CITATION: Canada Post Corporation v. Canadian Union of Postal Workers, 2017 ONSC 6400
DIVISIONAL COURT FILE NO.: 505/16
DATE: 20171102

2017 ONSC 6400 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

GORDON RSJ, KITELEY, WILTON-SIEGEL JJ.

BETWEEN:	
CANADA POST CORPORATION Applicant	Richard J. Charney and Pamela Hofman, for the Applicant.
– and –	
CANADIAN UNION OF POSTAL WORKERS and OWEN B. SHIME, Q.C. Respondents	Paul J.J. Cavalluzzo and Adrienne Telford, for the Respondent, Canadian Union of Postal Workers.
	HEARD: June 6, 2017 at Toronto

REASONS FOR DECISION

R. D. GORDON, RSJ

Overview

[1] This application for judicial review concerns an award dated September 21, 2016 (the "Award") of arbitrator Owen B. Shime (the "Arbitrator"). At issue was a grievance filed by the Respondent Canadian Union of Postal Workers (the "Union") in which it alleged that a temporary employee (the "Grievor") had been unjustly dismissed. Canada Post Corporation (the "Corporation") had dismissed the Grievor pursuant to article 44.11(b) of the Collective Agreement on the basis that he had not demonstrated reasonable availability in the acceptance of work assignments during a six month period.

[2] The Arbitrator agreed with the Union and ordered, among other things, that the Grievor be reinstated.

[3] The Corporation asks that the Award be quashed and the grievance denied, or in the alternative, that the matter be remitted to a different arbitrator for a hearing de novo.

[4] The Corporation takes the position that the decision of the Arbitrator was unreasonable for the following reasons:

1. He failed to follow arbitral jurisprudence.

2. He effectively amended the Collective Agreement by introducing a requirement for corporate prejudice in the determination of reasonable availability.

3. The test of corporate prejudice introduced by the Arbitrator is inconsistent with the *Canada Post Corporation Act*.

4. He failed to adequately explain his conclusions, particularly in light of the arbitral jurisprudence on point.

5. It was denied procedural fairness as it was not given an opportunity to know or make submissions on the issue of corporate prejudice.

[5] For the reasons that follow, I am of the view that although the Arbitrator failed to follow arbitral jurisprudence and improperly amended the Collective Agreement, his decision was nonetheless reasonable.

The Background Facts

[6] The Grievor was employed by the Corporation as a temporary postal worker from November 2, 2011 until his employment was terminated on September 17, 2015. The Grievor's offer of employment included the following provision:

> 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.

[7] The Corporation has a list of temporary employees who are called in order of seniority when employees are absent or as required by the workload. The Grievor was on the list of temporary employees who were called to fill in at the York Distribution Centre ("YDC").

[8] Temporary employees are offered work assignment opportunities in order of seniority by an automated calling system. They may accept or reject the assignment using the telephone keypad. An assignment opportunity is considered to be declined if it is rejected, or if the employee cannot be reached and does not return the call within ten

2017 ONSC 6400 (CanLII)

minutes. If more than one work assignment is offered in a day and all are rejected by the employee, those rejections count as only one refusal.

[9] The Corporation is of the view that an acceptance rate of less than 50% does not constitute reasonable availability. It wrote to the Grievor on May 25, 2015 to advise that between November 5, 2014 and April 25, 2015 he had accepted 39 out of 131 offers made and the corporation viewed this as unacceptable. The Corporation wrote to the Grievor again on July 10, 2015 to advise that between April 26 and June 27, 2015 he had accepted 19 out of 52 offers of work assignments and that it viewed this as unacceptable also. In this letter the Corporation advised the Grievor that failure to demonstrate reasonable availability in the next two month period could result in the termination of his employment. His dismissal ultimately occurred on September 17, 2015 when he was advised that for the six month period between February 26, 2015 and August 29, 2015 he had failed to meet his employment obligation of reasonable availability. Although this letter did not set out the numbers of offers and acceptances of work made, it is common ground that the Grievor had been offered 151 work assignments during this period of time and had accepted on 57 occasions. This constitutes an acceptance rate of 37.8 percent. None of the letters provided to the Grievor indicated what rate of acceptance would be required to meet the Corporation's view of reasonable availability.

2017 ONSC 6400 (CanLII)

The Collective Agreement

[10] The following provisions of the Collective Agreement are at the heart of the parties' dispute:

> Article 44.11(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.
>
> Article 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.

[11] It was under this provision the Grievor was dismissed. The parties agree that Article 44.11(b) must be read in conjunction with Articles 10.01(a) and 10.08 of the Collective Agreement which provide as follows:

> Article 10.01(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.

> Article 10.08 Article 9 and clause 10.01 shall apply mutatis mutandis to any form of termination of employment decided by the Corporation.

[12] The combined effect of these provisions is that the failure of a temporary employee to demonstrate reasonable availability in the acceptance of work assignments is deemed to be just cause for dismissal. However, the onus remains on the Corporation to establish that the temporary employee has failed to demonstrate his or her reasonable availability. "Reasonable availability" is not defined in the collective agreement.

[13] The dispute between the parties also raises the applicability of Articles 9.103 and 9.100. They provide as follows:

> Article 9.103 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.
>
> Article 9.100 The Arbitrator shall not modify the provisions of this collective agreement.

The Decision of the Arbitrator

[14] The Arbitrator held that "reasonable availability" must be determined in each case according to its particular facts, including not just the interests of the temporary employee in job security and financial support, but also the interests of the employer in maintaining proper standards for the delivery of mail. He rejected the practice of evaluating reasonable acceptance solely on the basis of an acceptance percentage or a rate of acceptance based on total assignments offered. In this regard he said the following:

> At page 26 of his decision:
>
> > Turning first to Article 44.11(b), that article clearly states that an employee must demonstrate "reasonable availability in the **acceptance** of work assignments." The plain language of the article is specific and clear and requires an understanding of the term acceptance. The Article does not mandate an acceptance percentage or a rate of acceptance based on total assignments offered.
>
> And at page 27 of this decision:
>
> > The complexity of the current formula to measure reasonable availability overshoots the language and intent of the Article. In simple terms, the actual acceptances by an employee measured against the delivery requirements of Canada Post is sufficient to determine reasonable availability.

2017 ONSC 6400 (CanLII)

2017 ONSC 6400 (CanLII)

[15] He went on to hold that in weighing the interests of the employer there is a requirement that there be some evidence of harm or prejudice before a dismissal can issue. He made the following specific findings in that regard.

At page 27 of his decision:

> Accordingly, it is my view, 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.

At page 28 of his decision:

> To put it another way, given the purpose of the Article which is to ensure the appropriate standards for mail delivery are maintained, "…reasonable availability in acceptance of work assignments…" should be measured or pitted against those standards. Where the failure to reasonably accept impairs the standards for delivery the temp may be terminated. Where there is no prejudice to the Corporation or the delivery of mail, the temp should not be terminated.

And at page 32 of his decision:

> In summary, as I have indicated earlier, the factual basis for determining reasonable availability must consider the interests of both the Corporation and the Grievor. The formula used was just that, a formula, it did not consider the competing interests of the Corporation or the Grievor. Indeed, insofar as the Corporation was concerned the formula did not consider whether there was any harm to the mail delivery or the standards of mail delivery at the YDC. The scrutiny afforded the total situation or factual basis to reach the conclusion of unreasonable availability, which underpins the deemed just cause basis for termination, did not exist.

[16] The Arbitrator also held that whether or not a temporary employee had demonstrated reasonable availability requires a factual analysis beyond simply determining whether the employee's acceptance rate was less than 50 per cent. In this regard, his reasons included the following:

At page 28 of his decision:

> What is so startling about the Grievor's termination was that it is based solely on the percentage numbers with no consideration given to his personal circumstances. Mr. Alexander never met the Grievor nor was any inquiry made of his personal situation. In effect, this was a "technical

> termination" without considering the Grievor's personal circumstances or the number of occasions that he accepted work assignments, which, in my view, is required as part of the just cause requirements.

2017 ONSC 6400 (CanLII)

And at page 31 of this decision:

> Counsel for the Corporation, very thoroughly cross-examined the Grievor as to his personal circumstances, including his work as an actor and his family problems, and very thoughtfully argued these issues. In effect, he explored the human element which was an appropriate just cause consideration under Article 10 with respect to the Grievor's attendance. This approach contrasted sharply with the Corporation's actual approach when it terminated the Grievor since as Mr. Alexander acknowledged he did not consider the Grievor's personal circumstances and only considered the data.

[17] The Arbitrator found that there was no evidence of harm to the Corporation and that the bare arithmetical formula of acceptance rate used by the Corporation to determine reasonable availability failed to consider several relevant aspects of the case before him. He found that the Corporation could not justify terminating the Grievor on the basis of his lack of reasonable availability and ordered the reinstatement of the Grievor with seniority and with compensation to be agreed upon.

The Standard of Review

[18] The Parties agree that the standard of reasonableness applies to my review of the Arbitrator's decision. Indeed, a labour arbitrator's interpretation of the collective agreement has long been held to fall at the center of their expertise and is owed a high degree of deference. To be reasonable, the Arbitrator's decision must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [See *Dunsmuir v. New Brunswick* [2008] 1 SCR 190].

Analysis

Did the Arbitrator fail to follow Arbitral Jurisprudence?

[19] As noted above, Article 9.103 of the collective agreement provides that 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. Several arbitration decisions have held that, with respect to the interpretation of any particular clause in the collective agreement, the parties are bound to the interpretation made by the first arbitrator to deal with the issue. [See *Canada Post Corporation and Canadian Union of Postal Workers (National Grievance re "Phantom Codes"),* N-1000-GG-44, July 5, 1985

(Swan), *Canada Post Corp. v. CUPE (A.M.E. Grievance),* [1996] C.L.A.D. No. 980, *Canadian Union of Postal Workers and Canada Post Corp.* (Furlong Grievance, CUPW 096-95-01081, Arb. Outhouse, [1998] C.L.A.D. No. 385, *Canada Post Corp v. CUPW, Re*, 1987 CarswellNat 2210]. As stated by Doherty J.A. dissenting in *Canada Post Corp. v. C.U.P.W.* (2001), 56 O.R. (3d) 457 (C.A.), Article 9.103 "reflects a considered decision by Canada Post and the union to avoid the costs, uncertainty and labour strife associated with never-ending interpretation and re-interpretation of the same provisions of the collective agreement through the grievance process. Canada Post and the union preferred to live with the certainty of a fixed interpretation of the agreement and to leave alteration to the collective bargaining process".

[20] Previous arbitral jurisprudence between the parties dealing with grievances arising from the dismissal of temporary employees under Article 44.11(b) was tendered as evidence at the arbitration. The Corporation argues that this arbitral jurisprudence established: (1) That reasonable availability is to be determined according to an employee's rate of acceptance; (2) That a rate of acceptance of less than 50% is not reasonable; and (3) Prejudice to the Corporation has never been a pre-condition to dismissal of an employee under this Article. The Corporation is of the view that the Arbitrator's decision was unreasonable because he was bound to follow this jurisprudence but did not.

[21] The relevant arbitral jurisprudence before the Arbitrator can be summarized as follows:

The Blouin Decision

On August 15, 2005, Arbitrator Blouin dismissed the grievances of three temporary employees who had been dismissed by the Corporation. The Corporation had identified and terminated the employees based upon work assignment acceptance rates of less than 50%. Their rates of acceptance were 25.4 %, 34.2% and 3.3%. He found that the 50% benchmark used by the Corporation was not a technical standard but a simple work instrument to identify cases likely to be referred for a decision of whether or not reasonable availability had been demonstrated. Arbitrator Blouin held that the wording of Article 44.11(b) authorized the Corporation to refer to objective data independent of an analysis of the temporary employee's behaviour in determining whether he or she had demonstrated reasonable availability and that dismissal based on such an analysis was non-disciplinary. He went on to hold that in the absence of any abusive, discriminatory or unreasonable personal motive against the Grievors, and in the absence of any allegation of inequality or injustice to them, their rates of availability could not be deemed to fall within what is suitable.

The Sabourin Decision

On June 24, 2006, in a case involving 13 different Grievors, Arbitrator Sabourin dismissed 9 grievances but granted four others. She held that the standard of reasonable availability must be left to the assessment of the arbitrator who has full jurisdiction to assess each case having regard to its particular circumstances. She

2017 ONSC 6400 (CanLII)

was of the view that the personal circumstances of a Grievor were not appropriate facts for consideration except insofar as those circumstances arose from the Corporation's interaction with the Grievor, and that the exceptions contained in Article 44.11(b) are the only exceptions that may be considered by the arbitrator absent acts of the Employer that are abusive, unreasonable, discriminatory or in bad faith. On judicial review by the Superior Court of Quebec this decision was upheld as having not been patently unreasonable. The Court of Appeal for Quebec agreed.

The Rousseau Decision

On July 19, 2006, Arbitrator Rousseau released a decision concerning a single Grievor who was dismissed for having accepted 24 out of 53 work assignments offered over a six month period. In granting the grievance the arbitrator held that although the Grievor had not been reasonably available, on consideration of the Grievor's personal circumstances it was not appropriate that he be dismissed. On judicial review by the Superior Court of Quebec this award was overturned on the basis that once the arbitrator had made a finding that the Grievor was not reasonably available, the dismissal must be upheld notwithstanding the personal circumstances of the Grievor. The Quebec Court of Appeal upheld the decision of the Superior Court.

The Quebec Court of Appeal Decision

On June 17, 2008 the Quebec Court of Appeal heard the appeals arising from the decisions of Arbitrators Sabourin and Rousseau noted above. In making its decisions the court held that arbitral case law reveals that Article 44.11 is an administrative measure applicable to all employees who fail to provide reasonable availability and is not a disciplinary measure. Accordingly, the arbitrator's role is limited to verifying whether the employee in question did or did not demonstrate reasonable availability during the six month period in question. If not, the arbitrator may only sustain the employer's termination.

The Lanyon Decision re Cormier

On September 27, 2005 Arbitrator Lanyon granted the grievance and in doing so held that: (a) there is no set definition of reasonable availability; and (b) the standard of reasonable availability may be expected to differ in different regions and among different types of operations. He undertook a close examination of the circumstances of the case insofar as they related to offers of work made while the Grievor was on vacation and the manner in which his acceptance rate was calculated and determined that the employer had not established that the Grievor was not reasonably available.

The Lanyon Decision re Sommerville

2017 ONSC 6400 (CanLII)

In a second decision of Arbitrator Lanyon dated September 28, 2006 he confirmed that the employer may rely entirely on statistical considerations and proceed to termination in a virtually mathematical way but that the concept of reasonableness remains both in the percentage chosen by the employer and in the application and implementation of the standard. In the particular circumstances of this case he held that several assignments offered while the Grievor was ill or injured should not be considered (even though the Grievor had not given notice of the illness or injury) and that the Grievor should not be required to accept shifts offered early in the morning and starting that same morning. As a result of these factors he could not determine what her actual acceptance rate was and held that the employer had not met its onus.

2017 ONSC 6400 (CanLII)

The Thistle Decision

The last arbitral decision for consideration was of Arbitrator Thistle dated December 11, 2013. In denying the grievance of a temporary employee who had been dismissed for having an acceptance rate of 11.25% over one six month period and 22% over a second six month period, he held that the employer had made no quantitative determination regarding the concept of reasonable availability, nor had it developed a practice of informing temporary employees regarding the level of availability they must provide. He determined that there is no definition of reasonable availability in the collective agreement with the result that an arbitrator must weigh the individual circumstances of each case. In the circumstance of the case before him, he determined that the Greivor's acceptance of work assignments was not reasonable.

[22] A fair reading of this arbitral and judicial jurisprudence reveals the following common threads: Firstly, dismissal under Article 44.11(b) is administrative rather than disciplinary. Secondly, the Corporation may dismiss a temporary employee on the basis of an arithmetical and quantitative determination of availability provided it can establish on the facts of each particular case that the standard used is reasonable and that the application or implementation of the standard to the temporary employee in question is also reasonable. Thirdly, there is no prescribed acceptance rate that establishes reasonable availability in every case. Fourthly, aside from the facts necessary to establish the reasonableness of the standard and its application to the temporary employee, the arbitrator's fact-finding is limited to whether the temporary employee is entitled to any of the exemptions referred to in Article 44.11. Put another way, "reasonable availability in the acceptance of work assignments" is not an inquiry into the reasonableness of a temporary employee's excuses for failing to accept work assignments. It is an inquiry into what, in the circumstances of the particular case, is a reasonable standard for measuring work acceptance and whether that standard has been reasonably applied to the worker in question. Lastly, in effecting a dismissal the Employer must not act in a manner that is abusive, discriminatory or in bad faith.

[23] It is against this arbitral jurisprudence that I analyze the arguments of the Corporation.

Does the Arbitral Jurisprudence Establish that Reasonable Availability is to be determined based upon an Employee's Rate of Acceptance?

[24] In all of the arbitral jurisprudence the framework for analysis of reasonable availability has been the rate of acceptance of the employee. Article 44.11(b) has been interpreted as administrative in nature, allowing for dismissal based on this bare arithmetical formula provided the standard used and its application to the employee are reasonable.

[25] The Arbitrator in this case chose to eschew this type of analysis, calling it unilateral and arbitrary. He held that reasonable availability should be determined by considering the actual acceptances by an employee (regardless of the number of offers) measured against the delivery requirements of the Corporation. In doing so, the Arbitrator forged a new path for analysis of dismissals under Article 44.11(b) contrary to the established arbitral jurisprudence. In my view, in light of Article 9.103, that new path is one that must be forged by parties in the course of collective bargaining. Accordingly, I agree that the jurisprudence establishes that reasonable availability be determined having regard to the employee's rate of acceptance and that the Arbitrator failed to follow that jurisprudence.

Does the Arbitral Jurisprudence Establish that an Acceptance Rate of less than 50% is Unreasonable?

[26] The arbitral jurisprudence does not establish that an acceptance rate of less than 50% constitutes unreasonable availability in every case. Rather, it establishes that appropriate acceptance rates may differ in different regions and in different operations and that the Corporation must be reasonable in establishing the rate it applies.

[27] 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.

[28] 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.

Does the Arbitral Jurisprudence Establish Corporate Prejudice as a Precondition to Dismissal Under Article 44.11(b)?

[29] The arbitral jurisprudence relating to Article 44.11(b) has never *required* proof of harm to the corporation to justify dismissal. To the extent the Arbitrator held that such proof is *required*, he departed from the arbitral jurisprudence.

[30] However, I am not satisfied that harm or prejudice to the Corporation is never a *factor for consideration* in the Article 44.11(b) analysis.

2017 ONSC 6400 (CanLII)

[31] The arbitral jurisprudence does not provide any detailed analysis of how the reasonableness of the standard used by the Corporation in a given situation is to be determined. However, read collectively, the cases indicate that the standard to be established by the Corporation in a given region or at a particular operation might have regard to such factors as the number of permanent employees, the number of temporary employees, the number of shifts at the facility (e.g. does it operate 24 hours per day, 7 days per week, or something less?), the volume of activity, and the impact of failing to accept work assignments on the ability of the Corporation to effectively and efficiently fulfill its mandate. In this context, prejudice or harm to the corporation may be a valid consideration in determining an appropriate acceptance rate.

2017 ONSC 6400 (CanLII)

Did the Arbitrator Effectively Amend the Collective Agreement?

[32] As noted above, the arbitral jurisprudence has never required prejudice to the corporation as a *precondition* to dismissal under Article 9.103. To the extent the decision of the Arbitrator introduced prejudice as a precondition to dismissal, he impermissibly amended the Collective Agreement in contravention of Article 9.100.

[33] That said, as I have indicated, the *consideration* of prejudice to the Corporation as one factor in determining an appropriate acceptance rate is prescribed by the arbitral jurisprudence.

The Remaining Arguments of the Corporation

[34] Given my finding that corporate prejudice as a precondition to dismissal is inconsistent with the arbitral jurisprudence I need not consider whether such a test would be inconsistent with the *Canada Post Corporation Act*, whether the Arbitrator's decision adequately explained his conclusions and whether the Corporation was denied procedural fairness in addressing the issue.

Did the Arbitrator's Failure to Follow Arbitral Jurisprudence and Amendment of the Collective Agreement Render his Decision Unreasonable?

[35] I agree with the Corporation that the Arbitrator failed to follow the arbitral jurisprudence by: (1) Failing to use the acceptance rate analysis in determining reasonable availability; and (2) Introducing corporate prejudice as a precondition to dismissal under Article 44.11(b). I also agree that by introducing the corporate prejudice requirement he effectively amended the Collective Agreement. However, for the reasons that follow I am not persuaded that his decision was rendered unreasonable thereby.

[36] The arbitral jurisprudence requires, among other things, that the standard used by the Corporation in making a dismissal under Article 44.11(b) have been reasonable and that the application of that standard to the Grievor have been reasonable.

[37] It is clear from the decision of the Arbitrator that neither of these requirements 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.

[38] 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.

[39] It follows that the Corporation's application is dismissed.

Costs

[40] At the conclusion of argument the parties indicated their expectation that costs would be agreed upon following release of my decision. If for some reason agreement cannot be reached, the parties may make written submissions on costs, not to exceed five pages plus attachments each, within 45 days.

____

R. D. Gordon, RSJ

I agree

____

Kiteley, J.

2017 ONSC 6400 (CanLII)

2017 ONSC 6400 (CanLII)

Wilton-Siegel J. (dissenting):

[1] The majority finds that the Arbitrator erred in holding that "reasonable availability" should be determined by considering the actual acceptances by an employee (regardless of the number of offers) measured against the delivery requirements of the Corporation. However, the majority also holds that neither the standard used by the Corporation in deciding to terminate the Grievor nor the application of that standard to the Grievor was reasonable and that, accordingly, the Arbitrator's decision – that "the [Griever] has not demonstrated reasonable availability in the acceptance of work assignments" – was reasonable. I agree with the first conclusion but do not agree with the second. My conclusions are set out below based on the following analysis.

<u>The Arbitrator's Reasoning</u>

[2] The Corporation's representative testified, and the Arbitrator accepted, that the Corporation terminated the Grievor based on a comparison of the Griever's acceptance rate with the peer average at the YDC. The Arbitrator found this standard to be inconsistent with the concept of "reasonable availability" under the Collective Agreement. His conclusion is set out in the paragraph at the bottom of page 28 and the top of page 29 of his reasons. The Arbitrator based this conclusion on findings that neither an acceptance rate nor a comparison with a peer average was permitted by the language of the Collective Agreement as well as a finding that the concept of "reasonable availability" required a consideration of corporate prejudice resulting from the Griever's rejection of offers.

[3] Each of the three propositions comprising the Arbitrator's reasoning were incorrect in my opinion. As the majority notes, the arbitral jurisprudence, by which the Arbitrator was bound by virtue of Article 9.103 of the Collective Agreement, has established that dismissal may be made on the basis of an acceptance rate. The majority also found that the Arbitrator departed from the arbitral jurisprudence, and therefore erred, to the extent that he held that proof of harm to the Corporation was required for a dismissal. As discussed further below, I consider that any consideration of corporate prejudice is beyond the concept of "reasonable availability". Lastly, there is nothing in the concept of "reasonable availability", or in the arbitral jurisprudence, that prevented the Corporation from taking into consideration the peer average at the YDC and, as

discussed below, good reasons for doing so. Accordingly, the Arbitrator's reasoning was fundamentally flawed and, by definition, unreasonable.

Was the Result in the Arbitrator's Decision Reasonable?

[4] The majority says, however, that the Corporation used a standard of an acceptance rate of less than 50% and that the Corporation's use of such standard and its application, without regard to the factors addressed below, rendered the Corporation's decision "unilateral and arbitrary". I will address each finding in turn.

Was the Corporation's Standard Unreasonable?

[5] I acknowledge that, despite the actual standard applied by the Corporation as described above, on this application, the Corporation argued that a standard limited to an acceptance rate of less than 50% was consistent with the arbitral jurisprudence. The majority says that an acceptance rate standard is acceptable, provided that the standard used and its application to the employee are reasonable. However, the majority agrees with the Arbitrator that, in this case, the acceptance rate should have been determined by taking three factors into consideration: (1) the 24/7 period of operation at the YDC; (2) the high increase in the volume of parcels at the facility; and (3) what impact a 50% acceptance rate would have on the Corporation's ability to meet its mandate. The majority does not state how these factors are to be taken into consideration. However, it would appear that the majority considers that they should be factored into the threshold rate below which termination would be justified. I do not agree with the majority's conclusion for three reasons.

[6] First, as the majority notes, the arbitral jurisprudence cited above limits an arbitrator's authority to a determination of two questions - whether a temporary employee is entitled to any of the exceptions in Article 44.11(b) and whether the Corporation has acted in a manner that is abusive, discriminatory or in bad faith. In this case, the answer to both questions is in the negative. None of the factors which the majority says ought to have been taken into account fall into either of these categories. On this basis, it was not appropriate to take them into consideration.

[7] Second, whether or not 50% is an appropriate threshold, the arbitral jurisprudence establishes that a rate materially below 50%, in this case 37.8%, was sufficient. Given the foregoing, there is no basis for finding that the Corporation based its decision to terminate the Grievor on an incorrect standard.

[8] Third, and most importantly, even if the Corporation was required to take the factors identified by the Arbitrator into consideration in establishing an appropriate threshold rate, I am of the opinion that the Corporation did so to the extent required.

[9] As mentioned, in making its decision, the Corporation compared the Grievor's actual acceptance rate with the peer average at the YDC. This approach takes into consideration the introduction of a 24/7 work schedule at YDC and the increase in the volume of parcels via the comparison of the employee's acceptance rate with the acceptance rate of the employee's peers, who were also subject to these developments. Neither the Arbitrator nor the majority have

2017 ONSC 6400 (CanLII)

suggested any other manner of taking these factors into consideration in the context of an acceptance rate standard. The Grievor's acceptance rate was considerably less than that of the other temporary employees at the YDC, who as mentioned experienced the same developments. Given the peer average at YDC of 49.9%, there was therefore ample support for a 50% threshold taking these factors into account via the peer average comparison.

[10] With respect to the third factor, the majority says that corporate prejudice cannot be considered by way of a "pre-condition to dismissal" but can be considered as one of the factors relevant to the establishment of an appropriate threshold rate. This would require establishment of a threshold rate for each distribution centre below which an employee's failure to accept offers of work will adversely affect the Corporation's business. I do not think that this is either practical or within the concept of "reasonable availability", particularly because it is not connected in any way with an employee's personal circumstances. Further, this approach would still result in this factor constituting a pre-condition, or more precisely an overriding condition, which the majority finds to be impermissible. In any event, such an approach was not argued on the application.

Was the Corporation's Application of its Standard Unreasonable?

[11] I also do not agree that the Corporation failed to apply the acceptance rate standard in a reasonable a manner. In this regard, the majority agrees with the Arbitrator that the Corporation's decision was not reasonable because: (1) the Corporation failed to consider the number of work assignments accepted by the Grievor and how this compared to other part-time employees; (2) the Corporation failed to consider his seniority and the consequent increase in offers made to him; and (3) the Corporation failed to consider that the very nature of certain offered work assignments rendered them incapable of acceptance.

[12] As mentioned above, the standard used by the Corporation took into consideration the number of work assignments accepted by the Grievor compared to other temporary employees by incorporating the peer average. There is no basis for comparing a temporary employee's hours worked with those of a part-time employee. It is not clear to what the majority specifically refers in (3). However, the use of a threshold of less than 50% captures the possibility that an employee will not be able to accept a certain number of assignments for various reasons.

[13] The remaining issue pertaining to the application of the Corporation's standard is the majority's position that, in addition to the 24/7 schedule and increasing volume at YDC, which affected all employees in the same manner, the Corporation should have taken into consideration the impact of the Griever's seniority on the number of offers made to him. I do not think that this is an appropriate consideration for the following reasons.

[14] The increasing number of offers was a necessary incident of the seniority arrangement for which the Union bargained. Introduction of a requirement to take the impact of seniority into consideration amounts to re-writing the Collective Agreement. It is also problematic because it is being made without the benefit of a full consideration of the issues and interests involved. In my view, the collective bargaining process is the proper place to address this consideration if, on balance, there is a real concern. Further, the majority does not state how this factor should be

2017 ONSC 6400 (CanLII)

taken into account although, given their finding that an acceptance rate standard is authorized, it would presumably be reflected in the threshold level. However, I see no principle upon which to base such a determination.

Additional Considerations

[15] Two additional considerations also inform my conclusion regarding the Arbitrator's decision.

[16] First, in my view, there is a fundamental difficulty with the Arbitrator's decision insofar as it is relied upon for the proposition that the six factors set out above are relevant considerations either in determining the applicable standard, or in applying such standard. As mentioned, rather than take such factors into consideration in determining a threshold rate in the context of an acceptance rate standard, the Arbitrator held that "reasonable availability" should be established as an absolute number of acceptances at a level that did not prejudice the Corporation's ability to carry out its mandate. In doing so, the Arbitrator's standard disregards these factors in favour of an overriding "corporate prejudice" test which the majority effectively finds to be unreasonable. I think the Arbitrator's approach reflects the fact that, as a practical matter, the only standard that incorporates considerations that are experienced by all temporary employees at a distribution centre (apart from the issue of seniority), is a standard that utilizes a comparison with a peer average, which the Arbitrator rejects. In any event, however, I do not think it is reasonable to find that the Corporation's decision was unreasonable on the basis of a failure to consider a number of factors which the Arbitrator does not take into consideration in the application of the standard which underlies his own decision.

[17] Second, the substantive issue in this proceeding is whether the concept of "reasonable availability" requires an employee to increase his or her absolute number of acceptances as the number of offers made to the employee increases as a consequence of the operation of seniority and increased activity at the employee's distribution centre. The Arbitrator's answer is in the negative, subject only to there being no corporate prejudice. The Arbitrator considers it to be both reasonable and in accordance with the arbitral jurisprudence that an employee should be entitled to maintain temporary employee status and seniority by maintaining an absolute number of acceptances at a constant level. The Arbitrator suggests that the constant level should be set by reference to whether or not an employee's refusal to accept shift offers prejudiced the Corporation's ability to fulfill its mandate. In fact, the Arbitrator's position would allow actual acceptances to fall subject only to satisfaction of this condition,

[18] The majority agrees that there is no authority in the language of Article 44.11(b) or the arbitral jurisprudence for the Arbitrator's concept of "reasonable availability". However, the majority accepts the result of the Arbitrator's determination without suggesting any means by which the factors which it says the Corporation failed to address can be taken into account. For this reason, I consider that a finding that the Arbitrator's decision is reasonable could be construed, in the circumstances, to be acceptance of his standard which, for the reasons set out above, I find is not consistent with the concept of "reasonable availability" in Article 44.11(b).

2017 ONSC 6400 (CanLII)

<u>**Conclusion**</u>

[19] Based on the foregoing, I conclude that the Corporation's decision to terminate the Grievor was consistent with the meaning of "reasonable availability" in the Collective Agreement on its plain meaning, and as interpreted by the arbitral jurisprudence referred to by the majority, both in respect of the standard applied and of the application of that standard to the Grievor's circumstances. I also find the Arbitrator's decision to be unreasonable both in its reasoning and in the result for the reasons set out above. Accordingly, I would set aside the decision and remit the grievance to another arbitrator for a *de novo* hearing.

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Wilton-Siegel J.

Released: November 02, 2017

2017 ONSC 6400 (CanLII)

CITATION: Canada Post Corporation v. Canadian Union of Postal Workers, 2017 ONSC 6400
DIVISIONAL COURT FILE NO.: 505/16
DATE: 20171102

2017 ONSC 6400 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

GORDON RSJ and KITELEY J. (concurring)

WILTON-SIEGEL J. (dissenting)

BETWEEN:

CANADA POST CORPORATION

Applicant

– and –

CANADIAN UNION OF POSTAL WORKERS and
OWEN B. SHIME, Q.C.

Respondents

REASONS FOR DECISION

Released: November 02, 2017