IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *IAMAW District Lodge 140 v. Air Canada,* 2017 BCSC 1060

Date: 20170623
Docket: S168678
Registry: Vancouver

Between:

IAMAW District Lodge 140

Petitioner

And

Air Canada

Respondent

Before: The Honourable Mr. Justice Davies

On judicial review from: An order of the Arbitrator, dated April 21, 2016.

Reasons for Judgment

Counsel for the Petitioner:	K. Ho I. Hosseini, Articling Student
Counsel for Respondent:	D. McDonald J. Gant
Place and Date of Trial/Hearing:	Vancouver, B.C. March 29, 2017
Place and Date of Judgment:	Vancouver, B.C. June 23, 2017

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I. INTRODUCTION

[1] What are discarded nuts and hand lotion left behind by a first class passenger on an Air Canada flight worth?

[2] For Neena Cheema, an employee with Air Canada, they were worth the job she had worked at for 17 years.

[3] That is because Ms. Cheema's employment was summarily terminated by Air Canada for the theft of the nuts and lotion and the grievance of her dismissal was upheld by an Arbitrator.

[4] The petitioner, IAMAW District Lodge 140, (the Union) now applies to have that decision set aside.

II. BACKGROUND

[5] On February 10, 2016, Ms. Cheema was employed by Air Canada as a Cabin Service and Cleaning Attendant based at the Vancouver International Airport (YVR). As such, she was a member of the Union.

[6] While cleaning the first class section of an Air Canada aircraft after its arrival at YVR, Ms. Cheema found and picked up four unopened packages of almonds and a tube of unused hand lotion that had been left behind by a passenger. She put them in her jacket pocket but did not, as she said she had intended to do, later put them on the galley counter so that catering could determine if the discarded items could be re-used.

[7] When she left the plane for her next assignment the nuts and lotion were still in her jacket pocket. Her evidence adduced before the Arbitrator was that the cleaning job was rushed, she was focussed upon completing it and forgot that the items were still in her pocket.

[8] Her evidence was also that the next flight she was assigned to clean was near Air Canada's Human Resources office. She asked her supervisor if she could

run into that office to inquire about her vacation dates. She was told she could do so but had to be back in five minutes.

[9] Before the Arbitrator, Ms. Cheema's evidence and that of Ms. Hance the Human Resources member with whom she spoke was in conflict.

[10] In his decision upholding the termination of her employment the Arbitrator recorded the following with respect to Ms. Cheema's evidence:

> The Grievor's evidence is that she had put the items in question in her pocket which she found in the seat pockets while cleaning the first class section of a plane and then forgot to put them in the garbage as she left. She also indicated she was in a rush to see Ms. Hance between her assignments. Then when meeting with Ms. Hance and after asking her once again if her vacation bid could be changed, Ms. Cheema reached into her pocket to see what time it was and discovered the items were there. She stated she then placed those items on Ms. Hance's desk and stated "Here are some nuts and lotion for you". Ms. Cheema does not remember saying the second part of the sentence identified by Ms. Hance

[11] The second part of the sentence identified by Ms. Hance was that Ms. Cheema said: "Here are some nuts and lotion for you - I appreciate any help you can do".

[12] After Ms. Cheema left her office, Ms. Hance went to Mr. Greg Daniels, Air Canada's Richmond Customer Service Manager, reported what had occurred and gave him the nuts and lotion.

[13] Later that day Mr. Daniels called Ms. Cheema to an investigation hearing. Her Union shop steward, Mr. Rod Ramsay attended with her.

[14] After that meeting Ms. Cheema's employment was suspended.

[15] On February 15, 2016, Mr. Daniels wrote a "Letter of Discipline" which stated:

> On February 10, 2016 at approximately 12:45 p.m. you came to the Resource office to speak with Melissa Hance, Resource Coordinator. At the beginning of your conversation you gave Mrs. Hance, 4 packages of almonds and a sealed package of toiletries from a J class amenity kit.
>
> During the interview that was conducted you admitted the following:
>
> 1. These items were taken off an aircraft

2. These items were not your personal properly
3. These items belong to Air Canada
4. You believed that it isn't wrong to take things that don't belong to you
5. That you regularly take things off the aircraft. In fact you had a tube of lotion taken from the aircraft on your person which you showed to all present in the meeting.
6. In a statement made prior to leaving the interview "you didn't mean to steal"

During the investigation hearing you failed to provide a satisfactory explanation for your conduct. Such events cannot be tolerated. The Air Canada Code of Conduct states: Unauthorized possessions or removal of Company property, funds or records is strictly prohibited. For example, unauthorized possession or removal of the following Company property is prohibited:

- Cargo
- Computer equipment and/or software
- Supplies from flights (including surplus), commissaries, stores, aircraft or offices

Furthermore, the Air Canada Employee Code of Conduct states:

d. Theft is the unauthorized possession of property, funds, or records, including but not limited to the following:

i. Unauthorized possession or removal of company property, funds, or records including but not limited to cargo, computer equipment and/or software, supplies (including waste and surplus) from flights, commissaries, stores aircraft or offices.

Having considered all the facts in this matter, including your service with Air Canada and your overall record, it is the Company's decision to issue you a Step V - Suspension pending discharge.

[16] On February 16, 2016, the Union filed a grievance on Ms. Cheema's behalf.

III. THE GRIEVANCE PROCESS

[17] Air Canada and the Union operate under a collective agreement which contains an expedited arbitration policy that has been in place since June of 1995.

[18] That expedited arbitration policy is governed by a Memorandum of Agreement that forms part of the collective agreement.

[19] That Memorandum of Agreement and the practises of the parties under it includes the following salient features:

1) Section 21 of the Memorandum of Agreement requires the parties to "each prepare a brief which will include their version of the relevant facts, the argument(s) in support of their positions and the documents to be relied upon at the hearing."

2) Section 24 of the Memorandum of Agreement provides:

> Unless otherwise agreed, evidence-in-chief will be by way of will-say statements. Cross-examination, re-direct and reply evidence shall proceed in the usual manner. In order for their evidence to be admitted, will-say statement authors shall be required to attend the hearing unless otherwise agreed.

3) The parties' practice is to include will-say statements in their respective briefs, and for a Letter of Discipline included in a brief to be treated as the will-say statement of the author.

4) Section 26 of the Memorandum of Agreement obligates the single arbitrator to render a "brief written decision within thirty (30) days of a hearing."

[20] It is not contested that the following processes were followed and the following evidence was adduced before the Arbitrator:

1) Neither party objected to the grievance proceeding pursuant to the expedited arbitration process.

2) In advance of the arbitration of the grievance, the parties exchanged briefs.

3) Air Canada's brief included: a witness statement from Ms. Hance; a witness statement from Mr. Kang (who witnessed the exchange between Mr. Cheema and Ms. Hance); and, the Letter of Discipline.

4) The Union's brief included: Mr. Ramsey's notes from the February 10, 2016, meeting notes with Ms. Cheema and Mr. Daniels; and, a witness statement from Ms. Cheema.

5) The Arbitrator received a copy of the parties' briefs prior to the arbitration hearing.

6) At the Arbitration hearing on April 12, 2016:

(a) The Union provided the Arbitrator with a written statement by Ms. Cheema, which was not included in the Union's brief;

(b) Ms. Cheema, Mr. Hance and Mr. Kang were examined and cross-examined;

(c) Mr. Daniels was not examined or cross-examined; and

(d) The Union did not object to the admissibility of the Letter of Discipline and did not argue that the Letter of Discipline was hearsay evidence.

[21] Air Canada's policy on "Bribery, Kickbacks and Fraud" policy states:

> No funds or assets of the Company shall be paid, loaned or otherwise disbursed as bribes, "kickbacks", or other payments designed to influence or compromise the conduct of the recipient. Employees shall not accept any funds or other assets for assisting in doing business with the Company.

[22] On April 26, 2016, the Arbitrator issued a written ruling (the "Award") dismissing the grievance.

IV. THE ARBITRATOR'S AWARD

[23] In the Award, after recording the contents of Mr. Daniels' Letter of Discipline the Arbitrator wrote:

> Ms. Cheema's comments are reflected in the termination letter set out above. Rod Ramsay's (Union representative) notes were also placed into evidence. They indicate that Ms. Cheema stated the items belonged to no one as "it is garbage". She is recorded as having also stated when asked if she thought this was theft that "Sony, but I find them on floor and in pockets". The notes also indicate that Ms. Cheema also stated that when she discovered the items in her pocket, "I took these items out of my pocket and placed them on Melissa's desk".

[24] The Arbitrator resolved issues of credibility against Ms. Cheema. In doing so he quoted the following passage from the oft-cited decision of the British Columbia Court of Appeal in *Faryna v. Chorney*, [1952] 2 D.L.R. 354:

> If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility ... A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.
>
> The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions

[25] The Arbitrator then wrote:

> Applying that approach in the present circumstances, there are a number of problems with Ms. Cheema's version of events and why they are not in "harmony with the preponderance of probabilities".
>
> First, it is not clear why Ms. Cheema would have put the items in her pocket in the first place as garbage is normally placed directly into garbage bags when it is picked up in the cabin. The second difficulty is if this was simply just a mistake on the part of the Grievor, why would she then simply give the items to Ms. Hance without any further explanation. If Ms. Hance is correct about her recall, the explanation is that they were an attempted "bribe" to get her vacation schedule changed. However, even if the Grievor is to be believed and all she said was that "these are for you", why would she make that statement if she thought the items were truly "garbage". It is important to consider that Ms. Cheema did not say that she had forgotten about the items in her pocket and ask Ms. Hance to put them in the garbage for her.
>
> At the investigation meeting, her responses as recorded by Mr. Daniels are very self-incriminating and disturbing. Once again, the notes indicate she stated:
>
> 1. These items were taken off an aircraft

2. These items were not your personal property
3. These items belong to Air Canada
4. You believed that it isn't wrong to take things that don't belong to you
5. That you regularly take things off the aircraft. In fact you had a tube of lotion taken from the aircraft on your person which you showed to all present in the meeting.
6. In a statement made prior to leaving the interview "you didn't mean to steal"

> Certainly, at least to some degree, many of these statements are confirmed in the notes taken by Mr. Ramsay. In any event, at the meeting Ms. Cheema never gave a full and satisfactory explanation as to what had happened but simply seemed to be avoiding dealing with the issue.
>
> Finally, at the hearing itself Ms. Cheema appeared evasive. She certainly had no explanation for why she said what she did (her own version) to Ms. Hance nor why she did not fully explain to Ms. Hance what had happened and why she was giving her garbage.

[26] The Arbitrator then concluded:

> In sum, the evidence of Ms. Cheema is not accepted. It is concluded that she stole the material from the plane and then subsequently decided to use it in an attempt to influence Ms. Hance. Further, she was not forthright in her interview with the Company on February 10 nor in her responses at the hearing.
>
> As a result, it is concluded that the Grievor provided the Company with just cause for discipline and that termination was not an excessive response in all the circumstances.
>
> For the above reasons, this grievance is dismissed.

[27] In dismissing the grievance the Arbitrator did not address with any specificity whether Ms. Cheema's dismissal was for just cause because of: the "theft" of the nuts and lotion; her "attempt to influence" Ms. Hance with those items; not being forthright in the investigation, the hearing, or both; or some combination of all of those factors.

V. ANALYSIS AND DISCUSSION

[28] The Union's application to have the Arbitrator's Award set aside is brought pursuant to the provisions of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.

[29] In determining that application I will first address the standard of review to be applied in the circumstances of this case. I will then consider the merits of the application with respect to the two aspects of the Award (just cause and punishment) engaged by the application.

1) The Standard of Review

[30] It is not contested that the judicial review of an award of an arbitrator appointed under the *Canada Labour Code*, R.S.C. 1985, c. L-2; the collective agreement between the parties; and the Memorandum of Agreement under which Ms. Cheema's grievance was heard, is the reasonableness standard.

[31] In *Dunsmuir v. New Brunswick*, 2008 SCC 9 [*Dunsmuir*] the Supreme of Canada articulated the reasonableness standard in the following terms at para. 47:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[32] The Union submitted that both as to just cause and penalty the Award was unreasonable when measured against that standard.

2) Were the Arbitrator's conclusions that Ms. Cheema committed "theft" and "bribery" reasonable?

[33] The Union submitted that the Arbitrator failed to articulate the test or burden for proving that Ms. Cheema committed either theft or bribery and failed to provide evidentiary justification for his conclusions other than his adverse findings of credibility concerning Ms. Cheema's evidence.

[34] The Union also argued that the Arbitrator improperly bolstered his credibility determination by relying heavily upon the contents of Mr. Daniels' Letter of Discipline and statements in it attributing to Ms. Cheema the statements that she "regularly takes things off the plane" and that "she believes that it isn't wrong to take things that don't belong to her".

[35] The Union says that evidence should have been discounted because it is self-serving as a justification for termination, provided no context for Ms. Cheema's alleged statements and was contradicted by Ms. Cheema's evidence at the hearing

[36] The Union also submitted that the Arbitrator erroneously moved from adverse findings of credibility to proof of "theft" without any consideration of the constituent elements of that delict including:

1) whether Air Canada retained any interest in property which it had given to passengers;

2) whether the nuts and lotion became "garbage" when discarded by a passenger;

3) whether the evidence established that Ms. Cheema had the requisite intent for theft given that:

    a) she gave the nuts and lotion to a manager with power to discipline her;

    b) did so in front of another employee; and

    c) when asked during the investigation by Mr. Daniels whether she had taken the nuts and lotions admitted doing so but stated: "Sorry if this is wrong".

[37] Concerning the allegations of bribery upon which Air Canada relied in terminating Ms. Cheema's employment, the Union submitted that given: the openness of Ms. Cheema's gesture; no analysis by the Arbitrator as to whether the

nuts and lotion were “assets of the company”; and, the nominal value of the nuts and lotion as an agent of influence the Arbitrator’s conclusion that Ms. Cheema had tried to “bribe” Ms. Hance was wholly unreasonable.

[38] In response to the Union’s submissions Air Canada submits that, in essence, the Union seeks to have me review the wisdom of the Arbitrator’s decision, re-weigh the evidence and question the Arbitrator’s findings of credibility in order to substitute my views for those of the Arbitrator.

[39] Air Canada also adverts to the expedited nature of the arbitration process, the rules of procedure and evidence adopted by the parties under the Memorandum of Agreement and in practise and submits that the Union now seeks to impose evidentiary standards upon the hearing process that were not in place before the Arbitrator that are neither warranted nor appropriate on judicial review.

[40] I am in general agreement with Air Canada’s submissions concerning the extent to which the Union is in some respects asking me to re-weigh evidence and draw inferences from the evidence that were not drawn by the Arbitrator given his adverse conclusions concerning Ms. Cheema’s credibility.

[41] It is not open for me to do that on a judicial review application. This Court’s role on judicial review is not to substitute its view of the merits for that of the Arbitrator. It is limited to determining whether the Arbitrator reached a decision that falls within a range of possible acceptable outcomes and provided reasons to that effect. See: *Kinexus Bioinformatics Corporation v. Asad,* 2010 BCSC 33 at paras. 12 and 13.

[42] While I would have expected a more complete explanation as to why the Arbitrator concluded how Ms. Cheema committed theft of Air Canada’s property when the subject matter under consideration could had readily have been determined to be discarded “garbage” I cannot say that his conclusion was not within a range of possible outcomes.

[43] Accordingly, while I have grave doubts as to whether the Arbitrator's decision on the theft issue was correct that is not the applicable standard of review by which to assess reasonableness.

[44] That is particularly so given the Arbitrator's adverse findings of credibility and the existence of the Air Canada policy that referred to theft as including "removal of supplies (including waste and surplus) from flights".

[45] I also cannot conclude that, given his credibility assessment in accepting Ms. Hance's evidence over that of Ms. Cheema, the Arbitrator's decision that Ms. Cheema had breached Air Canada's "bribery" policy was unreasonable.

[46] While it is difficult to accept that the giving of items of so little value was intended by Ms. Cheema to influence or compromise Ms. Hance's conduct in relation to her vacation, especially when done so openly, it is not open to me to substitute my opinion for that of the Arbitrator on an issue within his jurisdiction.

[47] I am accordingly satisfied that the Union has not established that the Arbitrator's decision that Ms. Cheema committed theft and bribery should be set aside.

3) Was the Arbitrator's conclusions that Air Canada was entitled to terminate Ms. Cheema's employment reasonable?

[48] The only reference in the Arbitrator's Award concerning the appropriate penalty to be imposed upon Ms. Cheema for her misconduct is his conclusion that:

> As a result, it is concluded that the Grievor provided the Company with just cause for discipline and that termination was not an excessive response in all the circumstances.

[49] The Union submits that the Arbitrator was required to consider whether disciplinary action of termination that was imposed upon Ms. Cheema was appropriate given that her misconduct was in the *de minimis* range and that his failure to do so renders his decision unreasonable.

[50] The Union further submits that the conclusory reasons of the Arbitrator fail to meet the standard of reasonableness enunciated in *Dunsmuir* by failing to articulate why termination of employment for a 17 year employee for such minor misconduct with only one previous entirely unrelated Stage II Letter of Discipline was not excessive.

[51] In response, Air Canada submits that read as a whole, including the Arbitrator's adverse findings of credibility both in the investigative process and at the hearing, the Arbitrator's conclusion was reasonable.

[52] Air Canada further submits that given the expedited nature of the agreed upon arbitration process and the requirement for the Arbitrator to give "brief" written reasons the Arbitrator's reasons sufficiently meet the test of reasonableness.

[53] I do not agree with Air Canada's submissions.

[54] In my opinion the expedited process engaged by the parties does not preclude or lessen the requirement of the Arbitrator to articulate why a specific penalty is appropriate with respect to the specific employee and the specific misconduct. While those reasons may be briefly stated the acceptance of an expedited process does not preclude or diminish the need for justification, transparency or intelligibility.

[55] In *Wm. Scott & Co, (Re)*, [1976] B.C.L.R.B.D. No. 98, [*Wm. Scott*] the British Columbia Labour Relations Board considered in detail the approach that should be taken by arbitrators in assessing whether termination of employment is the appropriate remedy for employer misconduct, In doing, so the Board stated at para. 13:

> … arbitrators should pose three distinct questions in the typical discharge grievance. First, has the employee given just and reasonable cause for some form of discipline by the employer? If so, <u>was the employer's decision to dismiss the employee an excessive response in all of the circumstances of the case? Finally, if the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?</u>
>
> [My emphasis.]

[56] To similar effect is the decision of the Supreme Court of Canada in *McKinley v. BC Tel*, 2001 SCC 38 [*McKinley*] in which the Court stated at paras. 48 and 49:

> 48 … I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.
>
> 49 In accordance with this test, a trial judge must instruct the jury to determine: (1) whether the evidence established the employee's deceitful conduct on a balance of probabilities; and (2) if so, whether the nature and degree of the dishonesty warranted dismissal. In my view, the second branch of this test does not blend questions of fact and law. Rather, assessing the seriousness of the misconduct requires the facts established at trial to be carefully considered and balanced. As such, it is a factual inquiry for the jury to undertake.
>
> [My emphasis.]

[57] The Court went on to discuss the concept of proportionality in assessing the impact of dishonesty upon the employment relationship at para. 53 in the following terms:

> 53 … An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed. The importance of this balance is better understood by considering the sense of identity and self-worth individuals frequently derive from their employment … [My emphasis.]

[58] After then considering the importance of work as a fundamental aspect of person's lives and well-being as well as the "power imbalance ingrained in most facets of the employment relationship" the Court in *McKinley* reached the conclusions at paras. 55 and 56 that:

> 55 In light of these considerations, I have serious difficulty with the absolute, unqualified rule that the Court of Appeal endorsed in this case. Pursuant to its reasoning, an employer would be entitled to dismiss an employee for just cause for a single act of dishonesty, however minor. As a result, the consequences of dishonesty would remain the same, irrespective of whether the impugned behaviour was sufficiently egregious to violate or undermine the obligations and faith inherent to the employment relationship.

> 56 Such an approach could foster results that are both unreasonable and unjust. Absent an analysis of the surrounding circumstances of the alleged misconduct, its level of seriousness, and the extent to which it impacted upon the employment relationship, dismissal on a ground as morally disreputable as "dishonesty" might well have an overly harsh and far-reaching impact for employees. In addition, allowing termination for cause wherever an employee's conduct can be labelled "dishonest" would further unjustly augment the power employers wield within the employment relationship.
>
> [My emphasis.]

[59] In finding that termination of Ms. Cheema's employment was not excessive the Arbitrator failed to address the many salient factors that both *Wm. Scott* and *McKinley* recognize as fundamental to the determination of the appropriate remedy for an employee's misconduct.

[60] Those factors included no analysis of such basic proportionality questions as:

1) why Ms. Cheema's actions in taking discarded supplies or using them in open dealings with Ms. Hance were so sufficiently serious or so detrimental to the employment relationship that they warranted the termination of her employment; and

2) why some lesser penalty would not appropriately address her misconduct, especially in light of her 17 years of service to Air Canada.

[61] I am satisfied that the Arbitrator's conclusory reasons that the "termination was not an excessive response in all of the circumstances" are not transparent and do not allow Ms. Cheema to know why the termination of her employment was not excessive.

[62] As such, on the issue of penalty, the Arbitrator's reasons fail the test of reasonableness.

VI. DISPOSITION

[63] The Union's application to set aside the Award on the issue of cause for dismissal is dismissed.

[64] The Union's application to set aside the Award on the issue of the penalty for dismissal is allowed.

[65] Determination of the appropriate penalty for Ms. Cheema's misconduct will be re-submitted to arbitration for determination. That determination must have specific regard to the principle of proportionality and the need to provide transparent reasons.

"The Honourable Mr. Justice Davies"