
“Premeditated and deliberate” use of company internet to run own business costs employee his job

A British Columbia arbitrator has upheld the dismissal of an employee with 15 years' seniority who was caught spending several hours each working day running his own business. The grievor in *Telus Communications Inc. v. Telecommunications Workers Union* (August 26, 2005) was employed as a mailroom manager, but also ran a travel agency business on the side. He made no effort to hide the fact of his personal business at work, soliciting business from co-workers and driving a car which advertised the web address of his business.

One day, however, a company manager who was leading a tour of company facilities by various officials noticed that the grievor appeared to be involved in a phone call related to his personal business. His suspicions aroused, the employer commenced an investigation, which revealed that in a ten-month period, the grievor spent roughly two hours per day on travel-related web sites and other sites unrelated to his employment duties. The investigation also showed that while at work, he made a number of telephone calls and sent e-mails and faxes for matters relating to his travel business.

When interviewed by the employer about conducting his personal business at work, the grievor stated that he did so only during lunch and coffee breaks. The employer placed the grievor on unpaid suspension for a week and conducted a second interview. Believing that the grievor was continuing to understate the extent of his conduct of personal business during work hours, the employer terminated the grievor for theft of company time, misuse of company resources and violation of the corporate ethics policy.

MITIGATING FACTORS FOR DISHONESTY

The union argued that while the grievor's conduct may have merited some discipline, termination was too harsh in the circumstances, and pointed to decisions in which arbitrators had declined to uphold terminations in cases of acknowledged employee dishonesty. The employer responded that while termination is not the inevitable outcome in cases of dishonesty, it is rule rather than the exception. In order to substitute a lesser penalty, the employer argued, there must be extraordinary mitigating factors, none of which were present in this case. These factors are:

- good faith confusion or mistake on the part of the grievor;
- inability of the grievor, due to drunkenness or other problems, to appreciate the wrongfulness of his actions;
- impulsiveness or lack of premeditation by the grievor in committing the act;
- the relatively trivial nature of the harm done;
- frank acknowledgement by the grievor of his misconduct;
- the existence of some sympathetic, understandable motive for the misconduct;
- the past record of the grievor;

- future prospects for the grievor's behaviour; and
- the economic impact of discharge in view of the grievor's age and personal circumstances.

The employer asserted that the only mitigating factor present in this case was the grievor's years of service. Against this was the fact that he had spent some 25 per cent of his working day over a 10-month period working on his personal business, and that he acknowledged his misconduct only when caught, without the necessary degree of frankness or contrition. The employer pointed also to the fact that the grievor failed to be totally forthcoming even at the arbitration hearing, which indicated that the prognosis for restoring the employment relationship was poor.

BALANCE FAVOURS TERMINATION

In dismissing the grievance, the arbitrator noted that the key issue in this case was whether the grievor had been sufficiently frank in his admissions. The arbitrator held that he was not. In the arbitrator's view, the grievor demonstrated that he thought the problem was the degree, not the propriety of his activity. For example, when asked whether he thought his conduct breached the company code of ethics, the grievor responded, "yes, but it can be corrected. I will only do it on my breaks from now on."

Turning to the checklist of mitigating circumstances, the arbitrator held that these did not favour reinstatement. The grievor could not have been mistaken about the fact that company rules forbade running one's own business on company time. Nor were there any emotional factors that caused him to fail to appreciate what he was doing. Rather, he pursued his activities in a manner that was "premeditated and deliberate" and the harm he caused to the company over ten months could not be considered trivial.

Against these were the grievor's years of service and previous commendable record. His wife was dealing with serious health issues at the time, a factor which could only invoke sympathy, but his misconduct pre-dated the onset of her illness. The arbitrator could not find that the grievor's personal concerns fully explained either his conduct or his failure to be frank, although he noted that he might have found in the grievor's favour had he been more forthcoming on some significant aspects of the case during the hearing.

Accordingly, the grievance was dismissed.

In Our View

This award demonstrates the importance arbitrators attach to a grievor's sincere understanding and contrition regarding the dishonest behaviour. Any sign of downplaying or rationalizing the behaviour is likely to be taken as an indicator that the prognosis for an end to the dishonest conduct is poor. As the arbitrator noted, even where frankness and contrition are first displayed at arbitration, this could make the difference in determining whether or not to reinstate the grievor.

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