

IN THE MATTER OF AN ARBITRATION

B E T W E E N:

Bell Technical Solutions

(the “Company” or “BTS”)

and

Unifor

(the “Union”)

Discharge Grievance of Andrew Morris

SOLE ARBITRATOR: Marilyn Silverman

APPEARANCES:

For the Union

Robert Church, Counsel

Sam Snyders, President Local 1996-0

Sean Howes, National Representative, Unifor

Lee Zommers, Vice President Local 1996-0

A. Morris, Grievor

For the Company

Evan Van Dyk, Counsel

Laura-Lee Hamilton, Labour Relations

The hearing was held on September 11, 2015, March 15 and 17, 2016, January 24 and 25, 2017 in Toronto, Ontario.

AWARD

1. This is a discharge case.

2. The grievor was employed as a BTS technician. BTS technicians install and repair the Bell communication network; TV, internet and home phone. They work on the network both in customers' homes and outside on the installation and repair of the lines.

3. The grievor was employed for seven years at the time of his discharge. He was a Union steward. In addition to being a Union steward, the grievor had also trained employees.

4. The Company contends that the grievor was terminated for three different types of misconduct. First, his excessive phone use. Second, the distribution of a group text message which the Company says was to encourage a work slowdown. Third, the Company relies on after acquired evidence obtained from a forensic review of the grievor's laptop. This review disclosed that the grievor had downloaded software to his company laptop and run a cleaning program which erased data.

5. The Union asserts that the excessive cell phone use was not relied upon by the Company in the grievor's termination letter as a reason for discharge, and also, no progressive discipline was imposed which would have allowed the grievor the opportunity to reduce his phone use in accordance with the Company directions. On the group text message, the Union says that its content was misunderstood by the Company and not intended to, nor did it, result in a slowdown of work. Finally, on the computer download and data delete allegations, the Union and the grievor concede that the grievor should not have done this and that some discipline is warranted. The Union contends that discharge is an excessive response.

6. The events leading to the discharge occurred mainly in December 2013/January 2014. In the fall of 2013 Donald Flowers, at the relevant time, an operations manager at

BTS, assumed responsibility for the team of technicians which included the grievor. As part of his managerial function Mr. Flowers would coach or “drop in” on technicians in the field to discuss matters such as performance, health and safety and Company policies. In the course of reviewing the grievor’s performance, he observed that the grievor was behind on job effectiveness. Effectiveness is the amount of time spent on the job.

7. The Company has a “Policy on the Use of Information Technology Resources” (the “IT Policy”). A portion of that policy outlines acceptable personal use of mobile devices provided by the Company. The policy states, in part, that use is permitted for “limited and reasonable communications with third parties, for reasonable personal research and for any other personal development activities consistent with Bell Technical Solutions leadership role in the realm of new technologies”. Further the policy provides that the use must not “impede or interfere with the User’s ability to perform his or her duties or diminish the User’s productivity or effectiveness at work.” It should be noted that other technicians are not “third parties”.

8. Mr. Flowers conducted three coaching sessions with the grievor on January 9, 16 and 17, 2014. On January 14, 2014, the manager reviewed the grievor’s cell phone activity data for the two months of November and December and noted that the grievor spent a great deal of time speaking to other technicians and one notably who was a friend. It was the manager’s assessment that this amount of time could not have been all work related. Mr. Flowers also noted that, in addition to phone calls, there was significant texting time on the grievor’s phone. Some of the messages were broadcast messages, sent to a group of employees. Mr. Flowers testified that most technicians use their phones actively, including allowable personal use, but his concern was excessive phone use detracting from work tasks. In the course of the coaching sessions, the grievor’s manager reviewed the grievor’s performance scores and determined that the grievor was not completing as much work as the Company thought he should. It was the manager’s view that the grievor did not share the Company’s understanding of his performance deficiencies. In the last January session, seeing no discernable improvement, Mr. Flowers advised the grievor that he would be placed on an Enhanced Active Supervision Plan (an “EAS”) beginning February 1. An EAS is

a program designed for individuals to improve. The grievor's performance, other than in respect of his efficiency, was not at issue. No discipline was taken immediately following this review.

9. In the chronology of events, there is relevance to a group email sent to BTS employees on January 8 and 9, 2014. That email was sent to about 300 employees and purported to be from the Union, asking for personal email addresses for the purpose of communicating with employees. This message however was not from the Union. In response to it, on January 16, 2014, the Director of Field Services for Ontario Central, John Fines, sent an email to all employees in that district indicating that the message was not from the Union and that if the Union or the Company required personal information this is not the manner in which they would request it. In cross-examination the grievor was asked if he sent this message and denied that he had. The origination of this email was never identified and as a consequence no one was ever disciplined for this event.

10. What next occurred was that the grievor's manager was advised by his supervisor, Steven Humble, of a group text message sent by the grievor on January 28, 2014. That message was sent to approximately 55 technicians and reads:

Despite IN jobs (NON-IPTV) showing up as 30 min duration in TMI, Horizon allowed 65 min for this job type once on site, so take your time and dont[sic] rush them.

11. The Company says this is a work slowdown message. The grievor admits that he sent the message but denies that it was sent for the purpose of counseling a slow down. He explains that he sends group messages to a list of technicians for a wings night event that he organizes. The grievor said that after his discussions with his manager about jobs and times, the grievor reviewed his ticket list to see where there were problems and noted that the time allotted for the specific job referenced in the message was 30 minutes. He said co-workers were asking him why they were only getting 30 minutes to perform that job. In response he sent the group text to his wings night group. The grievor testified that the issue of "reworks" had arisen at a recent wings night, concerning frustration of technicians who

had to return to repair the work of others, and so the message addressed that recent concern. The grievor denies he was telling technicians to slow down. The grievor said the message was misconstrued by the Company.

12. The grievor said that once he understood the way the Company interpreted the message, he regretted sending it. He said that none of the technicians he spoke to took this as a message to slow down, but he admits that sending the message was a bad idea. The Union emphasizes that in fact no slow down occurred and no *Canada Labour Code* or grievance proceedings were initiated by the Company in response to the group text.

13. The grievor later apologized in a letter to the Company at a meeting held on February 24, 2014. That was about three weeks after his termination.

14. Mr. Flowers explained that technicians are advised to work safely and effectively and that if there are threshold or standards problems, the technicians should address those with their supervisors. He was concerned about the group text message on a number of levels: that the grievor was telling other technicians to slow-down, that this disclosed that the grievor did not appreciate the coaching sessions aimed at improving his productivity and that the group text was not the appropriate forum to raise whatever issue the grievor had about the Company's time standard for any particular job. Mr. Flowers testified that the appropriate action would have been for the grievor to discuss the matter with him directly, which the grievor had not done.

15. Mr. Humble made the decision to terminate the grievor. He says his decision was based on the grievor's phone usage and the group text message of January 28, 2014. Mr. Humble himself had reviewed the grievor's cell phone logs as part of his investigation of the "Union text message" sent on January 8 and 9, 2014. He conducted this review sometime after January 10, 2014. Following this review, Mr. Humble too thought the grievor's cell phone use was excessive.

16. The Company met with the grievor in an investigation meeting on January 29, 2014. In attendance for the Company was Mr. Flowers, Mr. Humble and another manager. The grievor was accompanied by a Union steward. In addressing the phone use, the grievor said he was not communicating with third parties but other technicians. He said he could work and talk at the same time. The grievor did not think he was out of line on effectiveness measures and attributed much delay to the cold weather occurring during December 2013 and January 2014. It was a very cold winter and an ice storm occurred in the period in question. The grievor explained that, given the cold, he could only be outside for short periods of time, and the use of outside tools in such conditions was more challenging and slower. He has never been disciplined for either quality or safety. Most of his calls were of short duration and to other technicians. The grievor explained that he had to call other departments for work related issues and claimed that these calls did not adversely affect his work performance or customer service.

17. The grievor was discharged at the end of the meeting. Mr. Humble said that the grievor was not taking responsibility for the group text. In determining that discharge was the appropriate response, a decision made by Mr. Humble and his boss John Fines, the Company says it took into account the group text, the lack of remorse shown for that conduct and the excessive phone use. The termination letter does not specifically address the excessive phone usage. The grievor returned his Company cell phone when asked, but refused to either unlock it or provide the password necessary for the Company to unlock it. The grievor attributes his refusal to the fact that he had just been terminated and was emotional. The cell phone is Company property and both the Union and the grievor acknowledge he should have unlocked the phone at the Company's request.

18. The Company says it was suspicious about what was on the phone following the grievor's refusal to unlock it. Following the grievor's termination, the Company commissioned a forensic report of the grievor's laptop and cell phone. That report disclosed that the grievor installed a data deletion program called "CCleaner" onto the computer hard drive in September 2013. That is a program that erases data. CCleaner was used on January 17, 2014 at 8:19 in the morning. A total of 36,004 files were wiped

between 8:38am and 8:49am that morning. The report explains that a feature of this program is that before files are wiped, the original file is renamed with and replaced with a series of "zzzzz". This means that neither the data nor the file name can be retrieved. In short a complete wipe of all deleted files on the laptop hard drive was effected that morning.

19. The grievor states that he originally downloaded CCleaner software in order to clear the cache from his computer so that it would function better. Technicians are expected to clear the cache of their computers, and the Company produced a document outlining the steps to be taken to do so on the computer. Downloading external software is not one of those options and such a download is contrary to Company policy. The grievor admits that he had to bypass security features in order to install the software.

20. Item 2.5 of the IT policy outlines unacceptable and prohibited use and covers both intentionally altering the configuration of computer equipment and bypassing access restrictions or security features without specific authorization. The IT policy provides that violations may result in discipline up to and including dismissal.

21. The grievor says he used the cleaning function once a week. He only recalls doing the data wipe the one time. He explains the reason for the wipe was that he had kept confidential Union notes on the computer. The grievor acknowledged that the Union preferred notes taken at meetings with management be handwritten and then later typed up. When the grievor realized that sooner or later the laptops would be decommissioned and all the applications would be run off the phones, he was concerned that the Company would have access to the Union notes on the computer. Therefore, he says that the wipe was to delete notes and data from his deleted files that he had collected on his computer about employees and Union business in his capacity as a Union representative. He did not explain why he wiped more than just Union notes that were in the deleted files, if the confidentiality of those documents was his only concern.

22. The grievor admits that both the installation of this software and the data wipe are contrary to the Company IT policy. The grievor acknowledges the strict prohibition on installing software onto the Company computer and regrets having done so. If reinstated he says he would not do so again.

Submissions

23. BTS begins its argument by drawing attention to the context in which technicians work. They are highly independent; operating with limited supervision. The Company says this requires a high degree of trust. BTS asserts that the intentional direction that the grievor made to the other technicians in the group text message could have had a large yet slow to detect impact on productivity because of the manner in which these employees work. This employer is vulnerable to coordinated attempts to slow down work. Further, as a Union steward and occasional trainer, the grievor would have been seen by others as an employee with a degree of trustworthiness in his advice on to work-related matters.

24. The Company emphasizes the coincidental timing of Mr. Flowers' meetings and the group text message, highlighting that it was in the same period that Mr. Flowers was looking into the grievor's cell phone use to see if it was contributing to his poor efficiencies. Additionally, the issue of Horizon standards was raised during these sessions. Furthermore, Mr. Flowers advised the grievor that he would have to participate in a formal performance plan. The Company posits that against this backdrop, rather than improving his own work efficiencies, the grievor hoped to slow others down.

25. Finally, the Company says that the grievor showed no remorse but rather made excuses and provided improbable explanations. The Company does not consider the late served apology in the February letter to be convincing but rather characterizes it as half-hearted and qualified. The Company says that even in the course of his testimony the grievor still thinks he did nothing wrong by communicating in the fashion in which he did on January 28, 2014, and that the group text was simply misconstrued by the Company.

26. The Company then turns to the after-acquired evidence about the software installation and the data wipe. BTS contends that the explanation provided about the need to delete Union information on the computer is not credible. Rather, the timing points to what was occurring between the grievor and the Company at that time. There was increasing pressure brought to bear on the grievor to improve his productivity. Further, the Company contends it is difficult to believe that a Union representative who is aware that the Company can do a forensic analysis would save Union documents on a Company computer in the first place. And if he did, the Company suggests that he could just have cleaned those specific files, rather than wipe out a significant amount of other information. The Company submits that the grievor's actions were a willful act of vandalism of company property. Even if installing the software is not sufficient cause for termination, the Company says that destroying files on its property must be.

27. The Company references various cases in support of its various positions: *Ontario Nurses' Association and Hotel Dieu Hospital* [2009] O.L.A.A. No.11 (Rose) regarding after acquired evidence supporting termination, *Progistix Solutions Inc. and Communications, Energy and Paperworkers of Canada, Local 26*, (2010) CanLII 53029 (ON LA) (Surdykowski) and *Garda Security Screening and IAMAW*, (2013) 230 LAC (4th) 69 (2013) (Keller) for discipline in engaging in an illegal strike or slowdown. The Company refers to the decision in the *University of Manitoba and the Association of Employees Supporting Educational Services* (2015) 258 L.A.C. (4th) 240 (Peltz) in which a termination was upheld for deletions on a company cell phone.

28. On the issue of the phone use, the Union asserts that the Company would not have discharged the grievor for this reason at this time and that Mr. Flowers and Mr. Humble knew of the excessive use for a period of time before the termination meeting. It submits that this was not the real reason for discharge. In any case the policy contemplates reasonable personal use and most of the calls were not to third parties but to other technicians. The Union highlights that there was no attempt at progressive discipline nor any opportunity to enable the grievor to improve. It also says that the termination letters

does not specifically refer to excessive phone use as a reason, or a part of the reason, for discharge.

29. On the group text message, the Union says that the Company has not proven that the grievor's intention was to counsel a slow down and that the grievor's explanation has been consistent. The grievor testified that there was an issue about reworks that arose at a recent wings night event and the grievor was responding to that concern in the group text. The Union also relies on the fact that there was no evidence that a slowdown actually occurred. There were no grievances or Canada Labour Board applications filed by the Company in response to the group text. In the Union's submission this supports the grievor's explanation that the message was not in fact interpreted as a direction to slow down. It supports how employees understood the message.

30. The Union also notes that the grievor apologized, both one month after the termination and again at the hearing. It too refers to the *Progistix* case where the arbitrator noted that he had discretion to mitigate the penalty even in the face of such a serious offence. The Union submits therefore that discharge is not necessarily an automatic penalty for this conduct, and relies on the specific circumstances of this case.

31. The Union admits that the installation and use of the CC Cleaner is a violation of Company policy and grounds for some discipline. It asserts this is the only misconduct that BTS can prove and should therefore be the only misconduct it is permitted to rely on. The Union says however that this conduct does not warrant discharge. The grievor admitted what he did, accepted responsibility at the first opportunity, and provided a reason for his conduct. The grievor was told by the Company that he had to clear his cache and although this was not the way he should have done it, his purpose was not nefarious.

32. The Union relies on the following jurisprudence: *Consumers Distributing Co. and Teamsters Union, Local 419*, (1992) 24 LAC (4th) 444 (Carter) and *Mosaic Potash Colonsay ULC and United Steelworkers, Local 7656* (2013), 236 LAC (4th) 181 (Hood), (upheld on review) and as well as relevant sections from Brown, D.J.M. and Beatty, D.M. (Eds.),

Canadian Labour Arbitration, Fourth Edition (Toronto: Thomson Reuters). It notes particular references to rehabilitation potential which the Union asserts exists in this case.

33. The Union emphasizes that the grievor has 7 years of service and no discipline on record. In the Union's view these factors and the circumstances of this case warrant mitigation of penalty.

Analysis and Decision

34. The reasons relied on by the Company in this case are threefold: the excessive phone use, the group text message and the unauthorized software download and computer wipe.

The Phone Use

35. In the circumstances of this case, it appears clear that the excessive phone use, on its own, would not have resulted in the grievor's termination. This is borne out by the fact that he was scheduled to begin performance coaching, the EAS, just prior to when he was terminated. The conduct was raised in the termination meeting, and the Company says that it could generally be construed from the language of the termination letter. Both Mr. Flowers and Mr. Humble knew of the excessive phone use by mid-January yet did not respond to it in any imminent fashion. I agree with the Union's submission that the Company ought not to be able to rely on a vaguely drafted letter to discipline for excess phone use. Although excess phone use can be a disciplinable offence, the letter does not bear out that the grievor was being discharged for this. Had the Company intended to rely on the excessive phone use, it would have been relatively straightforward to specify in the termination letter the Company's concern about the grievor's lack of productivity due to the unwarranted amount of time he was spending talking and texting on the phone. The letter does not say that. However, this aspect of the case does not alter my conclusions arrived at below.

The group text message

36. It appears clear from the letter of discharge that this text message was the main, if not the sole, reason for the termination. The grievor claims that this was not a message telling employees to slow down but rather a message advising them of relevant work facts. I find this an after the fact justification. The communication, sent out to over 50 other employees, must be read on its face in its clearest and most obvious interpretation. It describes a particular task and tells employees – “take your time and don’t rush them”. It is difficult to place any other reasonable interpretation on that message other than what it says. The explanation that employees were talking about these tasks at wing night, also does not justify the group text. Assuming without determining that there was some valid reason for the content of the text message, it was not the grievor’s job to tell employees to slow down. There was no evidence he brought his concerns to his manager or to the Union in any formal or informal way. He simply took it upon himself to give his co-workers this direction.

37. The fact that the Union says no slow down occurred does not assist the grievor. It does not alter the fact that the grievor’s intention was to undermine the Company’s authority. It may well be that other employees knew not to heed this work direction, given his hasty termination. In any event, in this case what matters is that the grievor’s conduct was wrong in giving that direction.

38. In assessing these facts, it is of some concern that the grievor held a position as a Union steward. As such he is assumed to hold some measure of additional authority with the bargaining unit when discussing work related matters.

39. There is no dispute that as stated in *Progistix* counselling a work slowdown is a “very serious employment offence going to the heart of the employment relationship”.

40. It is important to note the context in which the grievor’s text was broadcast. His manager had been critical of the pace of the grievor’s work. I find that the purpose of the

group text was to counter the effects of the manager's intervention by encouraging other technicians to change the pace of their work. It appears to be a misguided attempt to achieve some personal goal at the expense of the Company. This conduct on the part of the grievor justifies discipline.

The CCleaner download and computer wipe

41. An assessment of the grievor's specific actions in relation to this conduct is an important feature of this case. The grievor took a number of active and deliberate steps in both downloading and wiping his Company computer. First, he decided to install software on his Company computer. Second in order to accomplish the first task, he had to bypass the computer's security features. His stated objective for these tasks was to enable his computer to work more efficiently. It is true that the technicians were directed to clean out their cache, but that does not justify the grievor's response to that directive, if indeed I accept that explanation. If the methods the Company directed to clean out the cache were not sufficient to enable the grievor's computer to operate efficiently, he should have brought this to the attention of his manager or the IT department. He could have asked them if he could download this cleaning software, if they could do it for him or if some other approved software or other method would assist. He could have raised the problem with the Union. Rather, he took none of those reasonable steps to deal with a problem about the efficiency of his computer, but rather chose a path clearly prohibited by the Company.

42. Of even greater concern is the wipe of the deleted files on the computer. The grievor's explanation that he wanted to ensure that the Company could not access Union business notes, does not seem likely or probable. First, the grievor knew that the Union preferred that he hand write Union business notations and yet he decided to use his Company computer to take those notes. He is technologically proficient enough to have known that the Company could have access to what was on his computer. It does not seem reasonable or probable that armed with that knowledge and the Union's advice to handwrite the notes that he would take Union notes on his Company computer. However,

even assuming that he had, there was no evidence that the grievor raised the problem of the Union notes with the Union or the Company in order to find a solution. He did not try to identify and erase those notes but effected a complete deletion of all the deleted files on the computer.

43. I turn next to the timing. There is no rationale that would assist the grievor as to why he chose January 17 to perform the deletion if the purpose was the Union notes. But, there are other more plausible explanations as to why the wipe may have been undertaken at that time. The grievor was in the midst of an interaction with his supervisor about his effectiveness. As well, on the day before the wipe, the Company sent out an email about the false Union text message. There is no likely construction of the computer wipe other than to conceal something (over and above Union notes) that the grievor did not want revealed. That conclusion is consistent with the grievor's refusal to unlock his phone.

44. Each case must be assessed on its own facts and individual merit. However, the *University of Manitoba* case is of some guidance on the issue of the imposition of the penalty of discharge and the factors of mitigation for conduct such as this. In that case the grievor wiped his employer provided cell phone to ensure his personal privacy. The arbitrator held that the employment relationship was irreparably damaged and upheld the discharge.

45. The grievor engaged in a combination of workplace offences. It is clear that the slowdown text message coupled with the improper computer download and data wipe, in the face of the grievor providing improbable explanations for these actions, amounts to just cause for discharge.

46. Given the nature of the conduct engaged in by the grievor, the fact that there were separate incidents of clear misconduct and the unlikely explanation provided by the grievor as to the reasons for his conduct, I am persuaded that this is not a case where mitigation of penalty is warranted. The grievor's actions are clearly incompatible with the continued relationship between him and the Company. His conduct seemed designed to

undermine the legitimate interests of this employer in an effort to advance or ensure his own.

47. It would be unreasonable to require BTS to place this employee in a workplace where he has shown that he does not have sufficient regard for its rules, and where he is prepared to engage in activity contrary to the interests of his employer. I find that the grievor's actions have irrevocably breached the bond of trust with this employer.

48. Accordingly, the discharge is upheld and the grievance dismissed.

Dated at Toronto this 22nd day of March, 2017.

A handwritten signature in cursive script that reads "Marilyn Silverman". The signature is written in dark ink and is positioned above a horizontal line.

Marilyn Silverman
Arbitrator