IN THE MATTER OF AN ARBITRATION

BETWEEN:

BELL TECHNICAL SOLUTIONS
(the "Employer" or the "Company")

-and-

UNIFOR
(the "Union")

RE: Termination Grievance of Eustus Jesuthasan
(2015-1996-42)

Bram Herlich, Sole Arbitrator

Evan VanDyk, Nicole Brown, Anthony Martin,
Heather Grace, Elizabeth Wheatcroft
and Laura-Lee Hamilton — for the Employer

Melissa J. Kronick, Steven Wiseman,
Lee Zommers, Randy Kitt and
Eustus Jesuthasan — for the Union

AWARD

(Hearings were held in Toronto on September 1, 2016;
February 13, 2017 and April 3, 2017)

This is a discharge case. Neither the union nor the grievor deny that the latter engaged in the conduct upon which the employer relied in effecting his discharge. Similarly, there is no dispute that this conduct warranted a disciplinary response. The union asserts, however, that, in all of the circumstances of the case, the penalty imposed was too harsh and asks that I reinstate the grievor to his employment with a penalty short of discharge.

The events giving rise to the discharge are largely uncontested and can be readily summarized.

At the time of his termination, the grievor was employed as a full-time technician. He had commenced his employment with the company some time after securing a diploma as an electronics engineering technician in 2008.

As a company technician he worked unsupervised in the field providing installation, maintenance and repair services for business and residential clients of the employer.

He was also a customer of Bell. Until August 2014 he was a consumer of both internet and TV services from the company. In August 2014, however, he called to advise that he no longer needed his internet service and wished to discontinue it. In fact, this resulting kind of TV only service, sometimes referred to in employer parlance as “Dark TV”, still requires some relatively minor internet access to facilitate the TV service. Customers, like the grievor, are allotted an extremely limited amount of internet data access for that purpose. However, once he had cancelled his internet service, the grievor proceeded, using both his technical expertise and the tools available to him (and to all of the 4000 or so company technicians) to circumvent any charges for internet usage and to then proceed to make active use of the internet service he had recently advised he no longer

needed. He was able to do this by, rather than using his own personal customer username, using a generic username employed by technicians during the course of their work.

This state of affairs did not come to the employer's attention until April 2015. Anthony Martin, a corporate security investigator, testified that in order to determine whether the grievor's actions back in the previous August had been inadvertent or a "one-off", the employer "reset" the grievor's internet connection to his personal username. As consequence, the grievor then, within a matter of hours, received an automated email from Bell advising that he had exhausted the modest data allotment associated with his TV only account. Within hours of receiving this notification the grievor once again, as he had done in the previous year, reset the connection so that the data used would be associated with a generic technicians' username rather than with his personal account.

On June 15, 2015, the grievor was summoned to a meeting with the employer at which he had trade union representation. While there may have been some extremely minor variations in the respective accounts of the meeting, none of these is significant for our purposes. When confronted with the particulars of his misconduct, the grievor admitted what he had done, acknowledged its impropriety, apologized and agreed (indeed he may well have made the suggestion himself) to repay the cost of the services he had used. Based on the actual internet usage in his account, an amount slightly in excess of $800 was agreed to as representing the employer's lost revenue.

The only reason the grievor proffered at the interview to explain his conduct was his desire to reduce the amount he was paying for the service. There was no mention, at that time, of the grievor's personal circumstances, which the union now points to in support of its urgings that I modify the penalty and reinstate the grievor to his employment. A few days after the meeting, on June 19, 2015, the grievor's employment was terminated, giving rise to the instant grievance.

The foregoing is not to suggest that the grievor's personal circumstances were not raised until the hearing in this matter. Within a few days of his discharge, the grievor penned a communication to his employer:

> I would like to take this time to make a formal apology to you on the record. I recognize that my violation of Company Code of Ethics was not only unprofessional but also damaged my relationship with Bell Technical Solutions. It was not my intention to cause such complications to the company. I have been working for Bell Technical Solutions for seven years and never had any disciplinary actions or any warnings given to me. I was extremely stressed during those period [sic], and did not have enough time to acknowledge what I was doing, and I wasn't myself. I had many personal issues during those period [sic]. I took a lot of time off work in order to deal with those problems. My wife was home from work due to illness and had a risky pregnancy. I have sick parents at home that I care for as I am the only child in the family. During the time my daughter was born, she was at the hospital and those times were very stressful. I started to drink due to all of these issues and everything started to come at me all at once. I wasn't in the right of mind at that time.
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> I promise that I have addressed the source of the problem and that I am taking the following steps, to correct it and ensure that it never happens again. First step to my mistake, I have paid for the internet usage that I was getting without paying. Secondly, I have re-read through all company policies and will not breach any one of them. Thirdly, for my stress, drinking problem, and my personal issues I have called Shepell [a company EAP provider] and has been following up with all their instruction and seeing a counselor from there. Losing this job will not only affect me but will also affect my family. If I do not have this job, I will lose my house, will have even more family problems, as I am the only income in the family.
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> Thank you for addressing this problem so professionally. Bell Technical Solutions has always been good to me and I apologize for any problems this has caused it. Once again, I am deeply sorry for my conduct. Please reconsider your decision.

The grievor elaborated on this somewhat in his testimony before me.

In February 2014 his wife's first pregnancy was terminated due to medical issues. A few months later, in June 2014, the couple discovered that his wife was once again pregnant. The grievor described it as a "risky" pregnancy which generated a lot of stress and required ongoing tests and monitoring. His wife did continue to work, but on a part-time basis only, until approximately October 2014 when she ceased working for the duration of the pregnancy. A baby daughter was born in February 2015, a month earlier than expected, and was admitted to hospital for a couple of weeks before coming home.

The grievor adverted to some health issues associated with his father. He also told us of his travel to Norway in November 2014 to attend the funeral of his cousin's husband, whom he described as someone with whom he was very close.

More telling, however, were the grievor's responses to direct questions regarding his conduct. When asked by union counsel why he did what he did in August 2014, he responded that he was deeply sorry for his mistake, that, at the time, he was in a tough situation and had a lot of stress. And when asked a similar question in relation to his similar conduct in May 2015, he reiterated that he was deeply sorry for the mistake he made and that he wished to correct it. And finally when asked why he had written the letter reproduced above, the grievor said he realized his mistake, that he hadn't done it intentionally, he was under a lot of pressure and stress dealing with issues and he wanted the employer to reconsider its decision. However, in cross-examination he did not seriously contest the propositions put to him regarding his intention, namely that there was no real mistake involved, that the grievor knew what he was doing in taking deliberate steps to obtain free internet access.

The positions of the parties were quite straightforward. The employer argued that there was an insufficient basis to warrant any adjustment of the penalty for the grievor's conduct, which amounted to theft. This was not a momentary lapse in

judgment. Neither was it an isolated single incident. And the evidence fell far short of establishing any link between the grievor's personal circumstances and his deliberate premeditated conduct.

The employer pointed to a number of arbitral awards in support of its position: *Labatt Ontario Breweries v I.U.O.E., Local 796,* 2001 CarswellOnt 5673 (Surdykowski); *Grand & Toy Ltd. V. U.S.W.A. Local 9197,* (2008), 176 L.A.C. (4th) 289 (Luborsky); *Ottawa (City) and Ottawa-Carleton Public Employees Union* (2014), 243 L.A.C. (4th) 222 (Sheehan); and *Canada Post Corp. and CPAA (D*), (2014), 251 L.A.C. (4th) 195 (M.G. Picher).

The union acknowledged that it has the burden to persuade that there are sufficient mitigating factors to warrant an alteration of the penalty in this case.

It relied on the decision in *Unimin Canada Ltd. and CEP, Local 306-0 (Post),* 2005 CarswellOnt 11784 (Weatherill), a case in which the arbitrator described that "the grievor's thefts, while certainly not "isolated incidents" or the result of a "sudden impulse", were not systematic, but rather appear to have been occasional pilferings over the years". These "pilferings" involved the taking of both scrap and new materials. After considering the relevant factors, which included substantial seniority (27 years); a good service record; the economic hardship of termination and the difficulty in securing alternate employment – particularly for a man of the grievor's age; the grievor's expression of a "degree of remorse", the arbitrator reinstated the grievor without compensation.

Union counsel suggested that the grievor, at least in part due to his personal circumstances, did not fully appreciate the consequences of his actions, he did not make any connection between his conduct and any harm to the company. He neither meant nor desired to harm the company. He now understands and has a full appreciation of the impropriety of his conduct and is unlikely to engage in any future similar conduct.

For the reasons that follow, I have not been persuaded that this is an appropriate case in which to overturn the discharge.

I begin with the general approach to instances of theft as set out at para 49 of the *City of Ottawa* case (*supra):*

> … an act of theft, or fraud, by an employee with respect to the interests of his/her employer has been universally accepted by arbitrators as a serious disciplinary offence since it strikes at the heart of the employment relationship. The general arbitral view is that absent compelling circumstances suggesting otherwise, the prima facie appropriate penalty for theft is termination. As noted by Arbitrator Surdykowski in *Labatt Ontario Breweries*, *supra* [at para 30]:
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> > An employer is entitled to demand that its employees be trustworthy and honest, particularly when they occupy positions of trust. Theft, like any other act of dishonesty or breach of trust, is a serious offense. The employer must prove such misconduct on a balance of probabilities. Because it goes to the very root of the employment relationship, once theft is proved, the *prima facie* appropriate penalty is discharge. Discharges not automatic, but the onus is on Union and the grievor to demonstrate that it is appropriate for an arbitrator to exercise his discretion to substitute a lesser penalty.

There is no dispute that the grievor's conduct in the instant case amounts to theft from his employer of services with a market value of at least some $800. Neither is there any dispute that the grievor occupied a position of trust – he was required to work entirely unsupervised and to enter and work in the private homes and premises of residential and commercial clients. Similarly, it appears that the grievor engaged in conduct which could equally as easily be replicated by any one of the employer's 4000 or so unsupervised technicians.

An effort to canvass factors which might favour an alteration of penalty can begin with a further characterization of the grievor's conduct. There can be no issue regarding levels of deliberation. In August 2014 the grievor, *qua customer*, called Bell to advise that he no longer needed or wanted internet access (this could be described as his first dishonest act), and, having thereby insulated himself from further charges for internet use, then took the steps necessary to secure his internet access in a fashion that evaded the need to pay. That state of affairs continued unabated until May 2015 when the employer "reset" the grievor's internet account so that usage charges would once again be directed to him. Within a few hours of learning of this change, the grievor again reset his connection to revert to and restore the previous improper configuration. The grievor's conduct cannot be described as a momentary aberration or an isolated incident. In fairness to the grievor, however, neither would I describe his transgressions as ongoing, at least not in the sense that he consciously renewed his intent on a daily basis or with every fresh use of the internet. However, whether his personal recognition of his dishonest conduct was a daily event or not, there can be no dispute that he was aware for a very substantial period of time that this improper state of affairs, designed by him for his own benefit, was in place.

One simply cannot characterize his conduct, as the grievor did on more than one occasion during his testimony, as a "mistake". It was certainly not a mistake in the sense of an absence of deliberation. And, again, in fairness to the grievor, I believe that he (mostly) used the word mistake to refer to an error in judgment. But even this conclusion is difficult to square with his testimony that he wrote his letter of appeal to the company because he realized the mistake he had made, that *he hadn't done it intentionally* and that he had been under a lot of pressure and stress dealing with his personal issues. (Indeed, even the letter itself claimed some lack of intention on his part.) Union counsel made a skillful effort to put a different gloss on the grievor's testimony, suggesting that he did not fully appreciate the impropriety of his conduct or the manner in which it would harm the company. I

am not persuaded that this gloss would alter the outcome of the case, but, more importantly, I do not find that it is supported by the evidence.

I turn next to the reliance of the grievor on his personal issues as relevant to the determination before me. First of all, those circumstances, which were presented to me in only little more detail than I have described them here, were undoubtedly difficult. It was, however, also difficult to marry the various events referred to with the grievor's conduct, most specifically in August 2014 and May 2015. The grievor's evidence, perhaps apart from some specific dates regarding his wife's pregnancies, was more of an overall description of the undefined "period" referred to in his letter. In any event, and whether considered on their own or in conjunction with all of the circumstances of the case, the grievor's personal circumstances are, in my view, insufficient to shield him from the consequences of his actions.

I might have come to a somewhat different conclusion if there were some basis to establish a nexus between the grievor's personal conduct and those circumstances. But any such conclusion was only barely hinted at in the case before me and the evidence, once again, simply does not support such a conclusion. In the *Canada Post* case, *supra* (at para.28), arbitrator Picher offered the following:

> … the grievor has adduced no evidence to establish that she suffered from any illness, disability or other condition which would explain or excuse her actions, … such elements might be viewed as mitigating in a case of theft, as reflected in the award of Arbitrator Ish in Canada Safeway Ltd. v. R.W.D.S.U. (1999), 82 L.A.C. (4th) 1. At p. 20 of that award Arbitrator Ish discusses elements to be established before an arbitrator might entertain the reinstatement of employee involved in such wrongdoing as theft. To quote arbitrator Ish:
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> > It must be established that there was an illness, or condition, or situation being experienced by the grievor. Sometimes this is a true illness while other times it might be circumstances in a person's life that cause considerable

> psychological strain and can be as debilitating as a fully recognizable illness. To establish the existence of an illness or condition, the grievor himself or herself gives testimony and it is usually accompanied by expert evidence of doctors or psychologists/counsellors.

Apart from attending three counselling sessions provided through the employer EAP program *after* the discharge, there was no evidence that the grievor sought any assistance, professional, medical or other support to assist him in dealing with his personal circumstances. Thus, there was no independent evidence before me to support any claim of a nexus between the grievor's personal issues and the improper conduct he engaged in. While the grievor has undoubtedly faced some unpleasant and challenging life experiences in the recent past, I am not satisfied that there is any nexus between those experiences and the inappropriate conduct that led to his dismissal.

The grievor, once discovered and confronted with the evidence of his derelictions, admitted his misconduct, apologized for it and offered to pay restitution to the employer. While this response might otherwise militate in favour of a modification to the penalty, in the instant case it must be measured against the many months of clandestine improper appropriation of employer services. Further, the grievor was provided a clear opportunity in May 2015 to correct his conduct, at least on a go forward basis, when his internet status was "reset". But he opted instead, with the same clear deliberation, to simply repeat and continue his previous impropriety. In this context, the grievor's ultimate admission, upon being caught, is not a strong factor.

Finally, with respect to the grievor's service and prospects for future employment, his circumstances are readily distinguishable from those before the arbitrator in the *Unimin* case, *supra*. The grievor is a young man with marketable

skills and his 7 years of service, while not insubstantial, pale in comparison to the 27 years of seniority enjoyed by the grievor in *Unimin*.

Having regard to all of the foregoing, I am not persuaded that any modification of the penalty in this case is warranted. The grievance is hereby dismissed.

DATED AT TORONTO THIS 26th DAY OF MAY 2017

Bram Herlich
Sole Arbitrator