

Termination The Only Acceptable Outcome For Employee Who Calls In Sick In Order To Play Baseball



In reasons released June 19, 2014, the Alberta Court of Appeal upheld a lower Court decision quashing labour arbitration award (*Telus Communications Inc v Telecommunications Workers Union*, 2014 ABCA 199). The case involved an employee of TELUS Communications Inc. who had requested a day off work to play in a softball tournament (which was denied) only to call in sick on the day in question. Suspicious that he was not actually sick, the Grievor's manager had attended the ball diamonds where he witnessed the Grievor playing baseball. When confronted, the Grievor stated that he was suffering from a severe case of diarrhea on the day in question and was not playing baseball. The Grievor later admitted to being at the baseball diamonds when confronted with the fact that someone had seen him there; however he stated that he was only watching. The Grievor subsequently admitted to playing, but minimized his involvement on the basis that he was "only pitching". TELUS terminated the Grievor for cause.

The Arbitrator reinstated the Grievor and substituted a one-month suspension for termination. According to the Arbitrator, TELUS had no direct evidence that the Grievor was not sick as he claimed and that his explanation regarding his absence was "plausible".

TELUS sought judicial review of the Arbitrator's award. It argued that the Arbitrator had failed to consider the overall weight of its circumstantial evidence, which pointed, irrefutably to the fact that the Grievor had lied about being sick. It also argued that the Arbitrator's award suggested an employee could be too sick to work yet sufficiently well to play baseball, and unreasonable interpretation of the sick leave provisions contained in the party's collective agreement. TELUS argued that termination was the only reasonable outcome on the evidence and, as such, the Arbitrator's award should be quashed without remitting the matter for rehearing.

The Alberta Court of Appeal determined that the Arbitrator had acted unreasonably in requiring TELUS to lead direct evidence establishing that the Grievor was not sick, an impossible standard. The Arbitrator was required to weigh the circumstantial evidence against the Grievor's testimony in order to determine whether the Grievor had lied about being sick. As the overwhelming weight of the evidence pointed to the fact that the Grievor had lied about being sick, the Arbitrator's conclusion otherwise was unreasonable. Having quashed the award, the Court declined to remit the

matter back to Arbitrator for hearing. The only reasonable inference to be drawn on the evidence was that the Grievor had lied about being sick, then repeatedly lied to his employer after the fact, and at Arbitration. The Court concluded that termination was the only reasonable outcome on the evidence and that remitting the matter to arbitration would be pointless.

In issuing its judgment, the Court was cognizant of the fact that Labour Arbitrators are entitled to considerable deference. However, the Court noted its oversight rule to protect litigants and administrative schemes from unreasonable decisions. The chambers judge's decision to uphold termination was "consistent with existing case law, public policy, and a supervisory role of Courts in the administrative process" (at para. 39).

The Court's decision suggests that, while very broad, an Arbitrator's discretion is not limitless. The reinstatement of an employee who lied about being sick in order to play baseball and lied about it again when confronted, and then lied at Arbitration was simply a bridge too far. Employers require the ability to discipline employees for flagrant abuses of sick leave in order to effectively manage their workplaces. The Courts maintain an oversight rule where administrative bodies fail to consider the most relevant circumstances and unreasonably interfere with these rights.

Bennett Jones LLP was counsel to TELUS before the Court of Appeal and in the proceedings below.

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