

Arbitrator upholds termination of long-service employee with a clean disciplinary record

Will lengthy service and a clean disciplinary record of an employee dismissed for dishonest conduct lead to the employee's reinstatement at arbitration? In *La Cité Collégiale v. OPSEU, Local 471* (March 29, 2007), a case argued by André Champagne and Sébastien Huard of our office, Ontario arbitrator Kathleen O'Neil has held that the answer is "no".

The grievor in the case had 16 years of service and was responsible for finding employment with local businesses for young francophones as part of a provincial government program administered by the employer. Participation in the program was based on criteria established by the Ministry of Training, Colleges and Universities.

The grievor was dismissed after her files were audited while she was on sick leave. The audit occurred after her colleagues noticed discrepancies in her files. The auditors found that, among other things, the grievor had been:

- filling out the participants' application forms, including participant satisfaction surveys;
- falsifying participants' information, such as francophone status, receipt of social assistance and employment status;
- giving herself the maximum score on satisfaction surveys;
- falsifying her log book;
- processing individuals for "fast-track" admission to the program on a regular basis;
- admitting participants to the program who were, at the time of their meeting with the grievor, already working at participating employers' premises; and
- providing job subsidies without properly verifying the participants' eligibility for the program.

IRREPARABLE DAMAGE TO EMPLOYMENT RELATIONSHIP

The College considered the employment relationship to have been irreparably damaged by the grievor. It viewed the grievor's conduct as fundamentally dishonest: she had falsified participants' information and authorized unjustifiable subsidies by registering non-French speaking participants in the program and registering individuals who were already employed by the participating employers. This dishonesty was compounded by the fact that the discrepancies introduced into the files were very hard to detect.

The grievor's position was one that conferred considerable discretion with respect to the disbursement of public funds and therefore demanded the utmost honesty. As the grievor had flagrantly disregarded her obligations in administering public funds, the College asserted that neither the employer nor taxpayers should run the risk of repeat behaviour.

GRIEVANCE DISMISSED

The arbitrator dismissed the grievance. In determining whether to substitute a lesser penalty for dismissal, the arbitrator considered whether:

- there had been *bona fide* confusion or mistake by the grievor as to whether she was entitled to act in the way she had;
- the grievor had been incapable, due to drunkenness or emotional problems, to appreciate the wrongfulness of her acts;
- her actions had been impulsive or non-premeditated;
- the harm done had been relatively trivial in nature;
- the grievor had made a frank acknowledgement of her misconduct;
- there was a sympathetic, personal motive for dishonesty, such as family need rather than hardened criminality;
- the past record of the grievor mitigated in favour of reinstatement;
- there were future prospects for likely good behaviour; and
- the economic impact of discharge in view of the grievor's age, personal circumstances, etc. would be too severe.

The arbitrator concluded that the grievor had been aware that the money paid to participating employers was for training purposes, that she was responsible for evaluating applicants' eligibility for the program and that her actions had been questionable. The arbitrator admonished the grievor for her failure to explain her actions or appreciate her misconduct, and for her fundamental dishonesty in misrepresenting key information to the College and the Ministry. After drawing a distinction between occasional inconsequential errors that can happen to anyone and frequent and deliberate misrepresentation of information, the arbitrator concluded that the grievor's practices had been very disturbing.

The arbitrator found that the grievor could not possibly have thought that the College or the Ministry would find it acceptable for her to admit participants solely on the basis of employer representations, without speaking to the participants directly. In this respect, the grievor had fundamentally breached her duty as a watchdog over public funds. Further, the grievor's willingness to admit unilingual anglophones to a program intended for francophones was evidence of her disregard for the core requirement and integrity of the program.

DEFENSES AND MITIGATION

The arbitrator rejected the grievor's defense that she had not been adequately supervised and that no one had taken issue with her practices. Given the indiscernible nature of the discrepancies the grievor introduced into her files, one could hardly detect errors without asking the appropriate questions to the grievor, the participants or the participating employers.

As to any mitigating factors, the arbitrator found that while the grievor suffered emotional stress during the period in question, there was no evidence that her ability to appreciate the consequences of her actions was impaired or that her actions were impulsive. On the contrary, her actions had been deliberate and she had gone to some lengths to hide her practices.

Finally, the arbitrator discussed the most important mitigating factors of all: service and disciplinary record. While the grievor's 16 years of service with the College and her unblemished disciplinary record were important, the arbitrator found that these factors did not justify reinstating the grievor, whose dishonesty struck at the heart of the employment relationship. Moreover, the grievor's inability to appreciate the gravity of her actions meant that there was no reasonable prospect of rehabilitation.

Accordingly, the grievance was dismissed.

In Our View

This decision is consistent with the principles established by the Supreme Court of Canada in *McKinley v. BC Tel* (2001). Employee dishonesty is not, in and of itself, cause for dismissal. Rather, in determining whether termination is justified, one has to assess the context of the dishonest conduct to determine whether the employee's dishonesty gives rise to a breakdown in the employment relationship. The arbitrator's decision illustrates that the more serious the dishonest conduct, the more substantial the mitigating factors have to be to warrant the substitution of a lesser penalty than dismissal. The message is that a clear disciplinary record and long service will not always prevent dismissal.

For further information, including a copy of the decision, please contact [André Champagne](#) at (613) 940-2735 or [Sébastien Huard](#) at (613) 940-2744.

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