2018 CarswellOnt 19737
Ontario Arbitration

Air Canada and CUPE (JL), Re

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Air Canada and CUPE, AC Component

William Kaplan Member

Heard: November 14, 2018
Judgment: November 20, 2018
Docket: None given.

Counsel: Jackie VanDerMeulen, for Air Canada
Adrienne Lei, for Union

***William Kaplan Member*:**

Introduction

1 JL, (hereafter "the grievor"), was a Montreal-based Service Director with seven years of service and a ten-day suspension and final warning on his record who was terminated on July 20, 2017. In brief, the employer takes the position that the termination was with just cause. The union disagrees. The matters in dispute proceeded to a hearing in Mississauga on November 14, 2018

Background Facts

2 In October 2016, the grievor, who is also a magician and performer, submitted a proposal to the London, Ontario, Fringe Festival. His proposal was accepted for a series of performances in the spring of 2017, although the grievor testified that, at the time, he did not know the exact dates. In January 2017, the grievor booked a number of standby flights from Montreal to and from Toronto and Hamilton. These dates, more or less, align with the dates of the Fringe Festival, although the grievor testified that this was coincidental as he did not learn the actual dates until March 2017: He was scheduled for six shows between June 1 and 10.

3 When the grievor bid for the June 2017 block month, he attempted to secure days off so that he could participate in the Fringe Festival. He was successful in

securing all of the dates except for one, the last one, June 10, 2017. The grievor was assigned call-in reserve duty on that day. The grievor brought this to the attention of a Fringe Festival organizer and asked if his performances could be rearranged so that the June 10th date could be cancelled. The answer to this question was no, and the grievor was told either he had to perform on all of the scheduled dates, or all of the scheduled shows would all be cancelled. The grievor made his way to London, Ontario, although not using any of standby flights he earlier booked. The grievor testified that he arranged for others to take over his role in the final June 10th show so he could be available for work if called in.

4 According to the grievor, when he woke up on June 9th he felt pain in his neck. He took painkillers but was able to perform his show scheduled later that day. The grievor testified that when he received notification from Air Canada that he was assigned a pairing out of Montreal at 4:00 p.m. on June 10th, he accepted it as he believed his neck pain would improve allowing him to make his way to Montreal from London. When the grievor woke up on the morning on June 10th, however, his neck pain had worsened: He had "difficulties" in moving his neck because "any movement would cause extreme pain." He had also taken more painkillers and so was concerned about whether he was fully fit for duty and so he booked off.

5 As noted above, the grievor testified that he had arranged for others to perform his show, but as he was still in London, and following their urgings, he decided to perform his show, although in an abbreviated performance and in a less vigorous manner so as to not physically exert himself and aggravate his neck condition. The grievor later made his way to Montreal in a ride share and, some 10 days after the neck condition first presented itself, went to a walk-in clinic and obtained a doctor's note that directed further time off work. The grievor received sick pay.

Employer Submissions

6 In the employer's submission, the evidence clearly established that the grievor never had any intention of returning to Montreal if called in on June 10th. This conclusion, in Air Canada's view, was irresistible when all the facts were considered. The grievor attempted to secure June 10th off from work. He was unsuccessful. He attempted to cancel the June 10th performance, but that too was unsuccessful. He testified that he made arrangements for others to perform the show on June 10th, when the evidence indicated otherwise. The employer pointed to the promotional literature and the grievor's continuing social media posts cumulatively indicating that he was the star attraction of his show: playwright, director, and principal

performer with marquee billing. He was also consistently urging others to attend all of the performances, including the one scheduled for June 10th. Referring to the grievor's Facebook posts, the employer elaborated on this point.

7 On June 10th, at 11:53 a.m., the grievor posted: "Last show! This afternoon at 2pm. Now's your chance." Later that day, at 6:13 p.m., the grievor posted "Thank you Everyone!!! Great shows!!! Lots of love." These and other social media posts that the employer referred to clearly established, in management's opinion, that the grievor's after the fact explanation about taking a secondary role in the final show was not believable.

8 There were other facts that supported the conclusion that the grievor had no intention of performing on June 10th. He has made no flight bookings home for the evening of June 9th. In evidence, the grievor testified that his June 9th performance was scheduled to finish at 10:00 p.m. Once it was over, his plan was to be driven to Toronto from London and make the 12:30 a.m. flight to Montreal. He testified that this could be easily accomplished. Indeed, even if he arrived at Pearson Airport twenty minutes before departure, he could make his way through security and to the gate and obtain a standby seat. The employer argued that this plan was inherently unrealistic. Even a slight delay would throw it completely off kilter, assuming for the sake of argument that there was even a standby seat available for the grievor. It was also quite suspicious, in management's estimation, given the severity of the neck injury that the grievor described, that he did not make his way to a doctor for some considerable number of days after he returned to Montreal. That delay raised questions about the grievor's claim that he was incapacitated from working - an assertion that was, in any event, belied by his participation in the June 9th and 10th performances.

9 Taken together, all of these facts established that the grievor's account was not credible and that the sick leave was a fraud that was perpetrated so that he could participate in his final show. Quite simply, the grievor gambled that he would not be called to work for June 10th and never intended to attend at work if he was called. The ten-day suspension on file was not for a similar incident, but it included a final warning. The grievor was a Service Director and so was expected to lead by example. This conduct was not an example worth following, in the employer's submission, and it was one that appropriately attracted termination on a just cause standard. Air Canada asked that the grievance be dismissed.

Union Submissions

10 In the union's view, the grievor may have exercised poor judgment by deciding to appear in the June 10th performance when he was suffering from his neck disability, but that mistake did not justify the termination of this Service Director with seven years of service. There was a ten-day suspension on file, but it had nothing to do with the events underlying this case and should, the union urged, be completely disregarded.

11 Union counsel argued that the grievor had acted responsibly. He had arranged for others to perform his show on June 10th so that he could be available for work that day - and several written statements from those others and to that effect were referred to. It was true that the grievor promoted the show, including the forthcoming June 10th performance, on social media, but no adverse inference could be drawn from that. The grievor was not intending to participate on that date, but he still wanted the show to be a success. Originally, he intended to return home the night of June 9th, but when he was assigned a pairing for the afternoon for June 10th, he realized he did not have to return until the following morning. And he would have returned the following morning but for the continuing and worsening neck injury.

12 There was no issue about the bona fides of his neck injury - the doctor's note established that there was an injury and a need for rest and recovery. It was also worth noting, the union argued, that the grievor explained why he did not go and see a doctor until June 19th. The walk-in clinic close to his residence was extremely busy and his health card had expired. He went to the doctor as soon as he could and the doctor diagnosed a neck injury dating back to June 9th and prescribed medications to ease the continuing pain. That evidence was uncontradicted. Therefore, there was no sick leave fraud. The long and short of it, the union argued, was that on June 9th the grievor was sick and remained so for a considerable period of time. He was appropriately compensated by the sick leave plan.

13 In conclusion, the union conceded that performing on June 10th was a mistake - the grievor should have focused on his rehabilitation - but this mistake was not, in the union's submission, sufficient to deprive this otherwise exemplary Service Director of his employment. The union asked that the termination be rescinded and that the grievor be fully compensated for his losses.

Decision

14 Having carefully considered the detailed written briefs, the lengthy witness statements and other exhibits, and the testimony presented at the hearing, I can only conclude that just cause has been established and that the grievance should, therefore, be dismissed.

15 In brief, the evidence establishes that the grievor had no intention of attending work on June 10th and that his absence was completely unjustified. In the circumstances of this case, where there has also been a complete lack of candour on the grievor's part, termination is the appropriate disciplinary response for what can only be described as the grievor's premediated decision not to attend work if he was called in. In reaching this conclusion, I note that the grievor does have a ten-day suspension on file together with a final warning. The purpose of a lengthy disciplinary suspension and a final warning is to bring to an employee's attention that their job is in jeopardy and that exemplary conduct is required.

16 In my view, the grievor's version of events - from start to finish - is completely incredible. I do not accept that the grievor was incapacitated from work but could still perform in his show, not just once, on the 9th, but then again on the 10th. The fact that the grievor waited ten days from when he first said he became sick to see medical attention also casts doubt about the true severity of his medical condition. The fact is that the grievor participated in two of his shows when he claimed to be incapacitated. There are many other reasons, however, for reaching the conclusion that termination is justified.

17 The grievor testified that he did not know the dates of his shows until March 2017. Standby flights were booked in January and they are coincident with the scheduled dates. The grievor's description of his plans to return to Montreal the evening of June 9th would require travelling to Pearson Airport from his evening show in London that concluded at 10:00 p.m. in record speed, passing quickly through security, and making it to the gate in time to board all in the hope that there would be a standby seat available for the 12:30 a.m. flight. But that flight was not even booked. This account is simply not credible. Even if it were true, it is not a responsible plan for someone who cared about his job and wished to ensure that he would be in Montreal to accept an assignment anytime on June 10th. It is not a proper plan of a person with a ten-day suspension on record, one that was accompanied with a final warning. But fundamentally, the entire narrative is completely unbelievable.

18 It is also factually significant that the grievor waited days after his return to Montreal to see a doctor to deal with a condition he described as so serious to have

incapacitated him from attending at his scheduled work, but as mentioned above, did not preclude his stage performances on June 9th and 10th. Considered in the overall, one can only conclude that the grievor never intended to show up for work on the 10th, that this misconduct was serious, and that the discipline imposed was justified.

19 Accordingly, and for the foregoing reasons, the grievance is dismissed.