In the Court of Appeal of Alberta

Citation: Telus Communications Inc. v Telecommunications Workers Union, 2014 ABCA 199

Date: 20140619
Docket: 1301-0203-AC
Registry: Calgary

Between:

Telus Communications Inc.

Respondent (Applicant)

- and -

Telecommunications Workers Union

Appellant (Respondent)

The Court:

The Honourable Mr. Justice Peter Martin
The Honourable Mr. Justice Brian O'Ferrall
The Honourable Madam Justice Barbara Lea Veldhuis

Memorandum of Judgment of the Honourable Mr. Justice O'Ferrall and the Honourable Madam Justice Veldhuis

Memorandum of Judgment of the Honourable Mr. Justice Martin Concurring in the Result

Appeal from the Order by
The Honourable Mr. Justice J.T. McCarthy
Dated the 20th day of June, 2013
Filed on the 18th day of July, 2013
(Docket: 1201 15455)

Memorandum of Judgment

The Majority:

I. Introduction

[1] Telecommunications Workers Union appeals from a judicial review decision quashing a labour arbitration award and the resulting remedy. For the reasons that follow, the appeal is dismissed.

II. Background Facts

[2] The issue arose from the termination of a service technician who worked for Telus Communications Inc. The facts are set out in detail in the chamber judge's decision reported at 2013 ABQB 355, so we will only briefly state them here.

[3] On June 24, 2011, the grievor asked to have July 3, 2011 off to play in a slo-pitch tournament, but his request was denied due to staffing concerns. On the morning of July 3, 2011, a few minutes before the start of his shift, the grievor texted his manager saying that he could not make it into work that day "due to unforeseen circumstances". The manager went to the ball park later that morning and saw the grievor pitching. At a subsequent investigative meeting, the grievor was questioned about his absence on the previous day. He initially said that he had woken up the night before with severe diarrhea, which persisted into the morning of July 3, 2011. The following evidence from the investigative meeting was before the arbitrator (the grievor's answers are in italics).

> 3) Yesterday I received an email and a text message stating that "due to unforeseen circumstances I cannot make it in today". Please tell me about these circumstances.
>
> *- playing ball (all weekend) & ate something (between Fri or Sat) that may have been funky*
>
> *- got the runs woke up at 3:30 was on the toilet for a couple of hours*
>
> […]
>
> 4) What did you do during the day? What were your symptoms? Did you go to the doctor?
>
> *- morning back to bed*
>
> *- runs (uncontrollable symptoms)*
>
> *- slept and went back to ball diamond at 10:45 (to watch team) did not play*
>
> *- did not go to the doctor*

[4] When questioned further, the grievor admitted to being at the ball park, stating that he was still sick and that he could manage his symptoms at the ball park, but could not have done so at a customer's home.

The grievor asserted twice that he was there to watch, rather than play. Upon being confronted that the manager saw him playing, he said that he was only pitching, not batting.

> 8) On June 24, 2011 you requested the day (July 3) off to play in the slo-pitch tournament, but it was denied due to business reasons. Were you playing slo-pitch yesterday?
>
> *No – had previously booked a job downtown (I wouldn't have done that if I knew I was gonna take the day off)*
>
> […]
>
> 9) I have reliable information that you were able to report to work yesterday, but chose not to? Is this true?
>
> *- (who told you?)*
>
> *- in morning not able to work (Q: But you were able to slo-pitch?)*
>
> *- I was a pitcher just stood there (played ball and was pitcher)*

[5] Telus terminated the grievor. The Union grieved the termination.

[6] At the hearing before the arbitrator, Mr. Sartison (the grievor's manager) testified about the impact that the incident had on the employer. The arbitrator summarized Mr. Sartison's testimony as follows:

> He said "we considered it a serious incident, that the grievor had lied three times until he was confronted and came clean".
>
> […]
>
> Mr. Sartison stated that in these circumstances of missed assignments there becomes "a significant impact on customers down the line" and the non-performance can impact the company adversely in relation to its competitors.
>
> […]
>
> At the conclusion of his direct evidence, Mr. Sartison was asked if he could trust the grievor again; he responded: "Absolutely not".

[7] In cross-examination at the arbitration hearing, the grievor gave the following evidence:

> Q: You acknowledge you lied three times to Sean (Sartison)?
>
> A: Yes.
>
> […]
>
> Q: You say there was a lot of pressure so you lied three times?

A: I did. I was worried. I made a bad judgment call.

Q: Do you understand the trust relationship has been broken?

A: Yes.

Q: You concealed the true reason for your absence?

A: Not really, I was sick.

Q: You understand that your actions negatively impacted customer service?

A: Yes.

III. The Arbitrator's Decision

[8] In this case, it is necessary to set out the detailed reasons articulated by the arbitrator.

I can appreciate the indignation of TELUS based on facts in two instances and their perceptions in two other instances:

1. The grievor lied twice at the investigative meeting about not playing ball, then diminished the extent of his involvement as the pitcher by saying he was "just standing there".

2. He only came clean at the investigative meeting when he was confronted with evidence that he was playing ball.

3. The grievor took July 3 off after being refused an authorized absence, which TELUS suspects was preplanned and then came up with a concocted excuse of illness, all the while intending to play ball.

4. The grievor intended to claim a sick day, when he was not sick, and only did not do so because he was "found out".

However, I believe that TELUS over-reacted to the grievor's dishonesty, and the termination cannot stand for the following reasons:

1. The grievor's account of his illness was plausible, as was his explanation about being able to deal with the diarrhoea [sic] at the ball park but not in a customer's home. TELUS had no evidence that he had not been sick during the night and early morning or did not have to use the washroom at the ball park. It was unreasonable for TELUS to argue that there was no evidence of a policy that an employee, in the circumstances described by the grievor, could not use a customer's washroom when it became necessary. A customer should not be put in that position. I would expect a customer to be quite taken aback by such an occurrence. I can imagine the censoring of the grievor by TELUS if he had been forced to use a customer's washroom, with unfortunate results, and the customer

complained to TELUS. It was bad enough that the grievor felt no compunction about potentially creating an unwelcome scene in the public washroom at the ball park.

2. The cases relied by the Union contain several examples of minor discipline being imposed for purported sick absences because TELUS "could not prove he was not sick". In this case, there is **no** evidence (beyond his being able to pitch which he says was because he could use the washroom at the ball park), he was not sick and that his health improved at any point in the day such that he could have reported to work, without difficulty, in the afternoon. Obviously TELUS, because of the suspicious circumstances, was not prepared to give any benefit of the doubt to the grievor about being sick and unable to be at work in customers' homes. [Emphasis in the original]

3. The grievor's absence was not an unreported absence. Even before his shift was to commence he had, at 7:47 a.m., texted Mr. Sartison: "due to unforeseen circumstances I cannot make it in today". He included in the text that he had been unable to contact Dispatch but would continue to try. He said in the investigative meeting that he had tried calling Dispatch about every 15 minutes from 7:15 to 8:45 a.m. but there was no answer. Those actions are not the actions of an employee that shows no regard for his employment responsibilities and no regard for the impact on customers. TELUS confirmed that he had texted the Dispatch Clerk at approximately 8:00 a.m. He again texted Mr. Sartison at 9:36 a.m. saying he could not get through to Dispatch and that they had not tried to contact him. He said he did not know what was going on. These circumstances strike me as being less of a violation of proper employee conduct than simply not showing up without any communication to TELUS which is described in three written warnings (Exhibit 18), two of which were as recent as 2011 and 2012:

> Contrary to expectations, you did not call in to report your absence and the absence has been coded AN (unauthorized).

Obviously the grievor was concerned about his absence and was conscious, as he acknowledged in the investigative meeting, that his absence "absolutely" had an impact on customers. Although we heard no evidence about steps being taken by Dispatch, one would assume that once notified of an employee's absence, or becoming aware that an employee would not be at work, they would take steps to mitigate the impact on customers by contacting them to advise that the technician scheduled for the job was unable to come to work and arrangements were being made for the work to be done at another date convenient to the customer. (We know that Mr. Sartison did not take any steps in that regard, including not confronting the grievor at the ball park and suggesting he should report to work.). TELUS **knew** in this case that, for whatever reason, the grievor would not be coming to work and they should have taken the same appropriate steps as when an employee simply does not show up and does not call in. [We had no evidence about whether steps were, or were not, taken. The only notation on the Missed Work Report (Exhibit 4) under the heading "Customer Contacted" is "Wrong/No CBR #", whatever that

means]. It is true that it may have been preferable for the grievor to have telephoned Mr. Sartison; I accept that the grievor was less than convincing about not remembering Mr. Sartison's instructions to call, not text. However, it appears from the reaction of Mr. Sartison, when he learned that the grievor would not be at work, that it would not have made any difference. Mr. Sartison said that Dispatch was responsible for dealing with such situations. [Emphasis in original].

4. As to the grievor being dishonest because he intended to claim a sick day, the first answer is that he **was** sick and was entitled to claim a sick day; there is no proof otherwise. Secondly, as the matter developed, particularly in the investigative meeting, he thought better about adding insult to injury. The fact is that there was **no** dishonesty about claiming a sick day because he did not. I reject the submission of Counsel for TELUS (p. 25 above) that the grievor "fraudulently" called in sick. [Emphasis in original].

5. This case comes down to the grievor lying about not playing ball until he was confronted with the evidence. My view is that it was a very misguided, nonsensical, half-truth or half-lie on the grievor's part and, aside from demonstrating very bad judgment as he acknowledged, it had insignificant impact. The grievor admitted, at the outset of the investigative meeting, that he was at the ball park. Being at the ball park was, in itself, a bad call, when he was sick. It was almost as incompatible as with his being sick as playing ball was incompatible. He did not attempt to hide the fact that he did not stay home and deal properly with his illness. He admits that he should not have gone to the ball park and played ball. Why he thought he should tell the truth about going to the ball park but lie about not playing ball defies understanding; it was indeed a bad judgment call when the full truth should not have made that much of a difference.

6. The uncompromising standard described by Ms. Lange, taken literally, leaves little room for flexibility or consideration of the circumstances. She said if an employee exacerbates the situation by lying at an investigative meeting, "we don't give employees second chances, we terminate". Perhaps Ms. Lange had a misconception about what the grievor had said because she testified: "He only admitted being at the ball park after irrefutable evidence." (He had, of course, admitted to being at the ball park but not to playing ball).

7. I have difficulty understanding why TELUS was not prepared to accept that the grievor's attitude at the investigative meeting and at the Arbitration Hearing had conviction and was sincere. My impression of the grievor's recorded answers at the investigative meting and his evidence at the Hearing was that he was contrite and does feel guilt and remorse. He readily admits it was bad judgment, that he let TELUS down, that it impacted customers and that he and TELUS would "have to rebuild our relationship." He "guarantee(s) it will not happen again".

8. Arbitrators certainly recognize that trust is essential to an employment relationship. That does not lead to the conclusion that every case of dishonesty, however minor, destroys the

> trust relationship and warrants termination. I do not see sufficient reasons in this case to conclude that the trust cannot be re-established if the grievor is reinstated.

[9] Ultimately, the arbitrator concluded that the grievor should be reinstated and substituted a one-month suspension for the termination.

IV. The Chambers Judge's Decision

[10] The chambers judge found the arbitrator failed to weigh the evidence and make a proper finding about whether the grievor was lying when he claimed to be too sick to report for work. In his view, this finding was central to the issue of whether Telus had established just cause for dismissing the grievor.

[11] The chambers judge held that the arbitrator's approach was unreasonable because it required Telus to prove that the grievor was not sick. He also found that the arbitrator's conclusion that the grievor was sick was contrary to the preponderance of evidence. The only evidence in support of the conclusion that the grievor was sick was his own testimony; however, the arbitrator questioned the grievor's credibility in most other aspects of his evidence.

[12] The chambers judge found that while not every illness that requires an employee to miss work will render that employee entirely incapacitated, the conclusion that an employee who is too sick to work could still pitch in a baseball game "defies logic and common sense": at para 36. He further found that it was unreasonable for the arbitrator to conclude that an illness so severe to merit missing work could be manageable from the pitcher's mound.

[13] The chambers judge found that it was unreasonable for the arbitrator to rely on evidence that the Telus manager did not confront the grievor at the ball park or otherwise attempt to reduce the impact of his absence on customer service as relevant and mitigating. In the chambers judge's view, that was irrelevant to whether the grievor was absent from work without a valid reason. Further, imposing an obligation on Telus to follow up on employee absences and to issue an additional directive to attend work was invalid. As well, the suggestion that discipline was warranted only in cases where customer service was affected was unreasonable.

[14] The chambers judge then turned his mind to the remedy. He held that on the evidence, the only reasonable conclusion was that the grievor lied about being sick, thus justifying the termination. He was of the view that "remitting this matter to a different arbitrator to arrive at the only reasonable conclusion serves no useful purpose": at para 68. The chambers judge quashed the arbitrator's conclusion and upheld the grievor's termination.

V. Grounds of Appeal

[15] The sole issue on appeal is whether the chambers judge correctly applied the reasonableness standard of review to the arbitrator's decision.

VI. Standard of Review

[16] This court, on an appeal from a judicial review decision, must determine whether the reviewing chambers judge correctly selected and applied the appropriate standard of review and, if not, to assess the arbitrator's decision in light of the correct standard: *AUPE v Alberta*, 2013 ABCA 212 at para 30, 553 AR 248; *Alberta v Alberta Union of Provincial Employees*, 2008 ABCA 258 at para 19, 433 AR 159.

VII. Analysis

[17] The parties agree that the reasonableness standard of review applies to the arbitrator's decision, but disagree about whether the chambers judge correctly applied this standard. They also disagree about whether the chambers judge was entitled to uphold the grievor's termination or whether he should have remitted the matter back to the arbitrator.

[18] We will first consider the chambers judge's analysis into the adequacy of the arbitrator's reasons and then consider the appropriate remedy.

A. Adequacy of Reasons

[19] As a general rule, a reviewing court must afford deference to arbitral awards under a collective agreement and, thus, reviews them on the reasonableness standard of review: *Alberta Health Services v Alberta Union of Provincial Employees*, 2013 ABCA 243 at para 10, 88 Alta LR (5^{th}) 57.

[20] In *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339, the Supreme Court explained the application of the reasonableness standard in the following terms:

> Reasonableness is a single standard that takes its colour from the context. One of the objectives of *Dunsmuir* was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

[21] The chambers judge was required to consider whether the arbitrator's decision falls within a range of possible acceptable outcomes which are defensible in respect of the facts and the law. In doing so, he was required to also consider the decision-making process and determine whether his decision is intelligible, transparent and justiciable.

[22] The correct approach to this task was articulated by the Supreme Court in *Law Society of New Brunswick v Ryan*, 2003 SCC 20 at para 56, [2003] 1 SCR 247:

> This does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.

[23] In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14, [2011] 3 SCR 708, the Supreme Court affirmed that the task of the reviewing court is to undertake an "organic exercise" and read the reasons together with the outcome to determine whether the result falls within a range of possible outcomes.

[24] It is our task, therefore, to determine whether the chambers judge was correct in his application of the reasonableness standard. In doing so, this court steps into the shoes of the reviewing judge to determine whether the arbitrator's decision was reasonable.

[25] At the arbitration hearing, Telus had to establish just cause for terminating the grievor. Once a *prima facie* case is made out, the grievor bears the onus to refute it. Then, the arbitrator must decide whether Telus proved just cause for termination. The question of whether the grievor was too sick to work was central to whether Telus had just cause to dismiss the grievor. This question required the arbitrator to weigh all the available evidence. Instead, the arbitrator focused on the fact that Telus did not adduce direct evidence that the grievor was not sick. In our view, it was unreasonable for the arbitrator to require Telus to prove that the grievor was in fact sick and to resolve the critical finding about whether the grievor was sick on the basis of Telus's onus alone. Instead, the arbitrator was required to weigh all of the evidence and determine whether the grievor had falsely called in sick.

[26] The arbitrator also erred by not considering all of the available evidence and by not conducting a thorough assessment of the grievor's credibility. In assessing the grievor's credibility, the arbitrator was required to consider whether his story was consistent with the overall circumstances. In *Faryna v Chorny*, [1952] 2 DLR 354 at 357, 4 WWR (NS) 171, the British Columbia Court of Appeal framed the test in the following terms:

> The credibility of interested witnesses, 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.

[27] In this case, the grievor's credibility should have been called into question in light of the following evidence: he had requested to have that day to play in the softball tournament approximately two weeks prior; this request was denied for business reasons; a Telus supervisor observed the grievor pitching

merely hours after he called in sick (he texted in sick at 7:47 a.m. and then again at 9:36 a.m.; he was pitching at least by 10:45 a.m.); during the investigative meeting, the grievor lied about playing softball until he was confronted; he admitted to playing only when he was confronted with the truth and even then, he attempted to minimize his involvement; and the arbitrator's own finding that the grievor was "less than convincing" about not remembering his manager's instructions to call, rather than text if he had to be absent from work.

[28] The grievor's own testimony that he was sick ought to have been balanced against the circumstantial evidence in this case. The arbitrator's failure to perform this analysis and to consider contradictory evidence, coupled with the sole reliance on the lack of direct evidence of sickness from Telus, creates a gap in the reasons, which renders them unintelligible: *Spinks v Alberta (Law Enforcement Review Board)*, 2011 ABCA 162 at paras 29-30, 505 AR 260. It is unclear how the arbitrator arrived at his findings on credibility and reliability without considering the totality of the evidence before him. This calls into question the transparency, justifiability, and intelligibility of the reasons as directed by *Dunsmuir*. Therefore, the chambers judge was correct in finding that the arbitrator's decision was not reasonable.

[29] Further, the arbitrator's finding that "it was a very misguided, nonsensical, half-truth or half-lie on the grievor's part and, aside from demonstrating very bad judgment as he acknowledged, it had insignificant impact" is not a finding that is supported by the evidence. Telus's manager gave uncontroverted evidence that he could not trust the grievor again. Indeed, the grievor himself acknowledged lying to his manager, acknowledged that the trust relationship had been broken, and that his actions negatively impacted customer service. Thus, the arbitrator's finding that the grievor's actions had "had insignificant impact" was not founded in the evidence and is therefore unreasonable.

[30] The chambers judge also found that the arbitrator's decision was unreasonable in its result. First, we agree with the chambers judge and with Telus that this results in an overly expansive approach to sick leave. The arbitrator's award suggests that an employee can be too sick to come into work, but not sick enough to play in a softball tournament. This cannot be a reasonable interpretation of the sick leave provisions. Second, the chambers judge concluded that the penalty imposed by the arbitrator was not reasonable. We agree. The arbitrator recognized that trust is essential to an employment relationship, but ultimately concluded that there was no "sufficient reason in this case to conclude that the trust cannot be re-established if the grievor is reinstated." As discussed above, Telus's evidence was clear that the trust relationship was irreparably damaged. Indeed, the arbitrator summarized Telus's evidence in this manner: "At the conclusion of his direct evidence [the grievor's manager] was asked if he could trust the grievor again; he responded: 'Absolutely not.'" This evidence was uncontroverted. Therefore, the arbitrator's conclusion that their trust relationship could be re-established if the grievor was reinstated was contrary to the evidence.

[31] Further, the arbitrator's decision to reinstate the grievor was unreasonable because it failed to consider relevant factors. Those factors included: Telus's evidence that the trust relationship was irreparably damaged; service to its customers was disrupted as a result of the grievor's absence; the grievor's repeated lies at the investigative meeting and his acknowledgment of those lies at the arbitration

hearing; the grievor was in a position of trust that required him to work independently and unsupervised, to have access to personal information of customers, and to access their homes; and established jurisprudence holding that reinstatement is not available where the employee engaged in protracted dishonest conduct. The arbitrator appears to suggest that the grievor's failure to report his absence is minimized or mitigated by Telus failing to take steps to notify customers that the work would not be carried out that day. While it is not entirely clear if the arbitrator relied on this factor in arriving at the final award, we find that these would have been unreasonable factors for him to consider. We therefore find that the arbitrator's failure to consider the relevant factors listed above and the reliance, if any, on irrelevant factors render his decision unreasonable.

[32] We conclude that the chambers judge was correct in concluding that the arbitrator's decision and award cannot stand. The chambers judge was aware that it is important that he not parse the decision of the arbitrator "too minutely": para 21. He approached the arbitrator's decision holistically and correctly concluded that the arbitrator's decision was not within the range of possible outcomes defensible in respect of the facts and law.

[33] This ground of appeal is dismissed.

B. Remedy

[34] Once the chambers judge quashed the arbitrator's decision and award, he was required to fashion a remedy. The chambers judge's choice of remedy is a question of mixed fact and law, reviewable on the palpable and overriding error standard of review.

[35] The parties agree that a reviewing court must quash the decision of an administrative tribunal if it is unreasonable. Once a reviewing court determines that an administrative body has rendered an unreasonable decision, the matter must, in theory, be sent back for a rehearing. However, the court may issue a decision on the merits if returning the case to the administrative tribunal would be pointless: *Giguère v Chambre des notaires du Québec,* 2004 SCC 1 at paras 65-66, [2004] 1 SCR 3 [*Giguère*].

[36] Where the facts before the tribunal lead only to one reasonable result, it would serve no useful purpose to remit the matter back to arbitration: *Canadian Airlines International Ltd v C.A.L.P.A.* (1997), [1998] 1 WWR 609 at para 75, 95 BCAC 40 (CA). In other words, the court has discretion not to send a matter back to a tribunal "where, in light of the circumstances and the evidence in the record, only one interpretation or solution is possible, that is, where any other interpretation or solution would be unreasonable": *Giguère*, *supra* at para 66.

[37] While both parties agreed that dishonesty is serious because of its impact on the trust relationship between employer and employee, the chambers judge found that the arbitrator's conclusion that the trust relationship was not irreparably damaged was coloured by his unreasonable conclusion about the grievor being sick on the day in question.

[38] The reviewing chambers judge concluded that "the only reasonable conclusion on the evidence is that the grievor lied about being sick" and that termination was the only reasonable outcome. He found that, based on any line of analysis, to order the reinstatement of an employee who falsely called in sick in

order to play baseball, then repeatedly lied to his employer after the fact, and at arbitration undermined the trust relationship between Telus and the grievor such that it could not be repaired.

[39] Here, the reviewing chambers judge correctly recognized that arbitrators are entitled to considerable deference. He also correctly recognized that reviewing courts function to protect parties and the administrative system from unreasonable decisions. Rather than usurping the proper functioning of administrative tribunals, this is a balancing that respects the role of tribunals to choose from among reasonable options and the responsibility of the courts to protect litigants and administrative schemes from unreasonable decisions. We find that the chambers judge's decision to uphold the termination was consistent with existent caselaw, public policy, and the supervisory role of the courts in the administrative process. This ground of appeal is dismissed.

VIII. Conclusion

[40] The appeal is dismissed.

Appeal heard on February 4, 2014

Memorandum filed at Calgary, Alberta
this 19th day of June, 2014

O'Ferrall J.A.

Veldhuis J.A.

Martin J.A. (concurring in the result):

[41] I am in substantial agreement with the reasons of my colleagues. However, in my opinion, the appeal can be wholly decided on the grievor's lack of credibility.

[42] To explain, the arbitrator concluded that the grievor had lied at the investigative meeting regarding his absence. From the outset, the grievor claimed his absence was due to an unforeseen illness which caused him to have to use the toilet for "a couple of hours". When confronted, the grievor admitted that he had actually gone to the ballpark despite his illness, but he minimized his participation, claiming that he was "just standing there". Twice, he claimed that he was there to watch and had not played. He subsequently "came clean" and admitted that he was also pitching, but only after being confronted with compelling conflicting evidence by the employer. That led the arbitrator to conclude that the grievor lied multiple times to his employer during the investigation of his absence.

[43] Then, the arbitrator considered the grievor's testimony at the hearing and, in particular, his explanation for texting, rather than phoning-in to report his absence, as he had been instructed by the employer. On this point, the arbitrator concluded: "I accept that the grievor was *less than convincing* about not remembering Mr. Sartison's instructions to call, not text" [emphasis added]. I understand this to be a finding that this evidence offered by the grievor at the arbitration hearing was not worthy of belief and was, in fact, disbelieved by the arbitrator.

[44] Despite these findings, the arbitrator concluded that Telus "overreacted" to the grievor's dishonesty by terminating him, because in his (the arbitrator's) opinion, the grievor's account of his illness and his explanation for being at the ballpark was "plausible". Unfortunately, "plausible" is ambivalent. Depending on the context, the meaning of "plausible" can vary from "credible and reasonable" to merely "possible and conceivable". It is also used to describe an explanation that may or may not be true, or a falsehood which has the appearance of truth.

[45] It is not for us to parse the language used by the arbitrator, but context is important. Here the undisputed findings were that the grievor had lied to his employer multiple times and that part of his testimony before the arbitrator was "less than convincing". Seen in that light, the characterization of his remaining testimony as "plausible" cannot be taken as a finding that the grievor was credible. To the contrary, no part of the arbitrator's decision supports the credibility of the grievor. I recognize that the arbitrator subsequently found the grievor was remorseful, contrite and at times, sincere, but these observations are not an endorsement of his credibility.

[46] In conclusion, I am mindful that the arbitrator's findings of fact are entitled to appellate deference. However, the grievor was found to be untruthful to his employer and to have offered false evidence at the arbitration hearing. These findings are well supported by the evidence. In my opinion, they preclude any

possibility for reinstatement of the employment relationship and they alone are sufficient to dispose of this appeal. I would dismiss the appeal for that reason.

Appeal heard on February 4, 2014

Memorandum filed at Calgary, Alberta
this 19th day of June, 2014

Martin J.A.

Appearances:

J. Gilmore / S. Beernaert
for the Respondent

W.J. Johnson, Q.C.
for the Appellant