2018 CarswellOnt 9136
Ontario Arbitration

Sunwing Airlines Inc. and CUPE, Local 4055 (Carrasqueiras), Re

2018 CarswellOnt 9136

IN THE MATTER OF AN ARBITRATION IN RELATION TO A COLLECTIVE AGREEMENT

Sunwing Airlines Inc. ("the Company") and Canadian Union of Public Employees Local 4055 ("the Union")

Jennifer Webster Member

Heard: April 13, 2018
Judgment: April 23, 2018
Docket: None given.

Counsel: Simon Mortimer, for Company
Paul Zamperin, for Union

***Jennifer Webster Member*:**

1 By letter dated February 9, 2018, Sunwing Airlines terminated the employment of Margarida Carrasqueiras ("the grievor"). The Union filed an individual grievance challenging the termination and the parties agreed to consolidate the termination grievance with three 2016 matters with which I was seized, being the grievor's harassment complaint and two individual grievances about a meeting with management and a request for medical substantiation to return to work. Hearing dates in relation to the four consolidated matters were scheduled for April 13 and 20 and May 28 and 30, 2018 in Toronto, Ontario. Prior to the first day of hearing, the Union advised that it would be raising a preliminary objection to the termination on the basis that the discipline was untimely.

2 At the hearing on April 13, 2018, the parties presented their submissions and documents in relation to the Union's preliminary objection that the Employer's decision to terminate the grievor's employment was invalid due to an undue delay between the events giving rise to the termination and the date of its imposition. The parties agreed that the issue of the timeliness of the termination should be determined before a hearing on the merits of the three grievances and the harassment complaint. The Union submitted that, on the basis of the Employer's delay in terminating the grievor's employment, the termination is invalid and the grievor should be returned to active duty and made whole with respect to lost wages, benefits and seniority since May 30, 2016. The Employer argued that the preliminary objection should be dismissed on the basis that the termination was timely. The Employer submitted that the termination decision was made once the Employer had completed its medical investigation and had concluded that the grievor's conduct was evidence of just cause for discipline. For all of the reasons outlined below, I would dismiss the preliminary objection on the basis that the termination was not untimely.

Background of the Harassment Complaint and Grievances

3 The events that form the basis for these grievances and harassment complaint started in March of 2016 when the grievor sent an email about her vacation pay to the Employer's payroll department. The grievor had been employed as a Cabin Crew Member by Sunwing Airlines since October of 2005. At the time of the email, there was a collective agreement between the Union and Employer which applied to the grievor's employment. This was the first collective agreement between these parties. The content of the grievor's email to payroll on March 14, 2016 is reproduced below:

I am hereby requesting payment owed to me for vacation pay for the past 10 years. From my date of hire October 2005 to December 31, 2015. The labour code is very clear that vacation pay is calculated from total renumeration *[sic]*, including commissions. After my very long investigation and in consultation with the appropriate officials from the labour board, I have discovered that I have only been paid on my basic guaranteed hours of 80 hours per month or on 960 hours per year at the respective percentage. As I worked in different departments for 4 years, there were manny *[sic]* months where my hours for each month were 140 hours of more. Reviewing my flying schedules, I have worked over 80 hours just about every month. This alone amounts to a substantial amount of money you are owing me! After consultation with both the labour board and our union, I opt to ask you for payment directly, as I have been employed with you without a collective agreement longer than with one. Furthermore, this is a non-union issue, is it the law! It was also your mistake, and as the law dictates, I am providing you the required 30 days to comply with payment. Payment of vacation pay on the hours an *[sic]* commissions earned above the 960 hours per year at the appropriate percentage for each year plus the accumulated interest. According to the labour code you must also provide a detailed account of payment. Please provide a separate payment for this money owing as I have made arrangements with CRA to include it on my income tax for 2015.

Please ensure I received this payment no later than April 15, 2016.

I trust this is sufficient information, you can access all hours worked and commissions earned from your records.

If you have any questions please consult the labour board.

Looking forward to my payment.

Sincerely,

Margarida (Maggie) Carrasqueiras

Employee #338

CSM

YYZ base

4 The Employer's Vice President of Inflight, Marcella Howley, responded to the grievor's email on March 16, 2016 by stating: "We are currently dealing with CUPE Local 4055 on the issue of vacation pay and will be communicating to all employees in the next couple weeks." The grievor responded to Ms Howley by email on March 16, 2016, which was copied to the payroll department and to the president of CUPE Local 4055. The grievor's email response was:

Hello all,

As stated before, this is not a union issue! the law, in this case the labour code supersedes the union and any collective agreement! Furthermore, I am not asking for any special treatment, I am advocating for my rights! Sunwing should have paid my accordingly, for each respective year I understand that mistakes can happen, however, I can not accept the fact that this mistake did not happen just once, it happened 10 times! The first time may have been a mistake, the other 9 times looks like it was an option! In any case, I kindly have provided an opportunity for the mistake to be corrected, as stated in my previous communication!

No further response is required.

looking forward to my payment as dictated by law on April 15, 2016.

Sincerely,

Maggie Carrasqueiras

5 On March 17, 2016, the grievor was asked to have a discussion with Ivor Hanna, the Base Manager Inflight and Ms Howley. There is a dispute between the parties whether the events between the grievor, Mr. Hanna and Ms Howley are properly characterized as a meeting or a discussion. For the purposes of outlining the background to these grievances, it is not necessary to determine whether these events were a meeting or a discussion, and I will identify the interaction as a conversation among the grievor, Mr. Hanna and Ms Howley about the exchange of emails in relation to the grievor's vacation pay. In response to this conversation, the grievor completed a Respect in the Workplace Report Form on March 17, 2016 in which she alleged, among other things, that Mr. Hanna and Ms Howley had harassed and bullied her in the conversation which had occurred on March 17, 2016. In the description of the incident, the grievor explained her experience and the impact of the conversation as follows:

> Ms. Howley and Mr. Hanna did not find fault in the way I perform my duties, so they ambushed me after a flight, isolated me, bullied, harass and threatened me, because I sent an email and it seemed to anger them.
>
> I find this conduct extreme, flagrant, calculated, deliberately to cause me stress and harm.
>
> I did not expect this to be the conduct of the VP of In-Flight or anyone from Senior Management. Here are two individuals who are practicing and encouraging prejudice and violence in the pursuit of personal power.
>
> I have always tried to do the best job possible, according to the directive that I have received, from all respective departments. I expect the same from my employer. I did not ask for any special treatment just that the employer follow the same policies, procedures and legislation. No more, no less.
>
> I feel very frightened, and without recourse, as these Individuals are the Senior Management of my Department.
>
> I hereby ask for immediate assistance for protection of physical and psychological harm. I am unsure of what Ms. Howley and Mr. Hanna intended when they said "this is a warning" and "better be cautious." I am afraid.
>
> I am afraid of everything that can happen to me, or even my family. I feel very vulnerable, as both Ms. Howley and Mr. Hanna have access to all my personal information. My mind has not rested thinking about the threats made by Ms. Howley and Mr. Hanna. I feel exhausted and unable to sleep, have nightmares, have lost my appetite, I am experiencing headaches, anxiety, heart palpitations, and over all sadness and I feel totally defeated. I am unsure I can perform my duties, and I am afraid I may make mistakes on the aircraft. This feeling alone is horrifying. I feel that I have been singled out, and that Ms. Howley and Mr. Hanna are constantly watching me. I don't know how this will affect my job. I am afraid of making the smallest of mistakes. I feel that I am being "watched" and that my work environment has been poisoned.

6 The Employer assigned a Human Resources Generalist to investigate the grievor's Respect in the Workplace complaint. The investigation involved an interview with the grievor, the local union president and the Senior Human Resources Manager, as well as an exchange of emails between the grievor and the Human Resources Generalist. In one of the emails to the Generalist, the grievor asked about security cameras in the parking lot and her fears about her personal safety. In another email, she identified that she had experienced an incident of sabotage by a deadheading crew on her flight on April 1, 2016 and that she believed this incident was another example of bullying by the Employer. In a third email exchange, she provided more information about why she was feeling afraid and stated that the conduct of Ms Howley and Mr. Hanna "was premeditated and designed to terrorize me." The grievor asked the Generalist about which steps were being taken to ensure her safety because she was fearful of serious violence in her workplace. She wrote in the email:

> Serious violence, even fatal is a reality in the workplace. I can refer back to recent news of Loblaws employee killing other employees, a Doctor stubbing *[sic]* a nurse to death... and so manny *[sic]* more. I am shaking just thinking

about it. These cars all started with bullying and harassment, progressing to threats and ultimately death. This possibilities are what I am afraid of. To put it in perspective, if Ms. Howley and Mr. hanna were angered by an email to the extent of threatening me, ignore all policies and laws in place, it is reasonable to deduce they are capable of anything.

7 On April 14, 2016, the Human Resources Generalist released her report in relation to the grievor's complaint and found, among other things, that the grievor's "reports of personal danger to her and her family are disproportionate to the intended purpose of the discussion with Ms. Howley on March 17, 2016." The Generalist concluded that "the complaint of threats and acts of physical violence are unsubstantiated an further are an unreasonable reaction to an exchange with management."

8 The grievor booked off sick on April 18, 2016. She provided a medical note on May 12, 2016 in which her physician advised that she was cleared to return to work on May 30, 2016. On May 17, 2016, the Employer requested further medical information and scheduled a meeting with the grievor and her union representatives for May 30, 2016. The Union filed grievance SW-16-03 on the grievor's behalf on June 3, 2016, claiming that the Employer had violated the collective agreement by failing to return her to work and by meeting with her on March 17, 2016. By letter dated June 9, 2016, the Employer provided a summary of the May 30th meeting to the grievor and advised that "at this time we are not satisfied that you are fit to return to work." The Employer requested more information to consider her return to work and asked that she meet with the Employer's Aviation doctor, Dr Gillmore for further assessment. The Employer's concerns about the grievor's fitness were outlined in the June 9th letter:

> During our meeting we discussed the complaint of harassment, the investigation findings and your subsequent time way from work and you made several comments that were alarming to us. You indicated that, notwithstanding our investigation and in the absence of any evidence, you considered it possible that members of management would engage in violence against you including physical violence up to the point of murder in an effort to address a grievance. You also continued to take the position that a flight you were on was deliberately sabotaged despite our investigation and explanation that this was not the case.
>
> Additionally you faxed an Incident / Injury report to Sunwing on May 5, 2016 in which you describe progressive symptoms of tremendous stress, panic attacks and the medical condition anhedonia. You also stated that you have "adjustment disorder." You again describe feeling this way on May 16, 2016 in the Form 6 document you faxed to the Human Resources Department.
>
> Your reactions and interpretations of what the investigation reveals are normal workplace activities, both with management and coworkers, coupled with your perceptions of violence, conspiracy and threat are worrying to us all. We cannot return you to active status as a Cabin Safety Manager until we fully understand whether you are fit to perform the core duties of a flight attendance safely having regard to your own safety, your coworkers' safety and the safety of our customers.

9 The grievor agreed to meet with Dr Gillmore, but subsequently cancelled the appointment. After the cancellation of the appointment with Dr Gillmore, the Employer advised the grievor that she would be on an offline status until she complied with the letter of June 9, 2016. The Union filed grievance SWG-16-05 on behalf of the grievor claiming that the decision to hold her out of service was a violation of the collective agreement.

10 On March 8, 2017, the parties appeared before me with respect to the two grievances. I issued a preliminary award in relation to medical disclosure. Subsequent to the preliminary award, the grievor consented to disclosure of medical information to Dr Gillmore. She also provided a psychologist's report and a report form a Civil Aviation Medical Examiner to the Employer. The Employer did not return her to work on the basis of these reports and I held a hearing for the purpose of mediation-arbitration on January 31, 2018, to address the Union's argument that the grievor be returned to work on the basis of the medical reports. At my direction and with the agreement of the parties, mediation briefs were

exchanged prior to the scheduled hearing. The parties were not able to resolve the issue of the grievor's return to work through the mediation-arbitration and agreed to proceed with the arbitration of the grievances.

11 On February 9, 2018, the Employer provided a letter to the grievor and the Union in which they confirmed that Sunwing was terminating the grievor's employment. The reason for the termination was set out in paragraphs two and three of the letter as follows:

> This decision is based upon my review of your behaviour and the allegations and comments made by you prior to the commencement of your current extended leave. Without dealing these events, I note that your words and actions at the time and since have made it clear that our working relationship must end.
>
> This termination is based on the existence of disciplinary just cause as a result of your false and overzealous complaint and allegations of physical threats, intimidation and conspiracy against members of management Alternatively, it is by way of frustration of contract as your unfounded allegations and the maintenance of this position has broken the trust essential to our customer safety based relationship and made continued employment untenable.

12 As noted above, the Union filed a grievance contesting the termination and the parties agreed that I would be seized of the termination grievance, along with the harassment complaint and two individual grievances from 2016 which were already before me.

The Parties Submissions on the Union's Preliminary Objection on Timeliness

13 The Union submitted that the termination of the grievor's employment was untimely on the basis that the termination letter of February 9, 2018 is nearly two years after the events which led the Employer to hold her out of service. Timeliness of discipline is essential to ensure procedural fairness and to provide the grievor with the opportunity to defend herself. The Union further argued that the Employer's termination decision was a violation of natural justice in that the Employer terminated for cause when it was unable to end the employment relationship through the steps of medical fitness for active duty. On the basis that the termination was untimely, the Union requested that the termination be invalidated and that the grievor be returned to flight duty and be made whole in all respects, which should include compensation for lost wages and benefits since May 30, 2016.

14 In support of its position, the Union provided four arbitration decisions. The decision of Arbitrator Bendel in *University of Ottawa v. I.U.O.E., Local 796-B*, 1994 CarswellOnt 1292, outlined and applied the general arbitral principle that undue delay invalidates disciplinary action. Arbitrator Bendel's decision is considered and followed but the Board of Arbitration in *N.A.P.E. v. Newfoundland & Labrador (Department of Human Resources)*, 137 L.A.C. (4th) 266.

15 The Union submitted that the four rationales for the general arbitral principle around undue delay were identified by Arbitrator Graham in *C.U.P.E. Local 500 v. Winnipeg (City)*, 115 L.A.C. (4th) 79, and that each of these rationales applied with respect to the delay in the instance grievance. In paragraph 12 of the *C.U.P.E. v. Winnipeg* decision, Arbitrator Graham lists the four rationales as:

> 1. unreasonable delay may indicate employer condonation;
>
> 2. the employee's right to procedural fairness must be preserved;
>
> 3. delay effectively denies the grievor the opportunity to defend himself or herself;
>
> 4. the requirement for expeditious discipline is a general arbitral principle applicable even in the absence of evidence of prejudice or unfairness to the employee.

16 The Union also relied on the decision of Arbitrator Surdykowski in *Delta Chelsea Hotel v. H.E.R.E.U. Local 75*, 111 L.A.C. (4th) 22. In the *Delta Chelsea* decision, the arbitrator invalidated a termination on the basis that the

Employer had failed to comply with the requirements of the collective agreement to provide reasons for a discipline notice and to issue the notice as soon as the Employer is aware of the events and has a reasonable time to investigate. The Delta Chelsea Hotel had discharged the grievor in April of 2002 for conduct that was alleged to have occurred in January of that year. The arbitrator found that the discharge was invalid and reinstated the grievor solely on the basis of the particular language of the collective agreement. With respect to the Union's argument here, I find that this decision is not helpful to the analysis because Arbitrator Surdykowski's decision is grounded in the particular language of the collective agreement between those parties and there is not similar language in the collective agreement between Sunwing and CUPE Local 4055.

17 The Employer maintained that the termination of the grievor's employment was timely because the decision to terminate was based on the events of March 2016 and the conduct which has followed after those events. The Employer argued that there was a continuum of events after the discussion among the grievor, Ms Howley and Mr. Hanna on March 17, 2016. This continuum included the harassment complaint and investigation and the discussions about the grievor's fitness for active duty. The Employer was engaged in an investigation about the grievor's medical condition to determine whether her reaction to the March, 2016 events was related to an underlying medical issue. The Employer submitted that it did not condone the grievor's conduct but engaged in a medical investigation rather than a disciplinary process. It became clear to the Employer through the medical investigation that the grievor maintained her position that her conduct in March and April of 2016 were appropriate relations to the conversation with management. It was at that point that the Employer made the decision to terminate which, in the Employer's submission, was not an untimely decision because any delays were justified and appropriate to ensure that the grievor's conduct was not caused by a medical condition.

18 The Employer accepted the general arbitral principle outlined in the arbitration decisions that undue delay invalidates discipline but distinguished the decisions in the cases provided. In particular, the Employer highlighted that, in two of the decisions relied upon by the Union (the *Newfoundland* and *Delta Chelsea* decisions), the arbitrators were applying collective agreement language with express provisions related to timeliness of discipline and that, in the Sunwing and CUPE collective agreement, no such time limits exist.

19 From the Employer's perspective, the termination letter was not triggered by the events of 2016 but rather by the events that followed as outlined in the reasons provided in the letter. The Employer argued that it was only in February of 2018 that it was in a position to review the circumstances and conclude, without engaging in discrimination on the basis of a disability or other human rights ground, that the grievor had engaged in conduct that justified the termination of her employment.

Decision

20 I accept the general arbitral principle as outlined in the arbitration decisions that undue delay in imposing discipline will render the discipline void. This general principle applies even in the absence of express collective agreement language about the time line for the imposition of discipline. The parties' collective agreement includes provisions related to discipline in article 20. These provisions include a commitment in article 20.1.2 that the Employer will "exercise its rights hereunder in a fair and reasonable manner, in good faith and without discrimination, in keeping with the provisions of this Agreement. Article 20.2.4 addressed progressive discipline and includes a provision that discipline can be started at any step for issues of a more serious nature. Article 20 does not include time limits for the investigation of incidents or for the imposition of discipline. However, the obligation for an Employer to act in a timely way does apply to the imposition of discipline as outlined in the decisions provided to the Union. Where an Employer fails to discipline in a timely way, the discipline will be found to be invalid, regardless of whether there is actual unfairness or prejudice to the employee.

21 In these circumstances, the grievor's employment was terminated by letter dated February 9, 2018. Her last day of active duty was in April of 2016 and the parties have been engaged in investigations, meetings, grievances, and arbitrations about the grievor's employment since her last day of active duty. The termination letter identified that the grievor's "words and actions at the time *and since* have made it clear that our working relationship must end." [Emphasis

added.] I accept that the Employer has engaged in an investigation related to the grievor's medical fitness since the events of March and April of 2016 with the purpose of determining whether her reactions to her managers and co-workers were caused by a medical condition. I also accept that the grievor has maintained the position throughout the period from March 2016 forward that her managers engaged in conduct which she experienced as harassment and which undermined her ability to function effectively at work. The Employer determined that the grievor reacted extremely to her experience of harassment. She shared her views with the Employer that members of management would engage in physical violence, including murder, towards her. It was based on these statements as well as medical information that identified panic attacks, stress and anhedonia that the Employer sought medical information to establish the grievor's fitness and also to determine whether there was an underlying medical cause to her extreme reactions.

22 The grievor and the Union have provided recent medical evidence that the grievor is fit to return to work. There has, however, been no medical evidence provided to establish a medical explanation or context for the grievor's extreme reactions to her managers and co-workers in March and April of 2016. The grievor asserts that her conduct was an appropriate response to harassment, bullying and the threat of violence in the March 17, 2016 conversation. The issue of whether the conduct was appropriate can only be addressed in the context of hearing evidence related to the merits of the grievances and harassment complaint.

23 While the termination of the grievor's employment appears to be imposed after a significant delay from the events in March of 2016, I do not find that the Employer has engaged in undue delay in the imposition of discipline because the Employer, Union and the grievor were engaged in an ongoing process of investigation in relation to the grievor's medical fitness. At the conclusion of this investigation, the Employer determined that the grievor's behaviour in March of 2016 and subsequent to the March, 2016 events involved false and overzealous complaints as well as allegations against members of management that provided the basis for a termination for just cause. Given that I have not found undue delay that would invalidate the discipline, I do not need to consider the rationales underlying the delay concerns. However, I would underline that the grievor and the Union have not suffered procedural unfairness related to the time frame involved in investigating the grievor's conduct. The Union and the grievor have been involved and active participants in meetings, investigations and grievances in relation to the subject matter of this arbitration. The opportunities for the grievor to defend herself and for the Union to represent her have not be undermined due to the time period involved in the investigation of the grievor's medical fitness and her conduct.

24 The preliminary objection about the timeliness of the termination of the grievor's employment is dismissed and the grievances will be heard on their merits.