IN THE MATTER OF AN ARBITRATION UNDER THE
CANADA LABOUR CODE, R.S.C. 1985 c. L-2

BETWEEN:

SEASPAN ULC

(the "Employer"/ "Seaspan")

AND:

INTERNATIONAL LONGSHORE & WAREHOUSE UNION, LOCAL 400

(the "Union")

(Re: Max O'Keefe Grievance)

ARBITRATOR:	Stan Lanyon, Q.C.
COUNSEL:	Charles G. Harrison for the Employer G. James Baugh for the Union
DATE AND PLACE OF HEARING:	November 17 & 18, 2014 Vancouver, B.C.
DATE OF AWARD:	December 19, 2014

Award

I. Introduction

[1] This is a preliminary application by the Employer. It raises the issue of the timeliness of a grievance. The grievance itself concerns the termination of the Grievor, Max O'Keefe.

[2] The Employer has a practice of "soft terminations" and "hard terminations". Soft terminations apply to employees who are in receipt of long term disabilities. The Employer states that its termination of the Grievor was a "hard termination".

[3] The Union replies that the Grievor's termination took place while he was in receipt of long term disability benefits and relies on the conduct of the Employer in respect to other employees who received similar hard termination letters, but were ultimately reinstated. The Union argues that the Employer is therefore estopped from relying on the hard termination letter of the Grievor. Alternatively, it seeks relief from the timelines for the filing of its grievance under the *Canada Labour Code.*

[4] The time period at issue is seven years. In this context, it is a very long period of time.

II. Facts

[5] The parties entered into evidence an Agreed Statement of Facts. Its primary purpose is the introduction of a series of documents. In addition to this Agreed Statement of Facts each party called two witnesses in respect to the preliminary issue of the timeliness of the grievance. The Agreed Statement of Fact reads as follows:

Collective Agreement

1. A copy of the grievance dated November 19, 2013 (the "Grievance") is Attachment "A" to this Agreed Statement of Facts.
2. A copy of the Employer's response to the Grievance dated February 5, 2014 is Attachment "B" to this Agreed Statement of Facts.
3. As of November 19, 2013, the date the Grievance was filed, the parties were subject to a collective agreement, which had a term from October 1, 2010 to September 30, 2013 and that remained in force at that time (the "Collective Agreement"). A copy of the Collective Agreement is Attachment "C" to this Agreed Statement of Facts.

The Employer's Operations

4. The Employer transports log, chip, petroleum and pulp and paper products via its tug and barge fleet.
5. As a cook, Mr. O'Keefe worked on continuous vessels, which are vessels that are at sea for two or three weeks at a time.
6. The Employer requires that employees working on board its vessels have Transport Canada medical certification of fitness.
7. The Employer's marine transportation division is federally regulated.

The Grievor's Work History and Termination

8. In or around May 1987, the Grievor applied for and was hired into the position of Cook to work on board vessels of the Employer.
9. On or about July 15, 2001, the Grievor went off work due to Hepatitis, and as a result was absent from work for 751 days.
10. On or about March 20, 2003, the Employer sent the Grievor a letter. A copy of that letter is Attachment "D" to this Agreed Statement of Facts.
11. On or about January 17, 2004, the Grievor went off work due to gastroenteritis, an illness that was not work-related.
12. On or about February 7, 2005, the Employer sent the Grievor a letter. A copy of that letter is Attachment "E" to this Agreed Statement of Facts.

13. On or about July 20, 2006, the Employer received a note from the Grievor's doctor. A copy of the note is Attachment "F" to this Agreed Statement of Facts.
14. On or about November 2, 2006, the Employer received a note from the Grievor's doctor. A copy of the note is Attachment "G" to this Agreed Statement of Facts.
15. On or about November 7, 2006, the Employer sent the Grievor a letter. A copy of that letter is Attachment "H" to this Agreed Statement of Facts.
16. On or about November 29, 2006, the Employer received a note from the Grievor's doctor. A copy of the note is Attachment "I" to this Agreed Statement of Facts.
17. Brian Siemens, the Assistant Manager, Marine Personnel, and author of letters at Attachments D, E, H and N, subsequently left employment with the Employer.

The Grievance

18. On or about September 16, 2013, the Employer received a letter from Great West Life. A copy of that letter is Attachment "J" to this Agreed Statement of Facts.
19. Shortly after receiving that letter, the Employer received a phone call from the Grievor upon which the Grievor advised that he was ready to come back to work.
20. On or about September 23, 2013, the Employer sent the Union a letter. A copy of that letter is Attachment "L" to this Agreed Statement of Facts.
21. On or about October 24, 2013, the Employer sent the Union a letter. A copy of that letter is Attachment "L" to this Agreed Statement of Facts.
22. On or about November 19, 2013, the Union filed the Grievance (Attachment "A").
23. On or about February 5, 2014, the Employer filed a response to the Grievance (Attachment "B").
24. On or about February 14, 2014, the Union sent the Employer a letter. A copy of that letter is Attachment "M" to this Agreed Statement of Facts.

Other Letters

25. Between 2003 and 2009, Mr. Brian Siemens authored a significant number of "soft termination" letters that were sent to various employees. Redacted copies of some of those letters are collectively Attachment "N" to this Agreed Statement of Facts. The Union was not copied on any of these letters.

26. On or about January 15, 2013, Captain Steve Thompson sent Mr. Phreddy Niven a letter. A copy of that letter is Attachment "O" to this Agreed Statement of Facts.
27. On or about January 21, 2013, Mr. Niven sent a letter to the Employer. A copy of that letter is Attachment "P" to this Agreed Statement of Facts.
28. On or about February 4, 2013, Captain Steve Thompson sent the Union a letter. A copy of that letter is Attachment "Q" to this Agreed Statement of Facts.
29. On or about April 8, 2013, Captain Steve Thompson sent Mr. Phreddy Niven a letter. A copy of that letter is Attachment "R" to this Agreed Statement of Facts.
30. On or about April 17, 2013, Mr. Niven sent a letter to the Employer. A copy of that letter is Attachment "S" to this Agreed Statement of Facts.
31. On or about May 28, 2013, Captain Steve Thompson sent Mr. Phreddy Niven a letter. A copy of that letter is Attachment "T" to this Agreed Statement of Facts.
32. On or about June 12, 2013, Mr. Niven sent a letter to the Employer. A copy of that letter is Attachment "U" to this Agreed Statement of Facts.
33. As of the date of the Agreed Statement of Facts, Mr. Niven's grievance remains outstanding.
34. On or about April 28, 2004, Captain Steve Thompson provided Mr. Peter Miller with a letter regarding his employment status. A copy of that letter is Attachment "V" to this Agreed Statement of Facts.
35. On or about August 9, 2004, a report regarding graduated return to work recommendations was issued with respect to Mr. Peter Miller. A copy of that report is Attachment "W" to this Agreed Statement of Facts.
36. In September 2004, Mr. Peter Miller sent a letter to Captain Steve Thompson requesting clarification of his employment status. A copy of that letter is Attachment "X" to this Agreed Statement of Facts.
37. On or about September 27, 2004, Captain Steve Thompson provided Mr. Peter Miller with a letter regarding his employment status. A copy of that letter is Attachment "Y" to this Agreed Statement of Facts.

[6] The Union called Mr. Terry Engler, who has been President of the Union, Local 400, since 2000. He has been with Seaspan since 1983.

[7] Mr. Engler began his testimony with reference to what the Employer has termed "soft terminations". Mr. Engler stated he had heard of this practice but had not seen any

correspondence to employees that referenced such a practice. However, he recalls a conversation with Brian Siemens, the former Assistant Manager of Marine Personnel, who stated to him that "the purpose of soft terminations was that the Company held monies in their [employee's] bank account and that it would be improper for the Company to keep those monies when the individual was going off on LTD (Long Term Disability)". He understood this to mean that when an employee went on LTD, and there was no likelihood of a return to work in the near future, the Employer would pay out any outstanding monies owed to them (employees) in various "banks" – vacation pay, layday and converted overtime. Mr. Engler said this was the understanding that he conveyed to his Union members.

[8] Mr. Siemens testified that he "felt some of these guys had been on LTD for some time, [they] would not be back in the near future, so pay them out". He described this practice as simply a "payroll function". It was a way to give notice to the Payroll Department that these employees were going on LTD and thus everyone would be "on the same page". He stated that "nothing changed in their [employees'] employment"; and "if an employee returned to work, everything was back to where it was when they left".

[9] Mr. Siemens introduced approximately twenty-three such soft termination letters between the years June 21, 2003 and October 8, 2009. The first two letters, dated January 21, 2003 and August 2, 2005, were similar and read as follows:

> January 21, 2003
>
> You have been off on Workers Compensation benefits since May 10, 2000. Since it is unlikely you will be returning to work in the near future, we are paying out all wages owing to you as per the enclosed statement. These dollars have been deposited directly to your bank account.
>
> If you are able to return to work at a later date, all personnel records, including seniority date, will be restored.
>
> If you have any questions or concerns please do not hesitate to call me at 604-990-1804.
>
> Brian Siemens

Assistant Manager
Marine Personnel

…

August 2, 2005

You have been off on sick benefits since July 9, 2004. Since it is unlikely that you will be returning to work in the near future, we are paying out all monies owing to you as per the enclosed statement. These dollars have been deposited directly to your bank account.

When you are able to return to work, all personnel records, including seniority date, will be restored.

If you have any questions or concerns please do not hesitate to call me at 604-990-1804.

Brian Siemens
Assistant Manager
Marine Personnel

[10] All the remaining letters, from January 3, 2006 to October 8, 2009, read the same, but have been amended, deleting the words "When you are able to return to work, all personnel records including seniority date, will be restored". Rather, they read as follows:

January 3, 2006

You have been off on short term sick benefits since November 2, 2004 and are now receiving long term disability payments. Once an employee is accepted for long term disability it is Seaspan's policy to pay out all monies owing to those employees.

Please find enclosed your pay statement showing the payment of all monies owing. These dollars have been deposited directly to your bank account.

If you have any questions or concerns please do not hesitate to call me at 604-990-1804.

Brian Siemens
Assistant Manager

Marine Personnel

[11] The Grievor received two soft termination letters. The first reads identical to the first two letters described above and is dated March 20, 2003. It makes reference to his seniority date being restored:

> You have been off on sick benefits since July 15, 2001. Since it is unlikely you will be returning to work in the near future, we are paying out all wages owing to you as per the enclosed statement. These dollars have been deposited directly to your bank account.
>
> If you are able to return to work at a later date, all personnel records, including seniority date, will be restored.
>
> If you have any questions or concerns please do not hesitate to call me at 604-990-1804.
>
> Brian Siemens
> Assistant Manager
> Marine Personnel

[12] The second letter received by the Grievor refers to the payment out of monies from his account and also makes reference to his health and welfare benefits premium being assumed by the Health and Welfare Plan Administrator. It is dated February 7, 2005. This letter reads as follows:

> You have been off on sick leave since January 17, 2004. Since it is unlikely you will be returning to work in the near future, we are paying out all wages owing to you as per the enclosed statement. These dollars have been deposited directly to your bank account.
>
> Just a reminder, as per my previous letter, effective January 31, 2005 Seaspan ceased paying the premiums for your health and welfare plan. D.A. Townley will assume these costs subject to your claim being accepted for long term disability.
>
> Should you have any questions or concerns, please do not hesitate to call me at 604-990-1804.

Brian Siemens
Assistant Manager
Marine Personnel

[13] Mr. Engler testified that the Union did not receive copies of these letters and the Grievor did not forward either of them to the Union. Second, he had never seen any of the soft termination letters entered into evidence by Mr. Siemens (January 21, 2003 – October 8, 2009) prior to this arbitration. Mr. Engler stated that he understood that when an employee went on LTD the Employer's practice was to terminate them, but these employees always had the "possibility of going back to work in the future".

[14] Mr. Siemens testified that when he first began sending these letters out, he received calls from all the unions, including Local 400, "asking what I was doing". He explained to them that he was just "paying out monies"; that "they were not termination letters"; and that "when employees returned to work they assume positions they left". He said the unions understood his explanation and "we continued on".

[15] Mr. Engler stated that this practice of soft terminations was in effect in 2004 when he received the following termination letter dated September 27, 2004, in respect to Peter Miller, a Cook/Deckhand. That letter reads as follows:

> As you know, you have been off work since November 30, 2001. In determining your entitlement to benefits, Great West Life initiated the production of medical reports of which we are in receipt. The August 9 report from Rehab in Motion, the July 7 return t work plan and the March 29 Transport Canada Marine Medical Report have been carefully reviewed. This information clearly does not indicated that you are able to perform the duties of a Cook/Deckhand. The possibility of offering you another position has also been considered but unfortunately there are no other positions within the Company for which you are qualified or would be able to perform based on your current impairments.
>
> Great West Life has indicated that your benefits will cease on October 15, 2004. Please be advised that as there is no indication that you are fit to return to your previous position or any position within the Company, your leave will not be

> extended beyond the date that your benefits cease and your employment will be terminated.
>
> Thank you for your years of service to Seaspan International Ltd. and we wish you well in your future endeavours.

[16] Mr. Engler stated that, in spite of the express wording in the letter terminating Mr. Miller, he understood this letter to be in fact "a soft termination".

[17] In response to the Employer's letter, Mr. Miller, on September 29, 2004, faxed Capt. Steve Thompson, Manager Marine Operations, asking him "To clarify my employment status with Seaspan International". On September 30, 2004, Mr. Miller's family doctor, Dr. W. Crowe, sent the Employer the following short medical note in respect to Mr. Miller:

> This gentleman has been under my treatment for a chronic back injury. He has had prolonged therapy for this problem. He has responded to a course of rehabilitation therapy. He currently has minimal symptoms related to his injury. In my opinion he is fit to return to his previous employment as a tugboat deckhand with no restrictions.

[18] Capt. Thompson, who was the author of the September 27, 2004 letter to Mr. Miller, described it as a "hard termination letter". He stated that, at that time, he was working on "WCB issues", and that Mr. Miller's termination was based on his "… past attendance and the possibility of his returning to work. It was a termination letter".

[19] Capt. Thompson described hard termination letters as having three elements: first, that benefits cease; second, the word "terminated" is expressly stated; and third, "I follow up with "We wish you well with your future endeavours". He said the purpose of a soft termination letter was to transfer benefits to the carrier when an employee goes on LTD.

[20] Mr. Engler testified that Mr. Miller "was not only reinstated but also promoted". Mr. Miller's return to work was subject only to a "functional capacity evaluation", which he successfully completed. Thus, Mr. Engler concluded that if an employee was able to return to work when his LTD benefits ceased, this was consistent with the Employer's "soft termination" policy, notwithstanding the initial hard termination letter.

[21] Capt. Thompson agreed that Mr. Miller was not terminated on October 15, 2004 as stated in his letter. He testified that after receiving the medical note from Mr. Miller's doctor, he arranged for Mr. Miller to undergo a "functional capacity evaluation". In a memo dated October 18, 2004, from Rick Lane, the Employer's Disability Coordinator, to Rehab in Motion, the company conducting the functional capacity evaluation, Mr. Lane addressed the Employer's concerns with Mr. Miller's ability to return to work. He pointed to an earlier return to work plan from Rehab in Motion (arranged by Great West Life) only a month earlier (August 2004) that indicated Mr. Miller may only be capable of light duties; however, Mr. Lane states that there are no such duties available in the Deckhand category. That memo reads as follows:

> The employer is requesting clarification of this workers suitability to return to his pre-injury employment as a deckhand. A physical demands analysis of the job has been provided for your reference.
>
> The employer is concerned about the safety and suitability of this worker returning to deckhand work after his prolonged absence (1050 days) due to disability.
>
> The employer believes that the long-term disability carrier has cancelled benefits because the worker is suitable to return to "any occupation". The employer believes that the worker is suitable for "light duty" only. The employer's concerns arose out of the following documentation:
>
> 1. Aug 09, 2004 Graduated Return to Work (GRTW) recommendations from Rehab in Motion, as arranged by Great West Life. The report identifies decreased endurance and strength of extremities and core stabilizers. Decreased tolerance for activity. Decreased flexibility. Worker complaints of increased symptoms after lifting 60 lbs. 4 times. Apparent increases in pain (minimal) from pushing and pulling 80 lbs. 10 times. Minimal increases in pain from sit, stand, and reaching activities.
>
> 2. July 07, 2004 (GRTW) plan of "light duties". There are no light duty jobs in the deckhand category.
>
> 3. Transport Canada – Marine Medical Examination Report dated March 29, 2004 indicates light duties no heavy lifting.

> In summary, the employer is concerned for the worker's safety at sea in this heavy industry. Please assess the worker, by way of your 2-day Functional Capacity Evaluation. If you require any further information from the employer to assist in this evaluation, please contact me directly at 604-990-3287.

[22] The Functional Capacity Evaluation was completed on October 27, 2004 and it concluded that Mr. Miller was capable of a "Full return to work, full duties". Transport Canada's Marine Medical Examination also concluded that Mr. Miller was capable of returning to work. Mr. Miller was back at work in November 2004.

[23] Mr. Engler stated that Mr. Miller remained at work until May 2006 "when he went off work again". Mr. Miller died in June 2007.

[24] Mr. Siemens wrote Mr. Miller the following letter, dated June 6, 2007:

> Dear Peter:
>
> You have been off on sick benefits since May 11, 2006. Since it is unlikely you will be returning to work in the near future, we are paying out all monies owing to you. These dollars have been deposited directly to your bank account.
>
> If you have any questions or concerns, please do not hesitate to call me at 604-990-1804.

[25] Mr. Engler described the timing of the letter as "unfortunate" because it arrived at approximately the same time as Mr. Miller's death. He stated that although he never saw the letter itself, he assumed it was another soft termination letter because "the family was upset that they had received the letter".

[26] Mr. Paul Lumsden, the current Secretary-Treasurer of the Union, was "shadowing" the then Secretary-Treasurer of the Union, Mr. George Bartlett in June 2007. When Mr. Bartlett received a copy of the above letter, Mr. Lumsden stated that Mr. Bartlett, "tore into Mr. Siemens". Mr. Bartlett stated that the Employer ought to "check on the welfare of employees before sending letters out". He said Mr. Siemens replied that it was "a standard cover letter to people on LTD"; and that the purpose of the letter was to pay out monies that

were being held by the Employer. He also stated to Mr. Bartlett that "If people could return to work they could be reinstated". Mr. Lumsden said that he did not see the June 6, 2007 letter himself. Mr. Siemens testified that the reason for writing his June 6, 2007 letter to Mr. Miller was that it was part of his management of employees on LTD who reached 52 weeks; further, that he was "notifying him [Peter Miller] we were paying out all monies to him".

[27] Approximately two years after Mr. Miller's termination letter of 2004, the Grievor, Max O'Keefe, received the following termination letter, dated November 7, 2006, from Mr. Siemens:

> You have been absent from work on sick leave since January 17, 2004. Based on the information provided by your physician on October 27, 2006 and previous medical information on file, the Company must conclude that your medical condition will not improve to the point where you will be able to return to work on a regular and consistent basis performing your normal duties as a Cook.
>
> As your employer we have become frustrated with your continued inability to maintain a regular work schedule and fulfill your side of the employment contract. Please understand the Company cannot accommodate an indefinite absence.
>
> After careful consideration we have decided to terminate your employment with Seaspan International Ltd. effective immediately. Please note that this will not in any way affect any long-term disability benefits that you are currently receiving.
>
> Thank you for your years of service with the Company. We wish you well in your future endeavors.

[28] Capt. Thompson described this letter as a "hard termination letter". Mr. Siemens, the author of the letter, stated the Grievor, "didn't look like he was going to be able to return to work in a regular and consistent basis to perform his duty as a Cook"; as a result "A decision was made to terminate his employment".

[29] A medical note from the Grievor's doctor, dated July 20, 2006, indicated that he would be able to return to work: "We have decided that September 2006 he [Grievor] will return to work at regular duties". However, on October 27, 2006 the Grievor's doctor wrote

a note stating "He is unfit to work as I understand it". The doctor also notes that the Grievor was subject to frequent episodes of "illness". This is the note referred to in his termination letter.

[30] Dr. Winsby's note of July 20, 2006 reads as follows:

> Re: Max O'Keefe
>
> Washington Marine Group
> Dr. Sweet/Rick Lane
> Dr. Sweet/Mr. Lane
>
> Mr. O'Keefe and I have spent quite a bit of time together recently. This is in regard to return to work with Washington Marine as a tow boat cook.
>
> He is improving with abdominal distress.
>
> We have decided that Sept. 2006 he will return to work at regular duties.
>
> Schedules should be modified.
> Thank you.
>
> Brian Winsby

[31] Dr. Winsby's note of October 27, 2006 reads as follows:

> Max O'Keefe
>
> This verifies that we have spent some time today in interview and exam. Mr. O'Keefe is subject to frequent episodes of illness. GI distress, etc.
>
> We are attempting to treat symptoms.
>
> I will arrange further consultation.
>
> He is unfit for his work as I understand it.
>
> Thank you.
>
> Brian Winsby

[32] Mr. Engler was copied on the November 7, 2006 termination letter to the Grievor. He stated that he "saw this letter as another soft termination letter similar to Mr. Miller's letter of 2004". The reason for this was that within a "short period of time I received a letter from Max's doctor; the expectation was that he would return to work which I believed covered his letter [termination letter] that there was a real expectation of his return to work". The Grievor's doctor's note, dated November 22, 2006, reads as follows:

> To Whom It May Concern
>
> This verifies that is our expectation that Mr. O'Keefe will regain his health such that he may return to work as a Chef for Seaspan.
>
> Thank you.
>
> Brian Winsby, M.D.

[33] Mr. Engler said that after the Grievor's doctors' note was forwarded to the Employer there was "no response from Seaspan, verbal or written". This lack of response from the Employer "led me to believe this was a soft termination scenario; therefore, Mr. O'Keefe would be able to return to work following normal procedures which would involve a functional capacity evaluation to see if he could perform the duties of a Cook". As a result, he told the Grievor "that he would be able to return to work with full seniority". Mr. Engler reiterated his view that a soft termination was not a termination of employment. That when an employee received a soft termination letter they were "getting a letter you were terminated because you were going on LTD". However, if an employee had the possibility of going back to work in the future then they were not terminated. He stated that "The majority of people who go on LTD do not return to work". In the case of Mr. O'Keefe, he drew the conclusion that his termination was a "soft termination because Mr. O'Keefe would be able to return to work sometime in the future".

[34] Capt. Thompson recalls seeing Mr. Miller's medical note from his family doctor but stated "It did not change things, Mr. O'Keefe had been terminated". He further said that the Grievor's circumstances, and Mr. Miller's circumstances, were not the same because the doctors' note for Mr. Miller had been received prior to his termination taking effect. Mr.

Siemens also stated that when he received the medical note from the Grievor's doctor "nothing had changed". Mr. O'Keefe's return to work was "still indeterminate; nothing said he would return to work in the near future". Capt. Thompson acknowledged that the Grievor was receiving LTD benefits when he was terminated.

[35] In terms of the factual narrative we now move forward seven years to 2013. Two events were the focus of the evidence in 2013. The first involves the termination of a P.W. Niven on January 15, 2013. This letter of termination reads as follows:

> After a lengthy absence on Weekly Indemnity for 364 days, it is our understanding that you have been absent without leave for a period of 187 days.
>
> As you are not currently fit to perform the duties required of a Deckhand, the Company must terminate your employment as being 'unfit for the industry'. All monies owing will be outlined in the mail to you and funds will be direct deposited to your bank account.
>
> We wish you well on your future endeavours.

[36] Mr. Niven filed a grievance dated January 21, 2013. He stated that he had been applying for LTD benefits. He further wrote that he expected the Employer to comply with its duty to accommodate him. He also stated that Mr. Engler had been counselling him throughout the entire disability process.

[37] In response to Mr. Niven's grievance, Capt. Thompson replied on February 4, 2013, reiterating that Mr. Niven's termination was "valid".

> Further to our discussion of today's date it is our understanding Mr. Niven was on W.I. from July 12, 2011 to July 9, 2012. We have also been apprised that Mr. Niven was denied LTD and is appealing his case and has been doing so for the past 190 days.
>
> The Company is no longer prepared to carry Mr. Niven's benefits package and, as such, our letter outlining Mr. Niven's termination is considered valid.

[38] Mr. Engler stated that he received a phone call, and a copy of the letter from Mr. Niven, who was "very upset". He told Mr. Niven that it was his "understanding" that it was a soft termination and "Fred [Mr. Niven] didn't have anything to worry about". He then "communicated with Mr. Thompson about Fred's [Mr. Niven's] concerns", and as a result, Mr. Thompson drafted two letters. The first of those letters, dated April 8, 2013, reads as follows:

> I have received numerous enquiries from your President at the I.L.W.U. hall regarding your status. It is normal procedure for the Company to pay out all monies owing and implement a 'soft' termination once an individual commences LTD. The intent of proceeding in this manner is to allow employees who are on LTD to return to active duty at a later date should they pass physical requirements.
>
> This letter in no way precludes Management Rights to deal with any individual with excessive absenteeism issues.

[39] Mr. Engler testified, "to be honest I thought this first letter amounted to a soft termination". However, Mr. Niven was not satisfied. He wanted a second letter that was "even more clear". As a result, Capt. Thompson wrote a second letter to Mr. Niven. It reads as follows and is dated May 28, 2013:

> I have received yet another request from the ILWU to clarify our Letter of Clarification dated April 8, 2013.
>
> Mr. Engler has requested this letter in an attempt to settle a grievance you submitted. As such, this letter will confirm that, should you return back to work from your current long term disability, you will return to work with no loss of seniority.

[40] Mr. Engler stated that his approach to Mr. Niven's grievance was that "My position was this was a soft termination; let's make clear what a soft termination was". He stated that "In discussions with Mr. Siemens and Capt. Thompson we understood what a soft termination was. I was confident in my understanding with Seaspan Human Resources what a soft termination was". This comment was in respect to both Mr. Miller and Mr. Niven circumstances.

[41] Capt. Thompson described the original letter of termination to Mr. Niven as a hard termination letter. He stated that Mr. Niven had been on Weekly Indemnity for a year, subsequently applied for LTD, but was denied. Mr. Niven had not returned to work, and as a result, he was Absent Without Leave, and therefore he dismissed Mr. Niven. He stated that "if Mr. Niven's application for LTD had been approved, then he [Mr. Niven] would have received a soft termination letter". After his initial discussions with Mr. Engler he stood by his decision to terminate Mr. Niven; however, when Mr. Niven was subsequently successful in winning his LTD claim, he was no longer AWOL, and this resulted in Capt. Thompson writing the first letter quoted above. When Mr. Niven was still unhappy with this initial first letter, he wrote the second letter to "settle the grievance".

[42] The second event in 2013 took place on September 16, 2013. The Grievor, Max O'Keefe, received a copy of a letter from Great West Life to DA Townley and Associates, Trustees of the Employees' Health and Welfare Benefit Plan, that he "no longer satisfies the definition of disability under your plan effective October 17, 2013". The entire letter reads as follows:

> We reviewed Mr. O'Keefe's claim for Long Term Disability benefits.
>
> Based on the information we've received, Mr. O'Keefe no longer satisfies the definition of disability under your plan, effective October 17, 2013. **Great-West Life's assessment has been based on available information and the terms and provisions of the group plan. Great-West Life's decision should not be relied upon for any other purpose**.
>
> We notified Mr. O'Keefe of this decision with a detailed letter.
>
> Should Mr. O'Keefe not return to work, his insurance coverage should be reviewed. If you have any questions regarding this, please contact your Great-West Life Client Service Representative.
>
> If you have any questions, my phone number is 604-646-1395
>
> Sincerely
> Mr. Neel D.
> Case Manager

(emphasis in original)

[43] Mr. Engler received a call from the Grievor stating he had been "cut off LTD". Mr. Engler stated that he informed [Mr. O'Keefe] to "call Seaspan and they would set up a Functional Capacity Evaluation to assess whether he was capable of doing all parts of a Cook at Seaspan". Mr. Engler assumed that would take a month and that "once he [Mr. O'Keefe] completed that, he would likely be back to work".

[44] On September 23, 2013 the Grievor forwarded his family doctors' medical note to the Company stating that he was capable of returning to work. That short note reads as follows:

> This verifies that Mr. O'Keefe, off on disability for some time, is physically capable of returning to work. He is likely to return to working on tow boats.
> Thank you.
>
> Brian Winsby, MD

[45] On October 24, 2013, Mr. Engler received a letter from Capt. Thompson stating that Mr. Siemens termination letter to Mr. O'Keefe on November 7, 2006 was "very clearly" a termination letter and that Seaspan is "not prepared to reinstate Mr. O'Keefe". That letter reads as follows:

> I have reviewed Mr. O'Keefe's personnel file along with the letters that Brian Siemens had sent in 2003 and 2006 with our LR department.
>
> In the time period from 2000 to 2006 Mr. O'Keefe had been off work on either WI or WCB for 1,764 days,.
>
> The wording in Mr. Siemens' letter is "As your employer we have become frustrated with your continued inability to maintain a regular work schedule and fulfill your side of the employment contract."
>
> And further on in Mr. Siemens' letter he states "After careful consideration we have decided to terminate your employment with Season International Ltd. effective immediately."

> We feel that Mr. Siemens' letter is very clearly as a termination letter and as such are not prepared to reinstate Mr. O'Keefe back into our work force.

[46] The Union filed a grievance on November 19, 2013. On February 14, 2014 Mr. Engler replied to Capt. Thompson's letter of October 24, 2013, stating that the Grievor's termination in 2006 had been a soft termination that had taken place while he was on LTD. It reads, in part, as follows:

> Seaspan has had a policy for many years of "soft terminating" employees when they go into LTD. We have always accepted Seaspan's word that these employees will be able to return to work with seniority if their medical circumstances improve to the point that they are medically cleared for a return to work.
>
> Mr. O'Keefe went onto LTD and was "soft terminated" as have many other Seaspan employees. The Nov. 7, 2006 letter is not substantially different from other "soft terminations" letters and the union did not respond to that letter because of the past practice of Seaspan.

III. Analysis and Decision

[47] There are two issues: first, estoppel in respect to the timeliness of the grievance; and second, an application under Section 60 (1.1) of the *Canada Labour Code* to extend the timeliness of the grievance.

[48] I will deal with the issue of estoppel first.

[49] The British Columbia Labour Relations Board in *B.C. Rail Limited*, IRC No. 152/92, adopted what it termed the "modern doctrine of estoppel" set out in the British Columbia Court of Appeal decision *Litwin Construction (1973) Ltd.*, (1988), 29 B.C.L.R. (2d) 88. This modern doctrine established a "broad principle", collapsing many prior equitable precepts to achieve one basic purpose: the prevention of "inequitable detriment":

> Under this broad principle, the distinctions between estoppel, promissory estoppel, waiver, election, laches and acquiescence do not always affect the outcome, though they may in some cases. The underlying concept is that of unfairness or injustice

> and it is not essential to its application that there be knowledge, detriment, acquiescence or encouragement although their presence may serve to raise the unfairness or injustice to the level requiring the exercise of judgment. If the unfairness or injustice is very slight, then the principle would not be applied. If it is more than slight, then the principle may be applicable.
>
> Thus, as to knowledge, Mr. Justice Oliver in Taylor Fashions [reported at [1981] 1 All ER 897] said "it would be unreasonable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment …" (emphasis added".
>
> This is now the proper test to be used in British Columbia with respect to the modern doctrine of estoppel. The purpose of the doctrine is to prevent inequitable detriment. On this point, the Court of Appeal in Litwin adopted the following passage from Grundt v. Great Boulder Proprietary Gold Mines Ltd. (1937), 59 C.L.R. 641 (Aus. H.C.): ….
>
> (page 25)

[50] Further, the Board writes that there is no requirement of an intention to induce reliance, nor must there be a positive act upon which reliance may be reasonably said to have arisen; in addition, the failure to act may be sufficient. Finally, unequivocal conduct is a question of fact and must be viewed from the perspective of the party raising the estoppel:

> There is no requirement that the conduct relied upon by a party who seeks to raise an estoppel have been intentionally designed to induce reliance. Nor is it essential that there be any positive acts upon which the reliance may reasonably be said to have arisen; the conduct may, in fact, be a failure to act in circumstances so as to give rise to an inference upon which reliance is founded: see Bowen v. O'Brian Financial Corp., (1991), 62 BCLR (2d) 328 (BCCA). The requirement that there be "unequivocal conduct" is a question of fact. In Revell v. O'Brian Financial Corp. (unreported; December 13, 1991; BCCA), one finds the following at page 14:
>
> > Whether the respondent's conduct was sufficient for the purpose of this test to constitute an unequivocal affirmation is a question of fact. The test is similar to the test of whether conduct is sufficient to constitute waiver or estoppel. It is a question of fact in each case.

> … This Court will not reverse findings of facts or substitute its assessment for the findings of a trial judge, unless the trial judge has made some palpable or overriding error which affected his assessment of the facts.
>
> Finally, in considering the notion of reliance based upon unequivocal conduct, the perspective from which the application of the doctrine must be viewed is that of the party who seeks to raise the estoppel: see Bowen, supra, at page 338.
>
> (page 26)

[51] The Employer has a practice of issuing both "soft terminations" and "hard terminations". Mr. Siemens, the former Assistant Manager of Marine Personnel, stated that he commenced this practice soon after his arrival at Seaspan in 1997. He testified that a soft termination was essentially a "payroll function" – the Company paid out any outstanding monies owed to an employee once they began to receive long term disability payments. However, if at some later point that employee had the ability to return to work, they were then restored to their original position and maintained their seniority – "everything was back to where it was when they left", as he commented. This practice was captured in letters sent out by Mr. Siemens. An example of such a letter is set out in January 2003:

> January 21, 2003
>
> You have been off on Workers Compensation benefits since May 10, 2000. Since it is unlikely you will be returning to work in the near future, we are paying out all wages owing to you as per the enclosed statement. These dollars have been deposited directly to your bank account.
>
> If you are able to return to work at a later date, all personnel records, including seniority date, will be restored…

[52] Mr. Siemens stated that when he initially sent out these letters to employees he received calls from all three unions, including Local 400, asking for an explanation as to what the letters meant. He stated that he related to them that he was simply paying out monies owed to these employees, that these letters were not termination letters, and that if an employee returned to work they would assume the positions they left.

[53] Mr. Engler has been the President of Local 400 since 2000. His understanding of soft terminations is similar to that of Mr. Siemens. It is based on discussions he had with both Mr. Siemens and Mr. Thompson. He stated that if an employee went on long term disability (LTD) he was paid out all monies owed to him in his various "banks" – vacation pay, lay days, converted overtime. A soft termination of an employee, he said, did not involve the actual termination of their employment; rather, if an employee was capable of returning to work while on LTD, or when their benefits had ceased, they were then restored to their former position, and retained all their seniority. However, although Mr. Engler, Mr. Siemens and Capt. Thompson, all had the same understanding of what constitutes a soft termination, Mr. Engler had never seen the standard form soft termination letters. Rather, his first experience with the issue of a soft termination was the hard termination letter sent to Mr. Miller in September 2004. It is helpful to reproduce that letter:

> This letter is subsequent to a verbal discussion between you and Rick Lane, Disability Coordinator.
>
> As you know, you have been off work since November 30, 2001. In determining your entitlement to benefits, Great West Life initiated the production of medical reports of which we are in receipt. The August 9 report from Rehab in Motion, the July 7 return to work plan and the March 29 Transport Canada Marine Medical Report have been carefully reviewed. This information clearly does not indicated that you are able to perform the duties of a Cook/Deckhand. The possibility of offering you another position has also been considered but unfortunately there are no other positions within the Company for which you are qualified or would be able to perform based on your current impairments.
>
> Great West Life has indicated that your benefits will cease on October 15, 2004. Please be advised that as there is no indication that you are fit to return to your previous position or any position within the Company, your leave will not be extended beyond the date that your benefits cease and you employment will be terminated.
>
> Thank you for your years of service to Seaspan International Ltd. and we wish you well in your future endeavours.
>
> (emphasis added)

[54] Capt. Thompson testified that this was a hard termination letter. Unlike the soft termination letters it expressly states that the employee is terminated. However, Capt. Thompson agrees that Mr. Miller was actually not terminated on October 15, 2004.

[55] Both Capt. Thompson and Mr. Siemens, in their testimony and in their letters to employees, set out a firm Employer policy in respect to the non-culpable termination of employees due to their innocent absenteeism. There are two basic elements to non-culpable termination due to innocent absenteeism: first, there must have been excessive absenteeism in the past; and second, in the foreseeable future, there must be no reasonable likelihood of the individual returning to work. Both factors must be present. The arbitral principle underlying non-culpable termination due to innocent absenteeism, is that the employment relationship has been "frustrated" or "fundamentally breached", and therefore an employee is no longer able to fulfill their employment contract (see Brown and Beatty, *Canadian Labour Arbitration*, 4th Edition, Canada Law Book, 2014 – 7:6110 Incapacity and Innocent Absenteeism).

[56] In one respect an employee in receipt of LTD benefits for a lengthy period may fulfill the first part of this test – excessive absenteeism. However, if there is medical evidence of likelihood of being able to return to work then the second part of the test would not be met. In effect, this complies with the Employer's soft termination policy. However, if there is no likelihood of a return to work then both elements of the innocent absenteeism test is met, resulting in a hard termination, consistent with the Employer's policy.

[57] Mr. Miller had been off work for approximately three years (November 2001 – September 27, 2004). His LTD was expiring some three weeks later (October 15, 2004). Capt. Thompson wrote to him that his leave would not be extended beyond the period when his "benefits cease and your employment will be terminated". Capt. Thompson testified that at the time he wrote the letter terminating Mr. Miller he had been reviewing "WCB issues" with Rick Lane, the Disability Coordinator for the Employer. In his letter to Mr. Miller, Capt. Thompson refers to a functional capacity evaluation having been conducted a month earlier, August 2004, at the request of Great West Life. It was conducted by the firm Rehab in Motion. It essentially stated that Mr. Miller could return to

work with modified duties, "light duties" as later described by Mr. Lane in his memo of October 18, 2004. It was Capt. Thompson's view expressed in his termination letter, that Mr. Miller could not perform the duties of a Cook/Deckhand, and there was no other position for which Mr. Miller was qualified.

[58] Three days later, on September 30, 2004, Mr. Miller's family doctor wrote a brief note, stating that Mr. Miller was capable of returning to employment with "no restrictions" (he had had a prior back injury). Capt. Thompson referred Mr. Miller back to Rehab in Motion for a second functional capacity evaluation. The result was that Mr. Miller was found to be fit to return to work and to "full duties". Mr. Miller worked for another two years, then went off work once again , and died in June 2007.

[59] Mr. Engler, from his involvement in this matter, concluded that Mr. Miller had been soft terminated. This was because when Mr. Miller's LTD benefits ceased, his family doctor wrote a note, stating he was able to return to work. This was confirmed by the functional capacity evaluation conducted by Rehab in Motion. He was restored to his prior position with full seniority, and indeed, at some later point, was promoted. This had all the basic elements required of a soft termination. What was important, therefore, was the Employer's conduct, which conformed to its policy of soft terminations, notwithstanding the express wording of the hard termination letter.

[60] Some two years later, in November 2006, the Employer terminated the Grievor. That letter, once again, reads as follows:

> You have been absent from work on sick leave since January 17, 2004. Based on the information provided by your physician on October 27, 2006 and previous medical information on file, the Company must conclude that your medical condition will not improve to the point where you will be able to return to work on a regular and consistent basis performing your normal duties as a Cook.
>
> As your employer we have become frustrated with your continued inability to maintain a regular work schedule and fulfill your side of the employment contract. Please understand the Company cannot accommodate an indefinite absence.

> After careful consideration we have decided to terminate your employment with Seaspan International Ltd. effective immediately. Please note that this will not in any way affect any long-term disability benefits that you are currently receiving.
>
> Thank you for your years of service with the Company. We wish you well in your future endeavors.

[61] The Grievor, similar to Mr. Miller, had been off work for almost three years: January 2004 – November 2006. Mr. Siemens drew the conclusion that the Grievor would not be able to return to work in the near future, nor perform his normal duties as a cook. He was therefore terminated; however, as the letter points out, this did not affect his LTD benefits. Mr. Engler was expressly copied on the letter. He once again viewed the Grievor's termination as a soft termination. The Grievor was on LTD, and in a very short period of time, Mr. Engler received a copy of the Grievor's family doctors' short note that stated that the Grievor "will regain his health such that he may return to work as a chef for Seaspan". Thus, with the expectation that the Grievor would at some point, during or after the expiration of his LTD, have the ability to return to work, Mr. Engler drew the conclusion that the Employer's termination letter had been addressed – "covered", as he put it. Thus, when the Employer issued no response, this confirmed his view that the Grievor's termination fell within the "soft termination scenario". It was his view that when the Grievor was fit to return to work he would be referred to Rehab in Motion, who would conduct a functional capability evaluation, and if he passed the evaluation, the Grievor would then return to work with full seniority.

[62] Both Capt. Thompson and Mr. Siemens stated that the family doctor's letter changed nothing. This was never communicated to the Union. As stated in Mr. Siemens' letter, and as Capt. Thompson acknowledged, the Grievor was still receiving LTD benefits when he was terminated. There was no issue of an AWOL or an imminent cessation of benefits.

[63] The other comparison set out in the evidence is between the Grievor and Mr. Niven in 2013. On January 15, 2013, Mr. Niven was terminated. He had been receiving weekly indemnity for a year. He had applied for LTD but had been denied. He appealed and was

successful. However, during the appeal period he was AWOL. He was also deemed to be "unfit for the industry". His termination letter reads as follows:

> Further to our discussion of today's date it is our understanding Mr. Niven was on W.I. from July 12, 2011 to July 9, 2012. We have also been apprised that Mr. Niven was denied LTD and is appealing his case and has been doing so for the past 190 days.
>
> The Company is no longer prepared to carry Mr. Niven's benefits package and, as such, our letter outlining Mr. Niven's termination is considered valid.

[64] Mr. Niven filed a grievance arguing that the Employer had a duty to accommodate him. He stated in the grievance that Mr. Engler had been "counselling me throughout this entire disability accommodation and long term disability process". After Mr. Niven filed his grievance, Capt. Thompson sent a second letter dated February 4, 2013, confirming that Mr. Niven's termination was valid. No such letter had been sent to the Grievor after he had filed his doctor's note stating there was an expectation that he would be capable of returning to work.

[65] Mr. Engler stated that when Mr. Niven called him, and told him that he had been terminated, he stated to him that "he didn't have anything to worry about because it was another soft termination". He contacted Capt. Thompson, and as a result of their discussions, Capt. Thompson issued two new letters confirming that Mr. Niven had been soft terminated, and that if he was capable of returning to work, he would be reinstated with no loss of seniority:

> I have received numerous enquiries from your President at the I.L.W.U. hall regarding your status. It is normal procedure for the Company to pay out all monies owing and implement a 'soft' termination once an individual commences LTD. <u>The intent of proceeding in this manner is to allow employees who are on LTD to return to active duty at a later date should they pass physical requirements.</u>
>
> This letter in no way precludes Management Rights to deal with any individual with excessive absenteeism issues.
>
> (emphasis added)

[66] What is important to note are the words in this letter which reflects the central element of what constitutes a soft termination: "The intent of proceeding in this matter is to allow employees who are on LTD to return to active duty at a later date should they pass physical requirements". Capt. Thompson testified that the initial letter was sent because Mr. Niven had been AWOL. However, when his appeal for LTD benefits was successful he was no longer AWOL. He said that the two subsequent letters were sent to settle Mr. Niven's grievance. Mr. Engler stated that his involvement in Mr. Niven's case in 2013 confirmed his understanding of what constituted a soft termination. He stated that he was "now confident in my understanding with Seaspan Human Resources what a soft termination was".

[67] Several months later, on September 16, 2013, the Grievor received a copy of a letter from Great West Lift that his LTD benefits would cease effective October 17, 2013. Mr. Engler received a call from the Grievor who said that he had been "cut off LTD". Mr. Engler stated to the Grievor that he needed to phone Seaspan and they would set up a functional capacity evaluation to see if he was capable of returning to his duties as a cook. He stated to the Grievor that once he had completed the functional capacity evaluation he would be back at work within a month. A week later, on September 23, 2013, the Grievor's family doctor wrote that he "is physically capable of returning to work".

[68] However, Capt. Thompson wrote a month later, on October 24, 2013, stating that because of the Grievor's excessive absenteeism, the employment contract has been "frustrated" and that the prior termination letter of November 7, 2006 was "very clearly a termination letter"; therefore, the Employer was not prepared to reinstate him. The Union filed a grievance and relied on the soft termination policy of the Employer. That letter, dated February 14, 2014 reads as follows:

> Seaspan has had a policy for many years of "soft terminating" employees when they go into LTD. We have always accepted Seaspan's word that these employees will be able to return to work with seniority if their medical circumstances improve to the point that they are medically cleared for a return to work.

> Mr. O'Keefe went onto LTD and was "soft terminated" as have many other Seaspan employees. The Nov. 7, 2006 letter is not substantially different from other "soft terminations" letters and the union did not respond to that letter because of the past practice of Seaspan.
>
> …

[69] As earlier stated, the essential elements of estoppel are an unequivocal conduct, reliance and detriment. The unequivocal representation or conduct does not have to be intentional. The issue is, whether intentional or not, has one party unequivocally represented to the other party that it will not rely on its strict legal rights? In addition to an express representation, an estoppel can result from a party's failure to act or from their silence. If a second party has relied on the conduct or representation and would suffer real harm or detriment, then the first party will not be permitted to change their position. Finally, the application of estoppel must be viewed from the perspective of the party that raises the estoppel. The purpose of estoppel is to prevent "inequitable detriment".

[70] Both parties understood what constituted soft termination: an individual who was on LTD, was paid out all monies owing to them, and then, should they be able to return to work at some future point, they would be reinstated to their former position with full seniority. Mr. Miller, Mr. Niven and the Grievor all received hard termination letters as Capt. Thompson characterized them. Mr. Miller, Mr. Niven and the Grievor were all off work due to injury or illness. They all occupied the position of Cook/Deckhand. They were all subject to non-culpable termination because of their innocent absenteeism – excessive absenteeism in the past and no prospect of returning to work in the near future.

[71] The estoppel in these circumstances must be based in the comparison between Mr. Miller, terminated in 2004, and the Grievor terminated in 2006. Both had been receiving LTD benefits for approximately three years. Mr. Miller's LTD benefits were ceasing October 15, 2004 and his termination was made effective the same date that his benefits ceased. He forwarded a letter from his family doctor stating that he was fit to return to work. The Employer was skeptical. It had a prior report that stated that he could return to

work with modified duties ("light duties") which both Capt. Thompson and Rick Lane stated were not available to the Grievor. However, pursuant to the soft termination policy he was referred to a functional capacity evaluation which cleared him to return to his work as Cook/Deckhand.

[72] Similarly, the Grievor was on LTD in 2006; indeed, he was on LTD at the time of his termination and continued to be after his termination. He sent the Employer a letter from his family doctor, similar to that submitted by Mr. Miller, a short note stating that he was capable of returning to work. There was no response from the Employer. Mr. Engler took the silence of the Employer as acquiescence, that the Employer had accepted the doctor's note, and that when the Grievor was able to return to work he would be sent for a functional capacity evaluation, and if he passed that evaluation, he would be reinstated with full seniority. And that was precisely the advice he gave the Grievor when the Grievor phoned him in September 2013, stating that he had been "cut off LTD".

[73] Thus the relevance of the comparison between Mr. Nevin and the Grievor is that both the conduct of the Employer and the Union in the Nevin matter is consistent with the Union's view of what constituted a soft termination, notwithstanding the issuance of hard termination letter by the Employer.

[74] The negotiation and administration of collective agreements, especially in mature bargaining relationships such as this one, takes place over many years during which the parties address a wide variety of problems across many different aspects of the Collective Agreement. Each party relies heavily on their own and the other party's past conduct. In such ongoing contractual relationships there arises a positive obligation to inform the other party that there is a disagreement in respect to a particular practice that is being carried out under the collective agreement. When the Employer in this case failed to respond to the Grievor's doctors' letter that he would be able to return to work, I find that it was reasonable for Mr. Engler to conclude that the Employer had accepted the Grievor's doctor's conclusion, that at some future point he would be physically capable of returning to work. As a result, the Union understood the Grievor's termination to be a soft termination. For

this reason Mr. Engler did not file a grievance contesting the Grievor's "hard termination". At this point it is worth repeating the basic elements of estoppel set out in *B.C. Rail, supra*:

> There is no requirement that the conduct relied upon by a party who seeks to raise an estoppel have been intentionally designed to induce reliance. Nor is it essential that there be any positive acts upon which the reliance may reasonably be said to have arisen; the conduct may, in fact, be a failure to act in circumstances so as to give rise to an inference upon which reliance is founded: see Bowen v. O'Brian Financial Corp., (1991), 62 BCLR (2d) 328 (BCCA). The requirement that there be "unequivocal conduct" is a question of fact. In Revell v. O'Brian Financial Corp. (unreported; December 13, 1991; BCCA), one finds the following at page 14:
>
> > Whether the respondent's conduct was sufficient for the purpose of this test to constitute an unequivocal affirmation is a question of fact. The test is similar to the test of whether conduct is sufficient to constitute waiver or estoppel. It is a question of fact in each case. … This Court will not reverse findings of facts or substitute its assessment for the findings of a trial judge, unless the trial judge has made some palpable or overriding error which affected his assessment of the facts.
>
> Finally, in considering the notion of reliance based upon unequivocal conduct, the perspective from which the application of the doctrine must be viewed is that of the party who seeks to raise the estoppel: see Bowen, supra, at page 338.

[75] Thus, the Employer's decision not to address the medical conclusion of the Grievor's doctor, or to affirm its hard termination letter at that time, does not require evidence that its conduct, or its failure to act, or its silence, was designed to induce the Union's reliance. However, its failure to act under the circumstances did reasonably give rise to an inference upon which Mr. Engler could conclude that the Grievor had been soft terminated. If the Employer did not accept the note from the Grievor's doctor that he was physically capable of returning to work, a basic element the Employer is required to establish to support its hard termination for non-culpable termination for innocent absenteeism, it had the

obligation to state this. And clearly the detrimental reliance is that the Union, having failed to file a grievance in 2006, would be out of time to file such a grievance some seven years later. Thus, the Grievor would be precluded from the opportunity to demonstrate that he was capable of returning to work. This clearly amounts to an inequitable detriment.

[76] Capt. Thompson stated that the distinction between Mr. Miller and the Grievor was that Mr. Miller had forwarded his family doctor's note prior to the expiry of his LTD benefit. However, as Capt. Thompson acknowledged, the Grievor was still receiving his LTD when he was terminated. I do not think this amounts to any kind of meaningful or substantive distinction.

[77] Once again, the subsequent conduct of Mr. Engler and Capt. Thompson in 2013 confirms Mr. Engler's understanding of the issue of soft termination, notwithstanding the fact that a hard termination letter had been issued. Mr. Nevin received a hard termination letter but was subsequently issued two soft termination letters once his LTD benefits had been confirmed. It must also be recalled that when Mr. Niven was issued the hard termination letter, Mr. Thompson wrote back several weeks later confirming his dismissal of Mr. Niven. This was something that Capt. Thompson did not do in respect to the Grievor. At no time after he received the Grievor's family doctor's note that he was physically able to return to work did Capt. Thompson or Mr. Siemens write the Grievor reaffirming that his hard termination was upheld.

[78] Capt. Thompson stated that a distinction between the Grievor and Mr. Niven was that Mr. Niven had been AWOL initially. He was declared "unfit for the industry". However, at no time was the Grievor AWOL. He was, as Capt. Thompson acknowledged, always on LTD. Notwithstanding that the initial hard termination letter declared Mr. Niven to be unfit for the industry, Capt. Thompson in his April 8, 2013 and May 28, 2013 letters affirmed the soft termination of Mr. Niven, stating that he would have the opportunity to return to active duty at a later date should he pass the physical requirements. Thus, both in respect to Mr. Miller and Mr. Niven, notwithstanding the initial hard termination letters, each subsequently conformed to the Employer's soft termination policy. These employees were off work due to illness or injury, received long term disability or

weekly indemnity, and consistent with the soft termination policy, had the right to return to work if they were physically able, and to be reinstated to their former positions with their full seniority.

[79] On reflection I had some initial hesitancy in basing an estoppel on what appeared to be a single incident – the Miller matter. As the old adage goes, a single swallow does not a spring make. And an employer does have a significant discretion to deal with the individual circumstances of employees in the administration of a collective agreement.

[80] However, in this case the Employer has implemented a distinctive policy – both a soft termination and hard termination of employees. This policy, of course, raises directly the arbitral principles of non-culpable termination, and more generally, the just cause provisions of the *Labour Relations Code* (Section 84).

[81] Mr. Engler, President of the Union, was confident that he understood the Employer's policy of what constituted a soft termination – an employee who was on LTD was paid out all outstanding monies owed to them, and then they were reinstated to their own position with full seniority if they were physically capable of returning to work. He arrived at this understanding through his discussions with Mr. Siemens and Mr. Thompson. His understanding is confirmed in the letters reproduced between 2003 – 2009. However, as set out in paragraph 25 of the Agreed Statement of Facts, the Union was not copied on any of these letters. And Mr. Engler's uncontradicted evidence is that not only did he not see these soft termination letters but that the only termination letters he actually saw were Mr. Millers and the Grievor's "hard termination letters" (as well as Mr. Nevin's letter).

[82] Thus, notwithstanding the express wording of the hard termination letter dismissing Mr. Miller, when he was finally cut off LTD, he was reinstated with full seniority once he was physically capable of returning to work. Although it might be construed as a single unrelated incident, it was in fact the application of the soft termination policy to the hard termination of an employee – in circumstances substantially similar to the Grievor's. And they are the only circumstances of which the Union was aware of in respect to the Employer's soft termination policy.

[83] I therefore conclude that the Employer is estopped from relying on the timelines set out in the Collective Agreement in respect to the Grievor's non-culpable "hard termination".

[84] Thus, the application of estoppel in these circumstances estops the Employer from relying on its November 2006 hard termination of the Grievor. When the Employer did in fact affirm its hard termination of the Grievor in October 2013 the Union filed a timely grievance in November 2013. Thus the application of estoppel in these circumstances only provides the Grievor with the opportunity to address his non-culpable termination on the merits.

[85] In the alternative, if an estoppel has not been established, I conclude that precisely the same facts that underlie my conclusion in regard to the issue of estoppel also form the basis upon which to exercise my discretion to extend the timelines under the Collective Agreement, pursuant to Section 60 (1.1) of the *Canada Labour Code*. Section 60(1.1) reads as follows:

> Power to extend time – The arbitrator or arbitration board may extend the time for taking any step in the grievance process or arbitration procedure set out in a collective agreement, even after the expiration of the time, if the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the other party would not be unduly prejudiced by the extension.

[86] Article 1.05(d) of the Collective Agreement sets out a 90 day period for the filing of a grievance. Failure to comply results in a grievance being "deemed abandoned". This is a strong contractual language.

> (d) The maximum time for raising a grievance shall be ninety (90) days from the time the incident occurs which gives rise to the grievance. In the event arbitration is desired, written notice must be given within the ninety (90) day period. Time limits under this clause may be extended by mutual agreement between the parties. Failing mutual agreement to extend the time limit, a grievance not raised and processed within the aforestated time period shall be deemed abandoned and

> all rights or recourse including arbitration in respect of this grievance shall be at an end.

[87] Arbitrator Pamela Picher in *Canada Post Corp. v. CUPW,* [2013] C.L.A.D. No. 111, reviewed the factors regarding the exercise of discretion under Section 60(1.1). The two statutory requirements for exercising a discretion to grant the extension of timelines under the Collective Agreement are first, there must be reasonable grounds, and second, the other party will not be "unduly prejudiced" by the extension.

[88] In terms of whether there are reasonable grounds the first consideration is the nature of the grievance. The circumstances in this case is the termination of a long service employee (26 years). As Arbitrator Picher states, a grievance involving the termination of a long service employee is a very serious matter, and therefore this factor has "substantial weight" when considering the exercise of discretion under Section 60(1.1). This factor weighs in favour of the Grievor.

[89] The second issue is when did the delay occur? In this case it is at the beginning of the grievance process and therefore there is a prejudice that accrues to the Employer in terms of its ability to prepare its case. This weighs against an extension of timeliness.

[90] The third and fourth issues are whether or not the Grievor was responsible for the delay and the reason for the delay. The Union makes clear in this case that it is responsible for the delay, not the Grievor. The fact that a grievance was not filed some seven years ago was because the Union viewed the Grievor's termination as a soft termination. I have found that there are reasonable grounds for this conclusion on behalf of the Union. I therefore find both these factors weigh in favour of extending the timelines.

[91] The fifth criteria is the length of delay. Of course, a seven year delay is extraordinary. However, this factor must be, as Arbitrator Picher states, viewed within the "total circumstances"; that is, the Union reasonably concluded that the Grievor's termination was a soft termination. When the Employer confirmed seven years later that it was a hard termination, the Union promptly filed its grievance.

[92] The second ground is whether or not the other party would be unduly prejudiced. The term unduly prejudiced contemplates some prejudice, which may result through the effluxion of time. However, in these circumstances, I conclude there is little or no prejudice to the Employer.

[93] First, the Union seeks no retroactivity for the period 2006 – 2013. The lengthy period in this case arises within the context and application of long term disability benefits.

[94] Second, the Employer's two primary witnesses, Capt. Thompson and Mr. Siemens, the author of both the policies and the letters at issue in this matter, testified in regard to all past events and documents. There was no issue in respect to either persons recollection of events or in identifying documents; nor was any other evidentiary prejudice raised.

[95] Third, the issue of excessive absenteeism in the past is a matter of record - i.e. long term disability records. Rather, what is at issue is whether or not the Grievor is able to physically return to work. That will be addressed through medical tests or functional capacity evaluations.

[96] Thus, I find there is no evidentiary or remedial prejudice to the Employer should this grievance proceed. I therefore exercise my discretion under Section 60 (1.1) of the *Canada Labour Code* and extend the timelines under the Collective Agreement.

[97] In conclusion, I find the Employer is estopped from relying on the timelines set out in the collective agreement in respect to the Grievor's termination. In the alternative, I extend the timelines under the Collective Agreement pursuant to Section 60(1.1) of the *Canada Labour Code*.

[98] It is so Awarded.

[99] Dated at the City of New Westminster in the Province of British Columbia, this 19th day of December, 2014.

Stan Lanyon, Q.C.