COURT OF APPEAL FOR ONTARIO

CITATION: Canada Post Corporation v. Canadian Union of Postal Workers, 2019 ONCA 476
DATE: 20190611
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Feldman, van Rensburg and Nordheimer JJ.A.

BETWEEN

Canada Post Corporation

Appellant

and

Canadian Union of Postal Workers

Respondent

Richard J. Charney and Kaley Dodds, for the appellant

Paul J.J. Cavalluzzo and Adrienne Telford, for the respondent

Heard: November 26, 2018

On appeal from the order of the Divisional Court (Regional Senior Justice Robbie D. Gordon and Justice Frances P. Kiteley, Justice Herman J. Wilton-Siegel dissenting), dated November 2, 2017, with reasons reported at 2017 ONSC 6400, affirming the award of Arbitrator Owen B. Shime, dated September 21, 2016, with reasons reported at [2016] C.L.A.D. No. 264, 2016 CarswellNat 5923.

van Rensburg J.A.:

OVERVIEW

[1] This appeal began with the arbitration of a grievance concerning the dismissal of Christopher Seivright, a temporary postal worker and member of the

Canadian Union of Postal Workers (the “respondent” or the “Union"). The arbitrator allowed the grievance and ordered Mr. Seivright’s reinstatement. Canada Post Corporation (the “appellant” or the “Corporation”) filed an application for judicial review of the arbitrator’s award, that was dismissed by the Divisional Court. The Corporation now appeals to this court with leave.

[2] At the heart of the case is the interpretation of Article 44.11(b) of the parties’ collective agreement authorizing the termination of employment of a temporary worker who fails to demonstrate “reasonable availability in the acceptance of work assignments” in any six consecutive month period.

[3] The employment of Mr. Seivright, a temporary employee at the York Distribution Centre (the “YDC”) was terminated when, between February 26 and August 29, 2015, he accepted 57 of 151 work assignments that were offered to him. The Corporation terminated his employment because his acceptance rate (37.8%) was below the average of 49.9% for his peer group, consisting of all the temporary employees in the YDC, during the same six-month period. The Union grieved the termination.

[4] The arbitrator considered the grievance and concluded that both the use of an acceptance rate benchmark and its application to the grievor were unreasonable. He held that the Corporation’s use of a bare arithmetical formula of comparing the employee’s acceptance rate with the peer average was arbitrary

and failed to consider factors such as the 24/7 operation of the YDC, the high volume of parcels passing through the facility, the resulting use of temporary workers, and the grievor's seniority – all of which increased how often the grievor was called for work. Instead, the arbitrator found that the Corporation ought to have considered the actual number of shifts worked by the grievor, and the fact that the Corporation suffered no prejudice in the form of delayed mail delivery as a result of the grievor's non-acceptance of work. The arbitrator observed that, when the relevant factors were considered, the grievor had been reasonably available to accept work assignments. He set aside the dismissal and ordered the grievor's reinstatement.

[5] On judicial review, the Divisional Court concluded that the arbitrator departed from binding arbitral jurisprudence in two respects – in rejecting an acceptance rate approach to assess reasonable availability, and in requiring prejudice to the Corporation as a pre-condition for termination. Gordon R.S.J., for the majority, nevertheless upheld the arbitrator's decision to reinstate Mr. Seivright on the basis that his decision, although flawed in certain respects, was reasonable. Wilton-Siegel J., in dissent, would have set aside the arbitrator's decision and remitted the grievance to a new arbitrator for determination.

[6] For the reasons that follow, I would dismiss the Corporation's appeal from the Divisional Court's decision. Briefly, I reject the appellant's argument that the

result in this case departed from binding arbitral jurisprudence interpreting Article 44.11(b) of the collective agreement, and was therefore unreasonable. The arbitrator was entitled to go beyond the grievor's acceptance rate and to consider other relevant circumstances in assessing the reasonableness of his availability. In this case, the relevant circumstances included the number of shifts offered to the grievor, the manner in which those offers were made, the total number of shifts and hours he actually worked, and the nature of the YDC's operations. And, although the arbitrator erred in requiring prejudice to the Corporation as a pre-condition for termination, this error did not affect the reasonableness of his decision.

[7] The arbitrator's award, allowing the grievance and reinstating the grievor after due consideration of the relevant circumstances, was reasonable. The Corporation failed to take into consideration the relevant factors, with the result that the termination of the grievor's employment was unjustified.

FACTS

[8] Christopher Seivright was employed as a temporary postal worker at the YDC from November 2, 2011 until his employment was terminated on September 17, 2015. He was on a list of temporary or casual employees called, in order of seniority, to fill in for absent full or part-time employees, or otherwise as required by the workload at the YDC. Temporary workers are offered shifts on an as-needed

basis, without guaranteed minimum hours of work per week. At the time of Mr. Seivright's termination, there were approximately 70 temporary employees on the YDC call list.

[9] Until October 28, 2014, when Canada Post implemented the Eclipse Automated Calling System nationally,[1] shifts were offered by management personnel to temporary employees at the YDC in order of seniority, and no such employee was disciplined for not accepting a shift. Under the Eclipse system, computerized calls are made at various times of the day (but typically not before 7:00 a.m.), seven days a week, without regard to whether an employee has just completed a shift. When an employee answers the call, there is an automated message with the assignment details and the employee can either accept or reject the offer of a shift using the telephone keypad. An assignment is considered "not accepted" when it is explicitly rejected, or when the employee cannot be reached and does not return the call within ten minutes. If more than one work assignment is offered for one day and some or all are rejected by the employee, the rejections count as a single refusal. Temporary employees are not called when they are on a sanctioned leave, including the two-week vacation to which they are entitled.

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[1] According to the appellant's counsel, the Eclipse system was in use in Montreal as early as 2006, but was extended nationally in 2014.

[10] Temporary employees are required to demonstrate “reasonable availability in the acceptance of work assignments”. Article 44.11(b) of the collective agreement provides that the employment of a temporary employee “shall” be terminated when the employee has not demonstrated such reasonable availability in any six-month period.

[11] From June 2014, parcel distribution at the YDC increased significantly, which led to five new full-time workers being hired, and the increased use of temporary workers. Beginning in August 2015, the YDC operated 24 hours a day for seven days a week, but had begun testing a seven day work week in June 2015, by introducing a Sunday afternoon shift.

[12] The number of shifts offered increases with seniority. During the relevant six-month period Mr. Seivright, who was the seventh most senior temporary employee, worked 57 shifts, which was within the top 25 to 30% of all temporary employees in the YDC. He received 230 calls (of which 151 were counted), and was offered more assignments in total than it was possible to work.

[13] Mr. Seivright received two warning letters before his termination. On May 25, 2015, he was informed that, between November 5, 2014 and April 25, 2015, he had accepted 39 of 131 offers made, and that this was unacceptable. The letter did not inform Mr. Seivright of his acceptance rate (29.8%) or that this was being compared to the peer average (39.1%) for that period. The letter stated that Mr.

Seivright's "level of availability [had] not been sufficient to meet [the Corporation's] business needs and customer service standards."

[14] A July 10, 2015 letter advised that, between April 26 and June 27, 2015, Mr. Seivright had accepted 19 of 52 offers of work assignments, which was unacceptable. Again, the letter did not inform Mr. Seivright of his acceptance rate (36.5%), and while it told him for the first time that he was being compared to his peers, it did not refer to the peer average of 49.7%. Mr. Seivright was warned in the letter that if he continued to demonstrate unreasonable availability in the next two months, his employment could be discontinued.

[15] On September 17, 2015, Mr. Seivright's employment was terminated. The stated reason for the termination was that he had not demonstrated reasonable availability in the acceptance of work assignments during the six-month period from February 26, 2015 to August 29, 2015.

[16] During the relevant six-month period, Mr. Seivright accepted 57 of the 151 work assignments offered. This was the 17th highest number of shifts worked, in the top 25 to 30% of all temporary employees at the YDC, and an average of 13.5 hours per week. Mr. Seivright's acceptance rate was 37.8%, while the average acceptance rate of all temporary employees at the YDC during the same period was 49.9%. To meet the peer average, Mr. Seivright would have had to have worked 3.5 shifts per week, roughly equivalent to part-time hours.

[17] The Union grieved the termination, alleging that the grievor had been reasonably available to work, such that his dismissal was unjust and unreasonable.

RELEVANT PROVISIONS OF THE COLLECTIVE AGREEMENT

[18] Article 44.11(b) was first introduced in the collective agreement signed September 30, 2003. The relevant provisions of the collective agreement in force at the time of Mr. Seivright's dismissal, including Article 44.11, are as follows.

> 9.100. Restriction of Power
>
> The arbitrator shall not modify the provisions of this collective agreement.
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> …
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> 9.103. Future Cases
>
> The final decision rendered by an arbitrator binds the Corporation, the Union and the employees in all cases involving identical and/or substantially identical circumstances.
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> …
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> 10.01. Just Cause and Burden of Proof
>
> (a) No disciplinary measure in the form of a notice of discipline, suspension or discharge or in any other form shall be imposed on any employee without just, reasonable and sufficient cause and without his or her receiving beforehand or at the same time a written notice showing the grounds on which a disciplinary measure is imposed.
>
> …

> 10.08. Termination of Employment
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> Article 9 and clause 10.01 shall apply mutatis mutandis to any form of termination of employment decided by the Corporation.
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> …
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> 44.11. Availability and Termination of Employment
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> (a) The employment of a temporary employee may be terminated by the Corporation when the employee has not worked for any reason during a period of twelve (12) continuous months excluding the period from December 1 to December 24 inclusive.
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> Following a review of its operational requirements, should the Corporation decide to partially exercise its right in this regard, the identification of the employees who will be terminated will be by reverse order of seniority.
>
> (b) The employment of a temporary employee shall be terminated when the employee has not demonstrated reasonable availability in the acceptance of work assignments during any six (6) consecutive months following the signing of the collective agreement.
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> Paragraphs 44.11 (a) and (b) do not apply with respect to any period during which an employee is disabled, on maternity, parental, adoption or union leave without pay, provided however that prior written notice has been given to the Corporation.

THE ARBITRATION DECISION

[19] The arbitrator began his reasons by summarizing some of the evidence at the arbitration. Of note was the evidence of Mark Alexander, Manager of Production Control and Reporting, who testified about the Corporation's approach

to termination in this case. Mr. Alexander was responsible for staffing levels for temporary employees and for the Eclipse system and its implementation. In consultation with the Corporation's National Labour Relations Division and the National Production Control and Reporting Division, he conceived of the practice of utilizing a peer acceptance rate for determining reasonable availability.

[20] Mr. Alexander confirmed that he had discharged Mr. Seivright because he continually had fallen below the peer average at YDC and because he had been notified twice about his availability and had not improved. Mr. Alexander did not consider the high number of calls the grievor received because of his level of seniority, or that the YDC was a 24/7 operation. Mr. Alexander was not aware of whether customer service was affected by Mr. Seivright's unavailability and this was not a factor he considered. Mr. Alexander acknowledged that the peer average was a moving target that varied from time to time.

[21] The resources planning officer at the YDC, the grievance officer for Mr. Seivright's Union local and Mr. Seivright also testified at the arbitration hearing. In evidence were various documents, including the grievor's letter of hire, the warning letters, the letter of termination, records of work assignment offers made to Mr. Seivright, and various corporate policies and guidelines.

[22] Mr. Seivright's letter of hire dated November 1, 2011 said in relation to Article 44.11 of the collective agreement:

> Canada Post counts on your availability as a temporary employee. Pursuant to clause 44.11 of your collective agreement, you have the obligation to demonstrate reasonable availability in the acceptance of work assignments.
>
> Canada Post expects you to be available for work. Consequently, depending upon the circumstances of each case, unsuccessful attempted calls or repetitive refusal of work assignment offers will be documented [in] accordance with clause 44.11(b) of the collective agreement.

[23] Mr. Seivright also signed a Directive Regarding the Obligation of Availability for Temporary Employees in the CUPW Bargaining Unit that set out Article 44.11 and stated:

> Canada Post expects you to be available for work. Consequently, depending on the circumstances of each case, unsuccessful attempted calls or repetitive refusals of work assignment offers will be documented and may lead to your termination of employment from Canada Post in accordance with clause 44.11(b) of the collective agreement.

[24] The arbitrator set out in detail the arguments of the parties. In brief, the Union argued that the peer acceptance rate approach to determining whether the grievor was reasonably available was unreasonable in the context of the high parcel volume at YDC, the shortage of permanent staff and the inordinate number of calls to the grievor during the six-month period. It led to absurd results when applied to employees with greater seniority: in the six-month period, the grievor worked 57 shifts and had an acceptance rate of 37.8%, while a less senior employee who

worked only two shifts had a 100% acceptance rate. The Union argued that the Corporation failed to consider a number of relevant factors, including: the casual nature of the temporary employment and the fact that temporary employees might have outside employment, that the YDC operated 24 hours a day, seven days a week, so that work offers could be made daily and would increase with an employee's seniority, and the fact that at the time there were approximately 70 employees on the temporary employee list, sufficient such that there was no prejudice to the Corporation. The Union also asserted that certain work offers should not have been counted against the grievor, such as early morning calls after Mr. Seivright had worked a night shift or calls on Sundays when he was observing the Sabbath, and that the grievor's personal circumstances, including the need for accommodation due to family obligations and religious observance, ought to have been considered. Finally, the Union submitted that the grievor did not have proper notice of the standard that the Corporation applied to him.

[25] The Corporation argued that the grievor's dismissal, based on a comparison of his rate of acceptance to the peer average, was warranted. It asserted that prior arbitral jurisprudence was binding under Article 9.103 of the collective agreement, and supported the proposition that an acceptance rate of less than 50% did not constitute reasonable availability. The Corporation rejected the assertion that only certain calls, or that any of Mr. Seivright's personal circumstances, should be considered. Instead, all calls should be counted, including those made to Mr.

Seivright in the early morning hours after he had just completed a night shift, and those requiring him to work on Sundays. According to the Corporation, it was a term of the grievor's employment that he be available at any time, and his failure to meet the peer average constituted unreasonable availability.

[26] Arbitrator Shime allowed the grievance and ordered Mr. Seivright's reinstatement. He accepted that Articles 10 and 44 of the collective agreement must be read together, such that where a temporary employee does not demonstrate reasonable availability in the acceptance of work assignments during any six-month period, such conduct constitutes just cause for the termination of employment, and the arbitrator must uphold the termination. He went on to state, at para. 57:

> However, that does not end the matter, because such a determination, as the cases reveal, requires a factual assessment in each case as to what constitutes reasonable availability. Because the end product of such a determination or assessment may lead to termination or discharge for just cause, the underlying facts must bear the same scrutiny as any other factual basis relied upon by the Corporation to terminate or discharge an employee for just cause.

[27] The arbitrator noted that Article 44.11(b) does not mandate consideration of a rate of acceptance based on total assignments offered, for the purpose of determining reasonable availability in the acceptance of work assignments. In fact, "the effect of measuring acceptance as a percentage of the assignments offered

is to automatically dilute the actual acceptances of work assignments to the detriment of the temp": at para. 60. Nor is there a mandate in the collective agreement to measure a temporary employee's acceptance against the peer average to determine reasonable availability.

[28] The arbitrator noted that the grievor's automatic termination was contrary to the Corporation's guidelines, which provide that the Corporation or managers "do not action every refusal or attempted call, [and are] to evaluate each case individually based on its merits." He referred to the directive that "lists may cover a 24/7 period; the expectation for availability may be lower" when he concluded that the Corporation ought to have considered the context of the YDC's 24/7 operation and the increased high volume of parcels as well as the grievor's increasing seniority in order to determine reasonable availability. Rather than applying the rate of acceptance formula to the seniority list, the Corporation ought to have counted the number of shifts accepted. The arbitrator noted that the automatic application of the acceptance rate formula did not consider Mr. Seivright's actual acceptances, which compared favourably to the hours worked by permanent part-time employees.

[29] In the arbitrator's view, the Corporation's use and application of the 50% acceptance rate was arbitrary and unreasonable. Article 44.11(b) did not include either a numerical threshold below which availability would be deemed

unreasonable, or a requirement that temporary employees' acceptance rates be compared to the peer average. The temporary employees had not been notified of any such standard, and in any event the average acceptance rate of temporary workers at the YDC was in constant flux and unknowable in advance.

[30] In the course of his reasons, the arbitrator observed that, when considering reasonable availability, the interests of the employer in maintaining the proper standards for the delivery of mail must be weighed along with the interests of the temporary employee in maintaining an element of job security and financial support. He went on to conclude that a mechanical application of the formula was unfair and arbitrary as it bore no relation to a level of availability that was required to satisfy business needs and customer service standards. He went so far as to state that a temporary employee should not be terminated unless his or her unavailability impaired the standards of delivery.

[31] Finally, the arbitrator concluded that, on the facts of this case, the Corporation did not have "just, reasonable and sufficient cause" to terminate Mr. Seivright's employment, as in all the circumstances he had demonstrated reasonable availability in the acceptance of work assignments.

THE DIVISIONAL COURT DECISION

[32] A majority of the Divisional Court (Gordon R.S.J. and Kiteley J.) upheld the arbitrator's decision as reasonable. Wilton-Siegel J. dissented.

[33] The majority held that the arbitrator departed from binding arbitral jurisprudence both in failing to use an acceptance rate analysis and in requiring prejudice to the employer as a pre-condition to termination.

[34] In the majority's view, the arbitrator's decision was nevertheless reasonable. It was reasonable for the arbitrator to conclude that both the acceptance rate standard of 50% and its application to Mr. Seivright were unreasonable. Gordon R.S.J. stated, at paras. 27-28 and 37-38:

> The Arbitrator in the case before us determined that the rate used was unilateral and arbitrary because, inter alia, it failed to take into consideration: (a) the 24/7 period of operation at the facility in question; (b) the high increase in the volume of parcels at the facility; and (c) what impact a 50% acceptance rate would have on the Corporation's ability to meet its mandate.
>
> In my view, the Arbitrator did not disregard arbitral jurisprudence in this respect. His determination that the acceptance rate used by the Corporation was both unilateral and arbitrary was reasonable.
>
> …
>
> It is clear from the decision of the Arbitrator that neither of these requirements [for the standard itself and the application of the standard to be reasonable] were met. As indicated above, the Arbitrator was justified in finding that the standard used by the Corporation was arbitrary. Furthermore, he determined that the application of the standard to the Grievor was not reasonable because: (1) It failed to consider the number of work assignments accepted by the Grievor and how this compared to other part-time employees; (2) It failed to consider his seniority and the consequent increase in offers made to him; and (3) It failed to consider that the very nature of certain

> offered work assignments rendered them incapable of acceptance.
>
> Based on these factors it was reasonable for the Arbitrator to have found that the Corporation did not meet its onus of establishing that the Grievor's rate of acceptance was unreasonable.

[35] Wilton-Siegel J. concluded that the arbitrator's reasoning was fundamentally flawed because he failed to follow arbitral jurisprudence which established that a dismissal may be made on the basis of an acceptance rate, and to the extent the arbitrator held that proof of harm to the Corporation was required for a dismissal.

[36] Wilton-Siegel J. accepted that the arbitral jurisprudence establishes that an acceptance rate materially below 50% is sufficient for termination, and that therefore the Corporation's use of such a standard in this case was reasonable. Even if the factors identified by the arbitrator (24/7 operation of the YDC and the increase in the volume of parcels) ought to be taken into consideration, these factors were accounted for in the peer average because such circumstances would apply equally to all YDC employees.

[37] Wilton-Siegel J. also concluded that the Corporation applied the acceptance rate standard to the grievor in a reasonable manner, when his acceptance of work assignments was compared to that of other temporary employees by incorporating the peer average. There was no basis for comparing the grievor's hours to those of a part-time employee. Finally, Wilton-Siegel J. rejected as a relevant factor the

impact of the grievor's seniority on the number of offers made, saying that considering this factor would amount to rewriting the collective agreement.

[38] Wilton-Siegel J. held that the Corporation's use and application of the acceptance rate formula in this case was reasonable and supported by arbitral jurisprudence, and that, in failing to follow the jurisprudence, which was binding by virtue of Article 9.103 of the collective agreement, the arbitrator's decision was unreasonable.

STANDARD OF REVIEW

[39] The parties agree that the standard of review of the arbitrator's award is reasonableness. The Supreme Court of Canada defined the reasonableness standard in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[40] On appeal to this court, we must determine whether the reviewing court correctly identified and properly applied the appropriate standard of review. In

other words, this court on appeal effectively steps into the shoes of the Divisional Court, focusing on the reasonableness of the arbitral decision itself: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 45-47.

ISSUES

[41] The appellant's central argument in this appeal is that the arbitrator failed to follow prior arbitral jurisprudence when he rejected the Corporation's termination of the grievor's employment that was based solely on his failure to meet the peer average acceptance rate.

[42] The appellant says that the arbitrator's decision, which rejected this approach and imported other considerations into determining whether reasonable availability was demonstrated, contravened Article 9.103 of the collective agreement and was unreasonable. Alternatively, the arbitrator's failure to explain why he departed from the prior arbitral cases in itself rendered the decision unreasonable, as it lacks the necessary justification, transparency and intelligibility that are required for appellate review.

[43] The determination of the appeal engages a number of issues, which will be canvassed in my analysis.

[44] First, I will consider what was, and was not, determined in the prior arbitration cases considering Article 44.11(b), which, under Article 9.103 of the collective agreement, are binding on the parties to the extent that they involved identical or substantially identical circumstances. I will examine the appellant's argument that these earlier cases consistently endorse the Corporation's use of an acceptance rate test in determining whether a temporary employee has demonstrated reasonable availability in the acceptance of work assignments.

[45] As I will explain, the prior arbitral jurisprudence does not support the appellant's position. While a number of cases used a 50% acceptance rate as an administrative screening device, there is simply no arbitral precedent for an automatic or mechanical termination based on a peer average, or even a rate of 50%. Rather, the cases, consistent with the Corporation's own policies, require a review of the particular circumstances of the workplace, which in this case, unlike any of the prior arbitral cases, involved temporary employees on a single list who could be offered work 24 hours a day, seven days a week.

[46] In view of this conclusion, it is unnecessary to consider the appellant's arguments that the arbitrator's failure to follow binding arbitral jurisprudence in itself, or his failure to explain why he departed from such jurisprudence, rendered his decision unreasonable.

[47] The next issue is whether there was any error in the arbitrator's analysis that made his decision unreasonable. I accept the appellant's argument (also accepted in the Divisional Court) that the arbitrator's insistence on prejudice to the Corporation as a pre-condition to termination, was inconsistent with the prior arbitral jurisprudence, and therefore an error. However, I agree with the majority of the Divisional Court that this error was not essential to the arbitrator's decision allowing the grievance, which was otherwise reasonable.

[48] Another issue raised by the appellant is whether it was denied procedural fairness when the arbitrator relied on the corporate prejudice factor, when it was not argued on the arbitration. In view of my conclusions on the corporate prejudice issue, it is unnecessary to determine this issue.

ANALYSIS

1. What Did the Prior Arbitration Decisions Determine?

[49] Pursuant to Article 9.103 of the collective agreement, prior arbitral awards involving "identical and/or substantially identical circumstances" are binding on the parties. This article is meant to prevent re-litigation, delay, costs and the risk of inconsistent results: *Canada Post Corp. v. Canadian Union of Postal Workers* (2001), 56 O.R. (3d) 457 (C.A.), at para. 29. At the time of the arbitration, there were six arbitral decisions that considered Article 44.11(b). Two of these decisions

were appealed first to the Superior Court of Quebec and then in 2008, to the Court of Appeal of Quebec.[2]

[50] A foundation of the appellant's argument is that the prior arbitral awards endorse the mechanical use of an acceptance rate in determining reasonable availability, and that in fact a minimum 50% acceptance rate has been accepted consistently in the cases. The appellant argues that the arbitrator unlawfully amended the collective agreement by departing from prior arbitral awards involving similar circumstances, contrary to Article 9.103 of the collective agreement, and that therefore he exceeded his jurisdiction. The Corporation asserts that considerations other than the peer acceptance rate are "personal circumstances" or subjective considerations, which, according to the cases, are irrelevant.

[51] The respondent disagrees with the Divisional Court's conclusion that the arbitrator departed from arbitral case law by "failing to use the acceptance rate

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[2] The prior arbitral jurisprudence consists of the following cases: *Syndicat des travailleurs et travailleuses des postes c. Société canadienne des postes* (August 15, 2005), Arbitration Decision No. 2005-32 (Arbitrator Rodrigue Blouin) (the "Blouin Arbitration"); *Canadian Union of Postal Workers v. Canada Post Corporation* (September 27, 2005) (Arbitrator Stan Lanyon) (the "First Lanyon Arbitration"); *Syndicat des travailleurs et travailleuses des postes c. Société canadienne des postes*, [2006] D.A.T.C. no. 281, 2006 CarswellNat 2321 (Arbitrator Diane Sabourin) (the "Sabourin Arbitration"), aff'd 2007 QCCS 4508, aff'd 2008 QCCA 1232; *Syndicat des travailleurs et travailleuses des postes c. Société canadienne des postes*, [2006] D.A.T.C. no. 302 (Arbitrator André Rousseau) (the "Rousseau Arbitration"), rev'd 2007 QCCS 4497, rev'd 2008 QCCA 1232; *Canadian Union of Postal Workers v. Canada Post Corporation* (2006), 156 L.A.C. (4th) 109 (Arbitrator Stan Lanyon) (the "Second Lanyon Arbitration"); *Canadian Union of Postal Workers v. Canada Post Corporation* (December 11, 2013), Arbitration Decision No. 2013-44 (Arbitrator Wayne Thistle) (the "Thistle Arbitration"). This court was provided with English translations "for internal use" of the Quebec arbitral and court decisions.

analysis". The Union argues that the binding arbitral jurisprudence does not dictate a formal acceptance rate test, but consistently calls for an analysis of the circumstances of each case. The Union also argues that, while the cases do not require corporate prejudice as a pre-condition to termination, they do not preclude its consideration as a factor in assessing reasonable availability.

[52] I begin with what is not in dispute. The prior jurisprudence establishes that the termination of a temporary employee is justified once the Corporation establishes that the employee has not demonstrated reasonable availability, unless the termination was abusive, discriminatory, or due to an unreasonable personal motive against the grievor. The arbitrator's jurisdiction is limited accordingly. Since the termination is not "disciplinary", an arbitrator has no ability to impose a lesser sanction for the employee's failure to demonstrate reasonable availability. See, for example, the appellate review of the Sabourin and Rousseau Arbitrations, at 2008 QCCA 1232, at para. 13.

[53] The cases observe that the collective agreement does not define "reasonable" availability, and that it is therefore necessary, and consistent with the Corporation's own policies, to consider the individual circumstances of each case, in other words to conduct a "case-by-case" analysis: Thistle Arbitration, at p. 13; Sabourin Arbitration, at para. 7. At para. 9 of its decision, the Court of Appeal of Quebec stated:

> [Translation]
>
> [T]he arbitrators bore the responsibility of assessing, case by case, whether the temporary employee in question had demonstrated reasonable availability, although the collective agreement was silent on the definition of this concept.

[54] I turn now to what the prior arbitral jurisprudence says about how reasonable availability is to be determined, and whether, as the appellant argues, the cases both endorse the use of an employee's "acceptance rate" – the number of work offers accepted divided by the offers made – and establish that 50% is an appropriate cut-off rate for determining reasonable availability.

[55] As the point of departure, I note that there is nothing in the prior arbitral jurisprudence that endorses or even refers to what occurred here – the use of a peer or "average" acceptance rate for temporary employees below which availability is mechanically determined to be unreasonable.

[56] Nor is there anything in the prior arbitral jurisprudence that requires the use of a rate of acceptance when determining whether a particular temporary employee has demonstrated reasonable availability, or that would preclude the approach taken by the arbitrator in this case – which considered the actual number of shifts that were offered to the grievor and then worked by him, in the context of the 24/7 operations of the YDC.

[57] The Corporation's argument confuses the use of a 50% benchmark as a screening device with a 50% acceptance rate standard for termination. In the earlier cases, the Corporation had identified the temporary employees whose acceptance rates fell below 50% and advised them to either increase their availability or face the risk of termination. However, with one exception, the Corporation had not adopted (and, in fact, expressly maintained that it was not making use of) such a standard as proof in itself that a particular employee was not reasonably available.

[58] In the Blouin Arbitration, for example, the Corporation used a 50% benchmark to check, control, and, if necessary, purge its call-back lists of temporary employees, in anticipation of moving to use only temporary employees for weekend shifts: at paras. 19-20. Arbitrator Blouin described the 50% benchmark as "the first step in the process" and "a simple work instrument to support an operational activity [the purging of the lists]": at para. 67. In the Sabourin Arbitration, the Corporation used a 50% standard as a starting point for reviewing the files of temporary employees. It was described as an "administrative standard" that was adopted to "draw the line": at para. 23. In the Thistle Arbitration, the Corporation conducted a major review of availability records, which had "focused on those employees who had not provided 50% availability": at p. 13. In the Rousseau Arbitration, the Corporation used the 50% standard as a first step after

it decided to “clean house” because temporary employees were no longer reporting for work: at para. 42.

[59] In each of these cases, it was the Corporation’s position that it had not adopted a 50% benchmark, or any benchmark at all, for determining the reasonable availability of temporary employees: Blouin Arbitration, at para. 37; Sabourin Arbitration, at para. 23; Rousseau Arbitration, at para. 47. Arbitrator Thistle explained that no such standard was used because the employer did not want to “low ball” its expectation for availability: at p. 7.

[60] While these cases do not compare the employee’s work acceptance rate to any particular standard, they do speak of the employee’s work acceptance both in the number of shifts offered and worked, and as a percentage of shifts offered. As the Union points out, in none of the cases was the standard applied by the Corporation to determine reasonable availability challenged, and in any event, the cases do not unanimously uphold the terminations of all temporary employees accepting less than 50% of work offers. Rather, the discharge of temporary employees with “acceptance rates” of anywhere from 3.3% to 45% were upheld, while the discharge of others with rates of 14% to 46% were not upheld.

[61] It is important to note that there is no evidence that any of these cases involved a workplace with 24/7 operations and a call-in list for temporary

employees, where an employee could be called upon to work any shift at any time.[3] In each of the Blouin, Sabourin and Rousseau Arbitrations, the grievors were on specific lists tied to a particular shift, and calls were made by an automated call generator to fill that shift. In the Rousseau Arbitration, temporary employees were placed on one of ten lists based on availability and could request transfer to another list. This was also the case in the Blouin Arbitration, where the grievors were all temporary employees on a weekend call-in list and could choose the hours during which they would be available. And, in the Sabourin Arbitration, the list on which each temporary employee was included also indicated the hours the employees could be contacted by the call generator (in some cases providing for a four hour call window, in others for a 5.5 hour call window, and in others for a window of “various hours”).

[62] It is reasonable to assume that an employee who is on a list to be called up for particular shifts only, and who can change lists depending on his or her availability, holds him or herself out as available for work during that time period. Indeed, in upholding the terminations that were reversed in the Rousseau Arbitration (involving numerous employees on various shift-specific call-in lists), the Court of Appeal of Quebec observed at para. 18 that “[s]omeone who is

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[3] Although the Thistle Arbitration and the First and Second Lanyon Arbitrations concerned temporary employees on a single list, there is no indication that employees on such a list could be contacted at any hour of the day or night.

unavailable most of the time he is supposed to be available lacks reasonable availability" (emphasis added).

[63] The only case where the Corporation purported to define reasonable availability strictly through an acceptance rate benchmark was in the Second Lanyon Arbitration. In that case, the employer had set an acceptance rate of 70% which it had communicated to its temporary employees, including the grievor. Arbitrator Lanyon nevertheless concluded that the grievor's injuries and exceptional daycare difficulties "cas[t] substantial doubt on the Employer's calculation of reasonable availability", and ordered the reinstatement of the employee: at para. 100.

2. Did the Arbitrator Depart from Prior Arbitral Decisions?

[64] It is impossible to extrapolate from the prior arbitral jurisprudence any general principle respecting the use of acceptance rates in the determination of whether a temporary employee has demonstrated reasonable availability in the acceptance of work assignments. The prior arbitral awards do not support what is argued by the appellant here – the requirement of an employee to meet the peer average or even a 50% availability rate as a proxy for "reasonable availability". And, in any event, none of these cases involved circumstances comparable to the present case, where the grievor could be called in to work at any time 24 hours a day and seven days a week.

[65] As such, there is no support in the arbitral jurisprudence for what would amount to an across-the-board reasonable acceptance rate or a mechanical application of such a rate. The arbitral jurisprudence points away from such an approach, by underlining the need for a “case-by-case” review of a grievor’s availability. I therefore disagree with the Divisional Court’s conclusion at para. 24 that “[i]n all of the arbitral jurisprudence the framework for analysis of reasonable availability has been the rate of acceptance of the employee.” Rather, at its highest, the prior arbitral jurisprudence refers to both the employees’ actual work acceptances and their acceptance rates, while assessing reasonable availability on a case-by-case basis. But a mechanically applied acceptance rate has never been held to be either mandatory or determinative.

[66] The arbitrator in this case therefore did not depart from the arbitral jurisprudence by considering factors other than Mr. Seivright’s acceptance rate when assessing the reasonableness of his availability.

[67] There are two additional questions to be considered in respect of the prior arbitral jurisprudence; however, it is unnecessary to express any definitive conclusion with respect to these issues.

[68] First, I agree with the Corporation’s submission, also accepted by the Divisional Court, that there are no prior arbitral cases where it was required, as a pre-condition for termination, that the failure of the grievor to respond to offers of

work must result in harm to the Corporation's economic interests or impede mail delivery.

[69] The cases accept that the reasonable availability requirement is intended to allow the Corporation to replace regular employees when they are absent and meet its service requirements without interruption. This is beyond dispute. Indeed, in this case, the grievor's first warning letter specifically told him that his level of availability had not been sufficient to meet the Corporation's "business needs and customer service standards." In some cases, the Corporation's specific needs during a busy period may well be relevant to the determination of reasonable availability. In the First Lanyon Arbitration, for example, the Corporation's decision to review the availability of its five temporary employees occurred after a very busy Christmas season when it had relied on inside workers and supervisors to deliver the mail.

[70] The Divisional Court accepted that the employer's economic interests could be considered as a relevant factor. While I agree that there is nothing in the prior arbitral jurisprudence that would prevent the consideration of the Corporation's economic interests, it is unnecessary to comment here on the extent to which, in a particular case, this factor could be taken into consideration in determining whether the temporary employee has demonstrated reasonable availability in the acceptance of work.

[71] In my view, the Corporation's failure to prove that Mr. Seivright's unavailability impeded mail delivery was not determinative of the arbitration. Lack of corporate prejudice was not, as the appellant argues, the "lynchpin" of the arbitrator's award. Rather, as I explain in the next section, the arbitrator's decision was based on his rejection of the Corporation's arbitrary application of an acceptance rate standard, and its failure to take into consideration factors relevant to the number of offers made and the work assignments the grievor ought reasonably to have accepted.

[72] Second, the appellant argues that the prior arbitral jurisprudence rejects the consideration of any and all personal circumstances or subjective factors in assessing reasonable availability, and then contends that anything other than the mechanical application of the peer average would fall into this category of irrelevant factors.

[73] The arbitral jurisprudence is not entirely consistent with respect to whether and in what circumstances an employee's personal circumstances can be considered.

[74] Many of the cases considered whether there had been a marked improvement in the employee's rate of acceptance after a warning had been given. See, for example, the Sabourin Arbitration, at paras. 76.2, 85.2, 88.3 and 91.2, endorsed by the Court of Appeal of Quebec, at para. 22.

[75] This is clearly a circumstance that is routinely taken into consideration, although personal to the employee. Some cases state specifically that an employee's reasons for refusing work cannot be considered (see the Sabourin Arbitration, at para. 59), while in other cases these reasons were considered (see the Second Lanyon Arbitration, at. paras. 94-96). And the Corporation's own guidelines, referred to by the arbitrator in this case, suggest that employees have the opportunity to explain their unavailability before a termination takes place under Article 44.11(b).

[76] The arbitrator in this case was invited to consider such factors as the grievor's reasons for refusing particular shifts; however, he declined to review the evidence offer by offer. As such, the reasons Mr. Seivright refused work offers (his religious observance, family commitments and other work demands) did not play any determinative role in the arbitrator's decision. It is unnecessary to consider whether and to what extent Mr. Seivright's reasons for not accepting work reasonably could have been considered. And it is similarly unnecessary for this court to determine whether and to what extent any reason for refusing work (other than the sanctioned reasons enumerated as exceptions in Article 44.11(b)) might have to be considered.

[77] In any event, the 24/7 operation of the YDC, the heavy parcel volume, the single temporary employee list and Mr. Seivright's seniority are not personal

circumstances or subjective considerations. Rather, they are circumstances relevant to how often work was offered, and that provide the necessary context for the determination of whether the grievor was reasonably available to accept work assignments.

3. Was the Arbitrator's Decision Otherwise Reasonable?

[78] I begin with the arbitrator's erroneous statement at para. 61, that "the relevant consideration for determining a lack of reasonable availability pursuant to Article 44.11 is whether there was a failure to accept work assignments which resulted in mail delivery being impeded" (emphasis added). I agree with the appellant, as did the Divisional Court, that it was unreasonable for the arbitrator to inject into the analysis a prerequisite of prejudice to the employer. As noted earlier, this is not supported by and appears inconsistent with both the plain language of Article 44.11(b) and the arbitral jurisprudence.

[79] However, the question for appellate review is whether the arbitrator's consideration of the lack of prejudice to the Corporation rendered the result unreasonable. An error in the arbitrator's analysis would not necessarily lead to an unreasonable decision. A reasonableness review is not an examination of the weakest link of a chain of analysis in isolation from the reasons as a whole: *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396, 98 B.C.L.R. (4th) 1, at para. 56. Nor is it a "line-by-line treasure hunt for

error": *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, at para. 54. In effect, the majority of the Divisional Court concluded that this error (as well as the departure from an “acceptance rate” approach, which I have concluded was not an error) did not render the arbitrator’s decision unreasonable, while the minority opinion of Wilton-Siegel J. concluded that these errors did.

[80] The point of departure, as the arbitrator noted, is that the collective agreement speaks of an employee’s obligation to demonstrate “reasonable availability in the acceptance of work assignments”. It does not define what is reasonable in numerical terms nor do the Corporation’s policies provide a formula or other method for determining reasonable availability. Instead, the guidelines instruct supervisors specifically not to action every refusal or attempted call and to evaluate each case for termination individually based on its merits. The policies further direct that consideration must be given to “local practice and how temporary employee lists are structured”, including that “lists may cover a 24/7 period”, in which case “the expectation for availability may be lower”.

[81] As I have explained, the prior arbitral jurisprudence did not require the use of an acceptance rate as a proxy for reasonable availability. The arbitrator characterized the use of an acceptance rate in the circumstances as leading to unreasonable and absurd consequences, having regard to the number of shifts

available to the grievor (because of the YDC's 24/7 operation, high number of parcels and his seniority). It was open to the arbitrator to reach this conclusion.

[82] There was nothing in Mr. Seivright's letter of hire, or for that matter in the warning letters he received, indicating that he was expected to accept 50% of all of the shifts that he was offered, or that indicated that his acceptance rate would be compared with the rate of other temporary employees. The requirement in the collective agreement, and what was communicated consistently, was that Mr. Seivright demonstrate "reasonable availability in the acceptance of work assignments".

[83] Because the termination of an employee for failure to demonstrate reasonable availability is not subject to discretion (for example, to apply progressive sanctions or to substitute an alternative disciplinary measure short of dismissal on arbitration), it is essential that the employer's approach not be arbitrary or unjust. There is nothing unreasonable in the arbitrator's rejection of the employer's automatic approach in this case, or in his characterization of the Corporation's use of an acceptance rate as arbitrary and unreasonable.

[84] What is or is not "reasonable" availability must be determined in light of the relevant circumstances of each case. It is reasonable to consider the circumstances that underlie how often work is offered to the temporary employee. Considered in this way, the increased parcel volume at the YDC, its 24/7 operation,

the placement of all temporary employees on a single call list, and Mr. Seivright's position on that list by virtue of seniority, were all relevant factors and properly considered by the arbitrator. Even a cursory review of these circumstances demonstrates that measuring Mr. Seivright's rate of acceptance against the average acceptance rate of all temporary employees at the YDC could not be used mechanically to determine whether he was "reasonably available to accept work assignments".

[85] Attempting to identify a reasonable "acceptance rate" in a case like this may well inject an unnecessary and impractical step into the analysis. Instead, as the arbitrator noted, reasonable availability could be determined by considering the actual hours worked by the grievor in the context of the frequency of calls that the grievor received. The expectation that the grievor would accept 50% (or whatever the peer average was) of work offers, when he could be offered shifts at any time of day, seven days a week, and where he ultimately received more work offers over the six-month period than it was possible to work, was reasonably described by the arbitrator as "absurd".

[86] In my view, the arbitrator's decision was reasonable. It was within the range of possible, acceptable outcomes for him to conclude that the grievor demonstrated reasonable availability in all the circumstances of the case. His

reasons exhibit the qualities of justification, transparency and intelligibility required by the Supreme Court of Canada in *Dunsmuir.*

[87] While the arbitrator erred in requiring proof of prejudice to the Corporation as a result of the griever's failure to accept shifts, this error did not drive the result. The substance of his decision consisted of explaining why he rejected the employer's insistence on a mechanical formula to determine reasonable availability, and his view, which is consistent with the arbitral jurisprudence and the Corporation's own policies, that reasonable availability must be determined on a case-by-case basis having regard to the relevant circumstances of the employment.

[88] The arbitrator did not err in rejecting the Corporation's use of an acceptance rate after concluding that the use of an acceptance rate to assess reasonable availability would negatively affect workers with higher seniority, as they would automatically receive more offers which would in turn dilute their acceptance rates and expose them to greater risk of termination. And he did not err in considering, as part of the relevant circumstances, the factors that were directly relevant to the amount of work that was available and the frequency with which Mr. Seivright would be called upon for work. He also did not err, in my view, in pointing out that, if Mr. Seivright had been required to accept 50% of the work he was offered, he would have had to work 3.5 shifts per week, which is roughly equivalent to part-

time hours. It would be unreasonable to uphold the termination of a temporary employee who, in terms of hours worked, was the 17th highest, and in the top 25 to 30% of all temporary employees at the YDC. It was reasonable to conclude that Mr. Seivright did not have to work the hours of a full-time or even part-time employee to demonstrate reasonable availability as a temporary employee.

[89] The arbitrator noted that there was no corporate policy concerning the use of an acceptance rate at the time of implementation of the Eclipse system. And, as discussed, there is no requirement in the arbitral jurisprudence for an arbitrator to use or defer to such an approach. As the arbitrator pointed out in the present case, the Corporation's reference to a 50% or a peer average acceptance rate does not assist in determining reasonable availability in a case like Mr. Seivright's.

CONCLUSION AND DISPOSITION

[90] In the final analysis, the arbitration award was reasonable. The Corporation's use of a mechanical standard based entirely on the average acceptance rate for temporary employees at the YDC during the relevant six-month period was not mandated by the prior arbitral jurisprudence. In the circumstances of this case, it also was an arbitrary approach that did not properly address whether the grievor was reasonably available to accept work assignments. While the arbitrator impermissibly injected into the analysis a pre-condition of corporate prejudice, this error did not drive the outcome. Rather, the

arbitrator reasonably considered the number of offers made to the grievor; the shifts he actually worked, in the context of the 24/7 operation of the YDC; the use of a single call list ordered by seniority; and the higher parcel volume, which led to greater reliance on temporary employees and a much higher number of available shifts.

[91] For these reasons, I would dismiss the appeal. I would award costs to the respondent fixed at $12,000, inclusive of disbursements and HST, the amount agreed between the parties.

Released: K.T. JUN 11 2019

K. van Rensburg J.A.

I agree K. Telles-Langdon J.A.

Jamie Tysoe J.A.