

In a labor arbitration hearing recently conducted before Arbitrator Gutman, the parties' collective bargaining agreement provided a three month probationary period for all new hires which gave the employer the discretion to terminate new employees during the first three months of their employment without showing just cause. In this case, a probationary employee was given timely notice that his job performance and attendance had been unsatisfactory during his first three months on the job but the employer give him a sixty day extension of his probationary period and cautioned that if he failed to make improvement in that period of time, his employment would be terminated.

The employer concluded the employee's performance failed to improve during the extension of his probationary period and several days before the end of the sixty days, management made the decision to terminate him. It was the Company's policy to meet face to face with employees who are to be terminated but the employee had called in sick the day management made the decision to terminate him and notification was delayed pending his return to work. His absence from work continued for the next three days passing the end of the extension period and he was given notice of termination by phone.

The employee filed a grievance alleging that he completed his probationary period giving him regular employment status and he could not be fired unless the company could prove just cause. The Company did not produce any evidence of just cause to support its decision to terminate the Grievant. Rather it defended its action solely in reliance on its contractual right to terminate a probationary employee.

The parties agreed the issue to be decided was whether the notification of termination given by management beyond the 60 day extension of his probationary status was effective to prevent the employee from achieving permanent standing.

The Arbitrator's decision explained a probationary period is to provide a trial period to allow an employer a period of time to determine whether a newly hired employee is suitable for regular employment; whether the employee is capable of meeting the standards set by the employer and the criteria of the job and fitness to perform the job. Under accepted labor-management principles, an employee serving a probationary period is an at-will employee and may be terminated at any time during this provisional period with or without notice or proof of just cause. An employee who is terminated under these conditions has no right of appeal. The parties did not dispute these are the principles

governing the application of a probationary period in a collective bargaining agreement. Nor was there a dispute that the employee's probationary period had been extended and after that date the company would not have been permitted to rely on probationary status as a defense to the grievance.

The Company acknowledged it did not give notice until several days after the end of the extension period but maintained it would be unfair to deny it the right to exercise its discretion to terminate the employee beyond the sixtieth day since any delay in notification of termination was attributed to the employee's continued absenteeism. The Union contended that accepting the Company's reasoning for delaying notification would undermine the concept of a probationary period and ventured that this Company would not accept the same reasoning for a late-filed grievance if the Union claimed it made its decision to file a grievance within the filing deadline, but waited until later to complete the filing.

The Union rejected the premise of the Company's defense and argued that the employee's absence from work did not absolve the Company from the contractual requirement of timely notice. Though he was absent during those two days, timely communication with the grievant could have been made through mail or phone as was done. Moreover, and as the Union aptly reasoned, the CBA did not require the Employer to exercise its right to terminate a probationary employee on the last day of the probationary period or require face-to face notification. Nor did the CBA allow the Employer a grace period to terminate a probationary employee under any circumstances. The CBA sets a fixed deadline, which the Company missed by several days.

The Union was correct that nothing in the CBA justified the delay in implementing the decision to fire the employee. The Company could have and in hindsight should have picked up the phone and called him. It didn't; not until it became concerned that a further lapse of time to inform the employee of the decision to terminate him because of his continued absence from the workplace might thwart firing him as a probationary employee.

Yet, the Union reasoned if a limitation period had expired but tolerance for implementing it was requested, as here by the employer, a fair concern would be the uncertainty of how long forbearance would last before decisive action was taken – after one

day, two days, a week? Indeed, as the Union argued, “Where would we draw the lines? How many days or weeks after its decision should we give the Company to notify the employee? The uncertainty of when that point is reached would be a good reason to say NO to a request by management to enforce its right under a probationary clause beyond the critical date. But here the uncertainty suggested by the Union was triggered by the grievant’s own behavior. This speculation by the Union ignored the difference between its hypothetical and the facts in this case where the evidence showed extenuating circumstances to explain the reason the Company did not give notice until after the sixtieth day.

Had he been present for the period between the date of management’s decision and the end of his probationary period, the Company would have no basis for claiming the right to delay his termination beyond the last day of the extension. But he wasn’t at work during the period when notice should have been given him. Nonetheless, the Union says once the “fixed deadline” for notification was exceeded, the employee became a regular employee.

I respectfully disagreed.

Validation for the Company’s defense can be premised on the analogous legal theory on which the equitable claim of tolling is based. Applying the tolling principle, the time limit for enforcing Herndon’s probationary status was prolonged by his continued absence from work during the period for notification of termination. Otherwise according to the Company, he would be able to assert a legal claim to job tenure assured by the very conduct on which the decision to deny permanent employment was based. The concept of equitable tolling was developed to avoid such an outcome.

The issue submitted by the parties is whether the notice of termination telephoned to the grievant beyond the 60 day extension period was effective to terminate his employment. Arbitrator Gutman found in the unique circumstances presented by the uncontroverted evidence, the telephone notification to the employee, albeit two days after the extension period expired was an effective termination of an employee within his probationary period.

The grievance was denied.

POSITION OF THE PARTIES

The COMPANY

“MOSAIC made the decision to terminate within the probationary period — but it was unable to communicate this decision to [Herndon] because he continued to call out from work. Given the circumstances (the employee's repeated absences and the manager's hospitalization), the Company communicated with [Herndon] in a reasonable amount of time. The Union does not contest that MOSAIC had the right to terminate Jeffrey's employment during the termination period. The Union seems to be arguing that because Jeffrey did not show up for work during the last week of his probationary period he successfully avoided termination. Jeffrey [Herndon] should not be rewarded for being absent consecutive string of days before, on, and after his probationary period ended.”

The Union

“... Herndon's probationary status expired on July 10. The CBA does not require the Company to terminate a probationary employee on the last day of the probationary period, nor does it require the Company to do so `in person.’ The CBA contains no exceptions

or `grace periods' due to exigent circumstances, nor does it permit the Company to `decide' to terminate a probationary employee on or prior to the deadline, but to wait to memorialize and notify the employee sometime thereafter. The CBA contains only a fixed deadline, which was exceeded in this case by five days." [Citations omitted]

"To accept the Company's reasoning here would undermine the definitive CBA terms bargained for and agreed to by these parties for many years. Where would we draw the lines? How many days or weeks after its decision should we give the Company to notify the employee? Would the Company accept the same reasoning for a late-filed grievance where the Union asserts that it made its decision to file the grievance within the filing deadline, but waited until later to do so? It would be perilous to accept the Company's invitation to ignore the unambiguous contract language at issue in this case."

DISCUSSION