

BRITISH COLUMBIA LABOUR RELATIONS BOARD

UNIVERSITY OF BRITISH COLUMBIA

(the "Employer")

-and-

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 116
(U.B.C. EMPLOYEES)

(the "Union")

PANEL: Bruce R. Wilkins, Vice-Chair

APPEARANCES: Michael H. Korbin, for the Employer
David Tarasoff, for the Union

CASE NO.: 58603

DATE OF DECISION: July 27, 2009

DECISION OF THE BOARD

I. NATURE OF THE APPLICATION

1 The Union applies under Section 99 of the *Labour Relations Code* (the "Code") for review of an arbitration award (the "Award") issued by Arbitrator Christopher Sullivan dated October 24, 2008 (Ministry No. A-142/08). The Union applies for review with respect to the portion of the Award which rules on the attendance management policy grievance. The Union says the Award is inconsistent with the principles expressed or implied in the Code and the Union was denied a fair hearing.

II. BACKGROUND FACTS

2 The Arbitrator ruled on a policy grievance filed by the Union which states, in part, the following:

This is a Policy grievance, filed at Step 3 of the grievance procedure.

It is the Union's position that the Employer has violated Article(s) 2.01 and 17 of the Collective Agreement and any other relevant Article, Act, or Code. More specifically, the University has instituted an Attendance Management Policy (in Land and Building Services – Policy I-A-22). This policy is being improperly applied in the workplace, and as such, this improper application is a violation of the Collective Agreement.

The Union seeks full redress to settle this grievance.

3 Excerpts of the Arbitrator's reasons from the Award are as follows:

As to the nature of the agreement reached between the parties, the issue is approached by the parties from two very different perspectives. On the one hand, the Union argues that the Attendance Management Policy was not applied consistently both within LBS [Land and Building Services] and across other departments and units, and it is therefore unreasonable and should not be upheld. The Employer, on the other hand, argues the parties agreed to the terms of the policy only with respect to LBS and there was no agreement to extend the application of the policy to other departments of the University. The Employer submits that even if the policy was extended outside of LBS, it was a unilateral extension and is of no significance with respect to the application of the agreement reached for LBS.

Given these opposing perspectives, it is necessary to reach a conclusion regarding the nature of the agreement reached by the parties.

Mr. Lance gave evidence that after the agreement between the parties was reached in 2004, the Attendance Management Policy was not applied throughout LBS. Rather, the policy was applied in Plant Operations only and not in Utilities. Mr. Cormier essentially agreed with this observation but indicated that following the departure of a former director of Utilities in 2007, the policy was and remains applied throughout LBS. Furthermore, Utilities has only twenty bargaining members out of a total of 696 in LBS.

As noted, the Attendance Management Policy has not been implemented in all departments of the University outside of LBS. An attendance management policy had been in place for some other departments, but it did not necessarily apply in the same manner as the LBS policy or, for that matter, always continue to be in use.

As described above, the parties agreed to changes to the Attendance Management Policy in 2004. The parties met with respect to these changes on April 15, 2004 and in a letter dated April 19, 2004 Mr. Cormier confirmed the changes to be made to the policy. Mr. Cormier indicated that employees would no longer be required to attend the Attendance Review Committee as the second step in the policy. The letter then stated:

Please accept this letter as a formal change to the program that will now apply to every department and unit on campus.

The Union at these proceedings takes this statement to mean that there was a plan to extend the Attendance Management Policy to all departments and units at the University, while the Employer takes the position that the agreement between the parties only applied to LBS. I find on a balance of probabilities that there was no agreement to extend the Attendance Management Policy outside of LBS.

I reach this conclusion for the following reasons. Mr. Cormier gave evidence with respect to the discussions on April 15, 2004 and stated that there was no discussion about extending the Attendance Management Policy outside of LBS. His uncontradicted evidence stands as strong support to the effect the parties did not actually intend the LBS policy to be extended throughout the University, but rather the newly negotiated changes would be applied to the three or four departments and units on campus which were at that time using the LBS Attendance Management Policy, with or without some variation.

Extension of the Attendance Management Policy throughout the entire University would constitute a significant event unrelated to the Employer's discussions with the Union that occurred on April 15, 2004. The fact that Mr. Cormier did not at the time distribute his letter to all departments and units at the University indicates that he certainly did not intend for the policy to be extended as the Union now claims. Further, there is no indication that the Union agreed to extend the application of the LBS policy to every department and unit at the University.

I therefore conclude that the evidence falls short of establishing that the Employer implemented the Attendance Management Policy in other departments and even less so that it reached agreement with the Union regarding such implementation. I find that the agreement consummated between the parties concerned only the implementation of the Attendance Management Policy with respect to LBS.

* * *

I am not satisfied the *KVP* analysis is applicable to the LBS Attendance Management Policy because the parties have agreed upon the policy. *KVP* expressly and unequivocally speaks to rules "unilaterally introduced by the Company, and not subsequently agreed to by the union". This is not the situation in the present case where an agreement was clearly reached by the parties regarding the policy at issue.

* * *

The final comment I wish to make regarding this grievance concerns the evidence with respect to the application of the LBS Attendance Management Policy within that department. Mr. Lance's evidence was that the policy was applied only within Plant Operations and was not at all times applied to the Utilities portion of the department. Had the evidence been that the policy continued to be applied unequally within LBS, I would have had no difficulty in concluding that this was an unreasonable or arbitrary application of the policy, given the nature of the agreement between the parties. However, the evidence supports a conclusion that since the departure of a former director the policy has in fact been applied in the same fashion in both Utilities and Plant Operations. I therefore find that the previous failure to apply the policy equally was an anomaly and not a sufficient basis upon which to find an inappropriate application of the Attendance Management Policy has occurred. The cases do not suggest that the Employer's action must meet a standard of perfection and I am satisfied that the LBS policy has been applied consistently apart from this anomalous circumstance. (pp. 15-17, 18, 24)

4 In a letter written April 19, 2004 (the "April 19, 2004 Letter") Kyle Cormier made the following remarks, among others:

This letter is further to our meeting of April 15, 2004. I am pleased to state that we do have agreement to the attached changes to the attendance management program.

After April 20, the University will no longer require that an employee be sent to the [sic] immediately to the Attendance Review Committee as the second step in the attendance management program. Please accept this letter as a formal change to the program that will now apply to every department and unit on campus.

* * *

To date, it is acknowledged that the program has worked well and there has not been a grievance filed by either side. It is believed that the above change to the program will reduce the need to send employees to their doctor for medical exams and make the program more effective.

It is understood that [sic] Union is free to grieve the issuing of any letter that they feel was issued without just cause.

I trust that you will find all the changes to your satisfaction.

III. POSITIONS OF THE PARTIES

I. The Union

5 The Union says the Arbitrator erred in refusing to apply *KVP Co. Ltd.* (1965), 16 L.A.C. 73 (Robinson) ("*KVP*") to determine whether or not the Employer applied the Land and Building Services ("*LBS*") Attendance Management Policy ("*AMP*") consistently in other departments and units. The Union says its point was that if the Employer wishes to engage attendance management in departments or units other than *LBS*, it must apply policies and rules in those departments which are consistent with the agreed upon policies. The Union argues that a *KVP* analysis was warranted given the evidence that an attendance management policy had been in place in some departments that differed from the *LBS AMP*.

6 The Union says that the agreement regarding the *LBS AMP* is not an agreement of any sort with respect to other departments where the Employer may wish to introduce attendance management initiatives. The Union further argues that there was no evidence to suggest the agreement regarding the *LBS AMP* contains an implied term regarding the Employer's ability to impose different terms in different departments. This agreement would mean that rules can be applied inconsistently and erratically, where

KVP says that if rules are not consistently applied, discipline imposed for breach of the rule is discipline imposed without cause. The Union argues that such an agreement would constitute a contracting out of the just cause provisions of the Code. The Union relies on *Vancouver Shipyards Co.*, [2006] B.C.C.A.A.A. No. 186, 156 L.A.C. (4th) 213 ("*Vancouver Shipyards*") for the proposition that arbitral deference will not go so far as to excuse a bilateral policy or application of that policy which fails the reasonableness test.

7 The Union says that if the Employer were allowed to apply different attendance management policies for different departments, Union members in the same bargaining unit will be subject to disparate regimes which will result in discipline in the broad sense and, potentially, loss of employment. The Union refers to the following passage in *Health Employers Association of British Columbia*, BCLRB No. B112/2002 (Leave for Reconsideration of BCLRB No. B385/99, 54 C.L.R.B.R. (2d) 96) ("*HEABC*") describing discipline in the broad sense:

Though they reach opposite conclusions, the same underlying theme permeates the analysis of both the Arbitration Board and the Original Panel. Both asked whether the program was "disciplinary" in nature. However the word "discipline" is susceptible of more than one meaning. It is frequently used to denote a punitive response to culpable conduct. However, in its ordinary dictionary sense, it may carry a broader meaning than that. It can mean to regulate, control or govern; to train to obedience; to train to act in accordance with rules; to teach rules and practice: see *Crane Canada*, at p. 283; *British Columbia Railway Company* (1982), 8 LAC (3d) 250 (Hope) (a case that was before the Arbitration Board), at p. 254. It could reasonably be construed as encompassing any corrective action taken by an employer in response to unsatisfactory conduct on an employee's part, that affects the employees status in a negative manner. There are sound policy reasons, consistent with the objective set out in Section 2(1)(d) of the Code, for permitting employees access to the grievance procedure to challenge the employer's action in placing them on such a program or advancing them through the stages where such action could be the basis for dismissal in the future. Employees should be allowed to do so while the facts are still fresh rather than being compelled to "sift through the ashes" years after the event. (para. 77)

8 By refusing to apply *KVP* correctly, the Union says the Arbitrator allowed the parties to contract out of the just cause provisions of the Code, and in doing so, fundamentally erred with respect to the law of the statute. The Union says the Award is consequently inconsistent with the principles expressed or implied in the Code.

9 The Union argues in its second ground of review that the Arbitrator erred in refusing to apply *KVP* to determine if the terms of the LBS AMP were being applied consistently in departments and units other than LBS given the evidence of the Employer's expressed intention to extend its terms to "every department and unit on

campus." The Union says the Arbitrator's finding that the Employer did not have this intention is perverse and amounts to a palpable and overriding error. Consequently, the Union says it was denied a fair hearing.

10 The Union argues in its third ground of review the Arbitrator erred in concluding the Employer's actions regarding attendance management in LBS in the two-year period when the LBS AMP was not applied in the Utilities division of LBS was an "anomaly". The effect of this finding is that the Employer's actions are not subject to the principle in *KVP* that rules must be consistently enforced or otherwise subject to *KVP* principles. The Union says that this conclusion amounts to a finding that an employer may impose discipline in the broad sense without just cause, or dismiss employees for culpable or non-culpable behaviour without just cause, provided these instances were anomalous rather than normal.

11 The Union says that the Arbitrator's conclusions are at odds with Section 84(1) of the Code and are in error with respect to the law of the statute. The Union argues the Arbitrator's conclusions are inconsistent with principles expressed or implied in the Code and result in a denial of a fair hearing. The Union says that the standard of review in this matter is that of correctness. The Union says that the issue in the arbitration was one of whether the Employer had just cause to discipline employees as described in *HEABC*. The Union argued before the Arbitrator that the letters issued by the Employer under the AMP should be removed from their personnel files.

12 The Union says that it did not ask the Arbitrator to strike down or declare invalid any part of the LBS AMP. The Union says its point was that if the Employer wishes to engage attendance management in departments or units other than LBS, it must apply policies and rules in those departments which are consistent with the agreed upon policies.

13 The Union seeks a number of remedies, including a declaration that the Award is inconsistent with principles expressed or implied in the Code and that the Union was denied a fair hearing; an order setting aside the dismissal of the Union's grievance; and an order referring the matter back to the Arbitrator with instructions to apply the principles in *KVP*.

II. The Employer

14 The Employer points out that the Union has not appealed the Award on the basis that the Arbitrator erred in finding that the Union agreed to the LBS AMP and that it was specific to LBS to the exclusion of other departments or units. The Employer says the Union asked the Arbitrator to order the removal of all letters from the files of employees without calling evidence about the individual circumstances behind those letters, and without the Arbitrator having jurisdiction over any individual grievance.

15 The Employer argues there is a fundamental flaw in the Union's approach to the case: the Union argued that *KVP* applied to the LBS AMP. The Employer says the Arbitrator correctly made a finding that *KVP* has no application to the LBS AMP.

16 The Employer says that the appropriate standard for the Board to apply is that of whether the Arbitrator made a genuine effort to interpret and apply the agreement of the parties over the LBS AMP. The Board must also answer whether the Award is inconsistent with the provisions of the Code and whether the Arbitrator denied the Union a fair hearing. The Employer asserts the standard is not correctness as the Union suggests. Unlike in *HEABC*, there was not a question as to whether the terms of the LBS AMP breached the just cause provisions or the grievance procedure provisions of the Code. The matters before the Arbitrator were not matters in relation to the law of the statute, so the correctness standard does not apply.

17 The Employer says the fact it applied the LBS AMP agreement in the manner the parties had specifically contemplated and did not apply that agreement beyond the scope of what the parties had agreed to cannot affect the applicability of the agreement as it applies to LBS. The Employer says there is nothing nonsensical about the Arbitrator's conclusion that *KVP* does not apply because such a conclusion flows naturally and directly from the scope of the parties' agreement, which was to limit the agreement to LBS. There was no agreement between the parties to apply the LBS AMP outside of LBS.

18 With respect to the Union's first ground of review the Employer says the fact that the LBS AMP was not applied outside LBS cannot affect the viability or application of the LBS AMP within LBS, because this limited application of the LBS AMP was consistent with the very agreement of the parties.

19 With respect to the Union's second ground of review the Employer asserts that all the Union has done is to lift a sentence out of the April 19, 2004 Letter and take it out of context. The Employer says the Union has not proven a palpable and overriding error. Furthermore, the Employer says the Union is simply rehashing an unsuccessful argument made before the Arbitrator.

20 With respect to the Union's third ground of review, the Employer says the Union's contention is unfounded. The Employer asserts the Union is free to grieve and put the Employer to the just cause test under the Code regarding any future termination or discipline.

21 The Employer says the Union has not advanced any reviewable errors in the Award, and requests that the Union's application be dismissed.

IV. ANALYSIS AND DECISION

22 The Union relies upon *KVP* in its first and third grounds of review. It is useful for the purposes of this decision to reproduce the following portion of *KVP*: