

CANADA / JUDGMENT

Telus Communications Inc. v. Telecommunications Workers Union

2017 BCSC 2209

COURT

Supreme Court of British Columbia

DECIDED

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2017 BCSC 2209 Telus Communications Inc. v. Telecommunications Workers Union

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Telus Communications Inc. v. Telecommunications Workers Union ,

2017 BCSC 2209

Date: 20171108

Docket: S177313

Registry: Vancouver

Between:

Telus Communications Inc.

Petitioner

And

Telecommunications Workers Union,

Local 1944 of the United Steelworkers and Wayne Moore

Respondents

Before: The Honourable Mr. Justice Silverman

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:

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Place and Date of Hearing:

Vancouver, B.C.

October 31, 2017

Place and Date of Reasons:

Vancouver, B.C.

November 8, 2017

- [1] THE COURT: These are Oral Reasons. If a transcript is ordered, I reserve the right to edit, although that process will not involve a change in the decision or in the reasoning.
- [2] The petitioner employer seeks judicial review of a portion of a labour arbitration decision concerning one of its employees. The employee is represented by the respondent union. I shall refer to her as the "Grievor". The parties are agreed that the Canada Labour Code, R.S.C., 1985, c. L-2 and the then in force collective agreement are applicable to the circumstances here. It is common ground on this review that the standard of review is one of reasonableness.
- [3] The Grievor was hired by the employer in 2011 and worked as a customer sales representative until she was terminated on November 12, 2014. She had continuing difficulty with tardiness. During the course of her employment with the employer, the Grievor was late returning from a break 167 times for a total of 570 minutes of extra paid time. She had also accumulated 169 minutes of late arrivals to work. She worked rotating start times and was late for work regardless of when her shift started. She consistently explained that she was late for her shifts due to traffic and/or public transit issues.
- [4] Between October 2013 and November 2014 the employer disciplined the Grievor four times:
1. A one-day suspension issued on October 10, 2013, for inappropriate customer interaction during a telephone call.
 2. A five-day suspension issued on October 15, 2013, for theft of time and breach of trust.
 3. A five-day suspension issued on May 2, 2014, for lateness.

4. The termination of her employment on November 12, 2014, for being five minutes late on November 3, 2014, referred to by the parties and in the arbitrator's decision as the "culminating incident."
- [5] The union filed grievances with respect to each of those four instances of discipline. The grievances were referred to arbitration, and the arbitrator, who provided the hearing and decision before this Court now, was appointed for that purpose. The hearing before the arbitrator took place over 11 days from November of 2015 to February of 2016. Among the evidence heard by the arbitrator was evidence of medical issues affecting the Grievor. The manner in which the arbitrator dealt with that evidence is the most contentious issue on this judicial review. While not the only issue that bears on the reasonableness analysis of the decision, it is arguably the most significant issue that bears on that analysis.
- [6] The grievance for the five-day suspension issued on May 2, 2014, for lateness, was dismissed by the arbitrator at a preliminary date on the basis of timing requirements not having been complied with. With respect to the balance of the complaints, on May 8, 2017, that is 15 months after the completion of the hearing, the arbitrator issued his award as follows:
 1. Dismissing the grievance of October 10, 2013, for inappropriate customer interaction and upholding the one-day suspension;
 2. Dismissing the grievance of October 15, 2013, for theft of time and breach of trust and upholding the five-day suspension;
 3. Allowing the grievance for the termination of the Grievor's employment on November 12, 2014, for her late arrival of five minutes on November 3, 2014.
- [7] In allowing the grievance in item 3 above, the arbitrator quashed the termination, ordered that the Grievor be reinstated with no loss of seniority and substituted for the termination, a three-month suspension. In addition, no compensation was awarded to her for the approximately two and a half years she had been off work as a result of the termination. It is the arbitrator's decision to quash the termination and replace it with a lesser penalty which is the subject of the employer's complaint and of this judicial review.
- [8] The arbitrator accepted, based on the evidence, that the Grievor had disabilities, in particular that she had chronic neck pain, headaches, anxiety and depression. However, he found that the evidence did not establish that her conduct was the result of a disability and that it was therefore non-culpable. He accordingly found that the Grievor's late arrival on November 3, 2014, provided just cause for some discipline. In the words of the written decision, the arbitrator said this:

Turning to the incident leading to her termination, the facts are not materially in dispute in this matter and are supported by documentation in the form of emails. There is no doubt that the Grievor was late reporting to work on November 3, 2013. She confirmed this fact in her 9:24 a.m. email to Huber on the same date. Huber emailed the Grievor at 9:18 a.m. and said she had received a report that the Grievor had arrived 5 minutes late for work and asked the Grievor to

confirm that late arrival. In response, the Grievor wrote: "That is correct unfortunately. Traffic was a biatch!! Thanks for confirming with me. I was going to call it in later. Thank you." I agree with the Employer that this incident constituted just cause for discipline.

[9] Although the arbitrator found that proof of a causal connection between the Grievor's disabilities and the workplace was not established on a balance of probabilities, he nevertheless concluded that it may be possible that the Grievor's disabilities caused her to be late. He reached this conclusion based on a statement made by the Grievor's doctor in a November 17, 2013 letter to the employer's health services department, to the effect that she was not in a position to comment on the correlation between the Grievor's health conditions and the workplace because she was "not aware of the nature of timing of these workplace events with respect to the Grievor's symptoms."

[10] In the words of the decision, the arbitrator says this:

I turn now to what I view as the primary consideration that mitigates in the Grievor's favour. I am satisfied that if Telus Health had taken appropriate steps to communicate more fully with Dr. Pfefferkorn, then the events that followed may have been significantly altered for both the Grievor and the Employer. I agree with the Union that the Employer, through the vehicle of Telus Health, failed in its procedural duty to inquire in that regard prior to determining that termination was appropriate. I do not agree that in the circumstances of this case, that vitiates the imposition of discipline, rather, as was canvassed by both parties in their arguments, I view it as a mitigating factor regardless of the outcome of those further inquiries. There is, in my view, a reasonable probability that the circumstances that evolved leading up to her termination may not have been the same. In other words, if Telus Health had fulfilled its obligations, the termination may not have occurred or, at least would have been handled differently as would the conduct of the Grievor.

[11] The arbitrator found that the health services department did not follow up with the Grievor's doctor to provide information about the timing and nature of the workplace events "leaving Telus without a proper basis to determine whether the behaviour was culpable or not.":

In my view, by November 3, 2014, the time of the culminating incident, the knowledge in the possession of Agosti should, at the very least, have translated into further communication with Dr. Pfefferkorn as to whether a causal link existed, in whole or in part, between the Grievor's disabilities and her lateness.

Specifically, Dr. Pfefferkorn wrote to Telus Health on November 17, 2013, she indicated that she did not have enough information about the workplace issues to determine whether they were correlated, she wrote: "... as I am not aware of the nature or timing of these workplace events with respect to [the Grievor's] symptoms". Agosti did not respond to Dr. Pfefferkorn and provide the information that Dr. Pfefferkorn sought; information that would have placed Dr. Pfefferkorn in a better position to advise Telus if there was a medical correlation between the workplace issues and the Grievor's medical conditions. Instead, Agosti did not take the appropriate steps with the information in his possession. He failed to respond to Dr. Pfefferkorn's request for additional

information as to the timing and nature of the workplace events; leaving Telus without a proper basis to determine whether the behaviour was culpable or not.

[12] The arbitrator concluded that line of analysis with the following:

Whether or not a mental health issue could be linked to an alleged misconduct "conclusively and directly", it remained a relevant factor in the labour relations analysis as to what factors may possibly have contributed to the events in question; and a factor that should have been considered by an employer as part of the mosaic of events as a possible explanation for actions on the part of the Grievor [See: Skirzyk]. Agosti's failure to alert the decision makers to the Grievor's mental health issues meant that the mitigating nature of them was not considered by Telus in reaching its decision that the Grievor's employment should be terminated. This failure is a significant mitigating factor that it affects the ability of Telus to demonstrate that the Grievor's termination should be upheld. All reasonable inquiries were not taken by Telus prior to reaching its decision to dismiss the Grievor.

[13] After considering both mitigating and aggravating factors the arbitrator determined that in the unique circumstances of this case termination was excessive and ordered that a three-month suspension be substituted. In the words of the decision:

Taking all of these factors into consideration I have concluded following a consideration of all of the circumstances that the termination was an excessive response. This conclusion is based on the mitigating factor that by this point in time, Telus Health knew of the existence of the Grievor's anxiety and depression, and was I aware of the discipline being issued to her. In my view, Telus Health had a duty to inquire further and to provide Dr. Pfefferkorn with the additional information she had requested so that Dr. Pfefferkorn could determine whether a causal link existed between the Grievor's disabilities and her misconduct.

[14] The Grievor argues that the arbitrator used the correct analysis relying on the generally accepted three William Scott questions as set out in the commonly referred to William Scott & Co. v. Canada Food & Allied Workers Union, Local P-162 (1977), 1 C.L.R.B.R. 1 (B.C.L.R.B.). The Grievor argues that the arbitrator applied that test correctly, applied the evidence to the three questions and arrived at a reasonable conclusion in the final result.

[15] The employer disagrees and argues a number of mistakes were made during the analysis of the evidence and the application of the William Scott test, leading ultimately to an unreasonable decision. The employer emphasizes that the arbitrator concluded that the Grievor was not reliable in her evidence and where there was a conflict of the viva voce evidence, he preferred the evidence of the employer's witnesses. This conclusion alone should have had a greater impact on the ultimate decision, the employer argues.

[16] He acknowledged that the Grievor had disabilities with chronic neck pain, headaches, anxiety and depression, but concluded that the evidence did not establish that the Grievor's conduct was non-culpable or that her conduct was the result of the disabilities and therefore her misconduct, the arbitrator decided, gave Telus just cause to impose disciplinary matters.

[17] Further he found that the Grievor's doctor's testimony and the medical evidence did not establish a causal link between the Grievor's disability and her misconduct. In the words of the decision he said this:

That leaves to be considered under this heading whether Dr. Pfefferkorn's indication that she would "speculate" the mental health issues had existed for "at least two years" is evidence of causality. I have concluded that it is not. In my opinion, the most reasonable interpretation of the 'speculate' comment is that the Doctor was expressing more of a general theory than an actual opinion. My conclusion in that regard flows from and is reinforced by Dr. Pfefferkorn's earlier statement that she was "not in a position to comment" on the correlation between XY's health conditions and the workplace. Unfortunately, this compounds the significance of the Employer's failure to follow up in regards to Dr. Pfefferkorn's letter.

As a result, while the Union has established that the Grievor suffered from chronic neck pain and headaches, and led uncontested evidence of Dr. Pfefferkorn's diagnosis of anxiety and depression there is no medical evidence that establishes a causal link between any of the Grievor's disabilities and her misconduct, namely: Her interaction with Jim Q (that led to the one-day suspension), her actions in changing her start time (that led to the five-day suspension) or her ongoing late arrivals at work.

While it may be possible that chronic neck pain and headaches or anxiety or depression caused her to be delayed in leaving the house in the morning, that conclusion has not been established on the balance of probabilities nor is it supported by the Grievor's own evidence that her late arrivals were caused by very specific delays in traffic and transit. On the evidence a reasonable conclusion would be that the Grievor had a chronic problem getting to work on time for a variety of reasons involving traffic and transit. Another possible source of the late arrivals and returns from breaks was the personal issues she was undergoing with her boyfriend by this time. However, the evidence establishes that she had been warned, counselled and progressively disciplined for lateness. [See: Pinette, Ball, Chatham]

These unique circumstances where the Grievor is advising her Manager in a credible manner, that the reasons for her lateness were traffic and transit, and promising to take specific corrective action, distinguish this matter from situations where an employee has brought their disability to the attention of an employer and created an obligation on the Manager to make inquiries. [See: Meorin] An employee must know, or ought reasonably to know that an employee suffers from a disability before the duty to accommodate will arise. [See: MacKenzie] In other words, if the Grievor had raised the issue, if there were reasons to suspect causation, or if there were enough information such as tell-tale signs that the Managers should have recognized, then they had a duty to inquire further. [See: MacKenzie, Fendick]. However, I accept that there were not.

- [18] Having determined that the Grievor was not credible and that there was no causal link between the disabilities and the culpable conduct, the arbitrator then erroneously proceeded to do the following. In conducting the William Scott analysis he considered those same disabilities that he had determined had no proven causal nexus with her conduct as mitigating circumstances leading to a reduced penalty. The employer argues not only is that unreasonable, it is also wrong.
- [19] The arbitrator also, the employer argues, unreasonably concluded that the doctor's letter referred to in one of the prior quotations was a request for further information; whereas, the employer argues, a plain reading of that letter does not lead to that conclusion. That difficulty with the arbitrator's decision is bound up with the arbitrator's error of distorting the extent of and circumstances in which an employer has a duty to inquire. In determining that Telus had a duty to inquire of the Grievor's doctor about more detail concerning her disabilities, something that again is referred to in some of the quotations previously read, he thereby erroneously reversed the burden of proof.
- [20] Further, with respect to the issue of there not being a causal nexus, the employer argues that not only was the decision unreasonable, it is wrong in law. In that regard I am referred to the case of *Canada Safeway Ltd. v. R.W.D.S.U. (MacNeil) (Re)* [1999] 82 L.A.C. (4th) [Canada Safeway] at page 1, reversed on other grounds at 2000 SKCA 119. This case suggests that there should be a four-part test in cases of this sort, in place of the William Scott test, which has historically been the one that is relied upon, and that this four-part test should be applied where a Grievor challenges termination for culpable conduct on the basis of illness as a mitigating factor.
- [21] Part two of that test, the case notes, is that "there must be a linkage or nexus between the illness or condition and the culpable conduct." This is not a factor to be considered, at least not one of the stated factors to be considered, in the three-question William Scott analysis. The employer points out that the Canada Safeway case has been followed, at least once and perhaps several times, at the arbitration level in various jurisdictions. The Grievor responds that the Canada Safeway case is actually an outlier, that it is rarely relied on and that the William Scott test remains the law or at least the prevailing go-to approach commonly followed in this jurisdiction.
- [22] The employer also argues that the arbitrator unreasonably failed to address the issue of the Grievor's long standing tardiness problem and the issue of whether there was a reasonable possibility of her being rehabilitated in that regard. The evidence, which is found in the decision which points to that issue, includes the following:
1. Her tardiness continuing despite several incidences along the way of progressive discipline;
 2. Her tardiness continuing after there had been an earlier sickness disability leave taken and despite, after that leave, her being cleared to return to work with no restrictions, limitations or accommodations;

3. Her dishonesty, which is referred to in the decision, relating to events material to some of the discipline;
4. Her lack of sincere apology and/or remorse referred to in the decision;
5. Her negative comments about Telus that had been made to a customer; and
6. Her texting to Telus employees during the hearing itself alleging that managers had taken the witness stand and lied. This was during her cross-examination after she had been warned not to discuss the evidence with anyone.

[23] The employer argues none of that was addressed, in the context of whether there was a reasonable possibility of rehabilitation in the decision.

[24] The employer concludes as a result that all of the foregoing taken together can lead to only one conclusion, and that is that the arbitrator's decision was unreasonable.

[25] I do not agree with that characterization of the decision. I do agree that if the arbitrator had chosen to follow the reasoning suggested by the employer and arrived at the decision suggested by the employer it would have been one of the possible reasonable alternative decisions that flow from all of the foregoing circumstances and I would not have interfered with it. However, I am satisfied that the analytical path and the decision that it led to, that the arbitrator chose, was also reasonable. Some arbitrators or judges with the precise same evidence before them may well have come to a different conclusion, but in this particular case that does not make the path that was chosen unreasonable. I am satisfied that it was one of the reasonable options available to the arbitrator that flows from the evidence.

[26] In my view the standard of review that I am bound by leaves me with no option to allow the application, and therefore I must dismiss it. I do so. The application is dismissed.

"Silverman, J."

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