Production Work Employees received between October 2 and December 1, 2006. If the Employer is able to establish that the Production Work Employees did mitigate some or all of their losses (regardless of whether they were required to), its obligation to pay Section 54 damages will be reduced accordingly.

14 One final matter requires consideration. *Pacific Pool No. 2* appears to approve the deduction from damages for failure to give sufficient Section 54 notice, of severance monies paid to employees who had been laid off. In my view, since the purpose of an award of Section 54 damages is to ensure an employee is returned to the position he or she would have been in had sufficient Section 54 notice been given, the question of whether any severance monies paid should be deducted from such an award should depend on the answer to the following question: 'If sufficient Section 54 notice had been given but subsequent negotiations did not produce an adjustment plan that resulted in a withdrawal of the layoff notices, would employees who were then laid off be entitled to severance pay under the terms of the collective agreement?' If the answer to that question is 'yes' despite the fact that Section 54 notice had earlier been given, deducting severance pay from an award of damages for failing to give any or sufficient Section 54 notice would not put the laid off employees in the position they would have been in had Section 54 not been breached.

#### IV. CONCLUSION

15 For the reasons given above, I order the Union to produce the particulars and documents sought by Employer. If they establish that the Production Work Employees received monies between October 2 and December 1, 2006 that they would not have earned or been entitled to if Section 54 notice had been given, any such monies must be deducted from the amount of Section 54 damages that the Production Work Employees would otherwise be entitled to.

LABOUR RELATIONS BOARD

  
G.J. MULLALY  
VICE-CHAIR