Court of Appeal for Saskatchewan

Docket: CACV2971

Citation: *Retail, Wholesale Department Store Union v Yorkton Cooperative Association*, 2017 SKCA 107

Date: 2017-12-11

Between:

Retail, Wholesale Department Store Union

Appellant
(Respondent)

And

Yorkton Cooperative Association

Respondent
(Applicant)

Before:	Richards C.J.S., Herauf and Whitmore JJ.A.
Disposition:	Appeal dismissed
Written reasons by:	The Honourable Chief Justice Richards
In concurrence:	The Honourable Mr. Justice Herauf The Honourable Mr. Justice Whitmore
On Appeal From:	2016 SKQB 296, Yorkton
Appeal Heard:	April 18, 2017
Counsel:	Larry Kowalchuk and Micah Kowalchuk for the Appellant Meghan McCreary for the Respondent

Richards C.J.S.

I. INTRODUCTION

[1] Denise Osbourne, who I will refer to as the Grievor, worked as a supervisor for the Yorkton Cooperative Association. She was dismissed from her position because she had committed "time theft" by intentionally falsifying time sheets and claiming pay for time she had not worked. The Grievor's union, Retail, Wholesale Department Store Union, grieved the termination and the matter proceeded to arbitration.

[2] The Arbitration Board found the Grievor had committed time theft on two occasions by closing her store early. Additional allegations of time theft had been made by the Co-op but were not proven. The Board also found the Grievor had lied during the investigation conducted by the Co-op and had continued to lie about her misconduct while testifying at the arbitration hearing. The Board was not confident the misconduct would not be repeated. Nonetheless, the Board overturned the termination and ordered the Co-op to reinstate the Grievor, subject to a four-month suspension.

[3] The Co-op brought an application for judicial review in the Court of Queen's Bench. The Chambers judge found the Board's decision to be unreasonable in light of the governing legal principles and the factual findings it had made about the Grievor's conduct. He quashed the Board's decision and confirmed the Grievor's termination.

[4] The Union appeals from the Chambers decision. It argues that, although the Chambers judge purported to apply the reasonableness standard of review to the Board's decision, he in fact simply substituted his own views for those of the Board. The Union also argues that the Chambers judge erred by reinstating the termination rather than contenting himself with quashing the Board's decision.

[5] In my view, and as explained below, this appeal should be dismissed. Given the applicable jurisprudence and the facts as found by the Board, I agree with the Chambers judge's conclusion that the Board acted unreasonably in setting aside the termination. Further, in the particular circumstances of this case, it was open to the Chambers judge to reinstate the termination of the Grievor's employment.

II. BACKGROUND

[6] The Grievor was employed as a supervisor by the Co-op at a store located on West Broadway Street in Yorkton. She had a manager but frequently operated the store without direct supervision. Her responsibilities included ensuring that other employees followed the Co-op's policies.

A. The incidents underpinning the disciplinary action

[7] On the nights of June 30 and July 1, 2014, the Grievor was the supervisor of the store. The store was scheduled to be closed at 11:00 p.m. The staff were expected to work until 11:30 p.m. conducting end of day activities such as readying the store to be reopened the next morning.

[8] The Grievor closed the store at approximately 10:40 p.m. on June 30. She and the employees under her supervision left the store at approximately 11:00 p.m. The Grievor falsified her time sheet to show that she had worked until 11:30 p.m. She also directed a subordinate employee, Luke Walters, to falsify his own time sheet to show that he too had worked until 11:30 p.m.

[9] Similar things occurred on the night of July 1, 2014. The doors of the store were locked and the lights were off at 10:41 p.m. However, a customer arrived at 10:45 p.m. and he was allowed into the store. The customer made a purchase and was immediately let out by an employee. The store was then closed again at 10:46 p.m. The Grievor and the other employees left at about 11:22 p.m. The Grievor marked her time sheet to show that she had worked until 11:30 p.m., again claiming pay for time she had not worked.

[10] From July 21 to 25 and from July 28 to August 1, 2014, the Grievor filled in for the store manager, Sam Hall, while Ms. Hall was on holidays. The Grievor was scheduled to work from 6:30 a.m. to 11:00 a.m. and 12:00 p.m. to 3:30 p.m. on Mondays and 8:00 a.m. to 12:00 p.m. and 1:00 p.m. to 5:00 p.m. Tuesday through Friday. The Grievor's time sheets indicated that she had worked those hours, plus one hour of overtime. However, a video showed that she had not followed that timetable. She always started work earlier than the scheduled time and she always left work earlier than scheduled, sometimes more than an hour earlier. The duration of her

absences from the store at lunch time suggested the Grievor was not working for some part of that time and was, therefore, stealing time.

B. The Co-op's investigation

[11] The Co-op became aware of allegations that the Grievor had "stolen time". It conducted an investigation which included meeting with the Grievor. At the meeting, the Grievor denied all wrongdoing. She claimed that she did not close the store early on June 30 and July 1, 2014. She stated that her time sheets for the relevant shifts, showing she had worked until 11:30 p.m., were accurate. The Grievor also said that the time sheets for the period she had stood in for Ms. Hall were accurate.

[12] On August 12, 2014, the Grievor's employment was terminated by the Co-op. The termination letter referred to the theft of time from July 21 to August 1, 2014, and on July 1, 2014. This led the Union to file a grievance and in due course the matter made its way before the Board.

C. The arbitration proceedings

[13] During examination-in-chief at the arbitration hearing, the Grievor denied closing the store early on June 30 and July 1. The Board found this to be "untruthful".

[14] The Grievor also denied instructing her subordinate, Mr. Walters, to falsify his time sheet to show he had worked until 11:30 p.m. on June 30, 2014. The Board described this as "deceptive" and decided she had given these instructions to Mr. Walters.

[15] The Grievor testified, in addition, that she had told a subordinate, Mr. Heibel, not to close early on July 1, 2014, but that Mr. Heibel had done so nonetheless. The Board noted the Grievor was the supervisor and could easily have countermanded Mr. Heibel. The Board determined it did not believe the Grievor's version of events.

[16] More generally, the Board made a finding that the Grievor's testimony under oath was not merely inaccurate or mistaken. It found that she had lied, stating at paragraph 217:

> Particularly vexing to the Board is the fact that the Grievor continued to lie stating that the Store had not closed early on two occasions, even during her examination-in-chief.

> This was not only untruthful, it was foolish. Not until cross-examination did the Grievor admit that she closed the store early. Even then she was not forthcoming regarding her instructions to Mr. Walters regarding his time recording.

[17] After carefully reviewing the evidence, the Board concluded the Co-op's allegations relating to time theft on the nights of June 30 and July 1, 2014, had been proven. With respect to the allegations about July 21 to 25 and July 28 to August 1, the Board found that the Grievor's time sheets bore little, if any, resemblance to the time she had actually worked and concluded there was no way for the Co-op to tell from the Grievor's time sheets when she had been on the job. The Board said the Grievor was wrong to have taken the position that, so long as she worked eight hours per day, nothing else mattered. However, the Board also held that, although the duration of the Grievor's absences from the store at lunch time gave rise to a suspicion she had not been working for some of that time, the actual theft of time over lunch had not been proven on a balance of probabilities.

[18] The Board also noted that the termination letter provided to the Grievor had been poorly drafted by a manager who was not experienced in such matters. Among other things, the letter had failed to make specific reference to the June 30 store closing, something important to the Co-op's case before the Board. Nonetheless, the Board expressly found that neither the Union nor the Grievor had been prejudiced by the lack of precision in the wording of the termination letter.

[19] The Board ultimately turned to the question of whether it should impose discipline less than termination. In so doing, it made reference to the following factors at paragraphs 215–218 of its decision:

(a) the Grievor had a previous good employment record without discipline;

(b) the Grievor had approximately three years of seniority and was neither a long service employee nor a new employee;

(c) there was no isolated incident as there were several acts of wrongdoing;

(d) there was no provocation;

(e) the Grievor had not acted on the spur of the moment;

(f) the penalty imposed by the Co-op created no special economic hardship for the Grievor because she had another job;

(g) although there was some evidence that working hours rules had not been enforced in the past, the former manager under whose supervision this had happened had been terminated and, in March of 2014, the Grievor had received training indicating that the rules would be enforced;

(h) the Grievor's conduct was intentional and she knew what she was doing was wrong;

(i) the Grievor's misconduct was serious, particularly given her supervisory role; and

(j) the Grievor had lied during her testimony and this did not give "comfort that she has taken ownership of her wrongdoing and will not repeat it".

[20] Notwithstanding the overall import of these findings, the Board decided to reinstate the Grievor, subject to a formal suspension without pay from the date of her termination. It did so without any express examination of the impact of the Grievor's misconduct on her ability to maintain a viable employment relationship with the Co-op.

D. The Queen's Bench decision

[21] The Co-op sought judicial review of the Board's decision. See: 2016 SKQB 296.

[22] The Chambers judge identified "reasonableness" as the appropriate standard of review. He began his analysis by observing that the Board's decision was transparent and clearly articulated. He then turned to the question of whether overturning the dismissal and substituting a suspension fell within the range of possible outcomes that were defensible in light of the facts and the law.

[23] The Chambers judge thoroughly reviewed the facts, the applicable common law principles and relevant arbitral jurisprudence. In the end, he found that, given the facts it had found, the Board had acted unreasonably in setting aside the Grievor's termination. The essence of the Chambers judge's reasoning is captured in the following excerpt from his decision:

> [54] The Board found that [the Grievor] was not trustworthy in circumstances under which the Co-op had the right to expect her to be trustworthy. Having perpetrated a serious wrong by committing time theft, [the Grievor] compounded her wrongdoing by lying when she was confronted by her employer. In addition to that, [the Grievor] directed at least one other employee over whom she had supervisory authority to falsify his time records and leave work early (para. 214). The Board found that there was no provocation for [the Grievor]'s actions. Her actions were not spur-of-the-moment, nor were they isolated. Her actions were intentional and they were serious, especially given the position she occupied, and given that she had recently received training relating to the very rules she violated. The Board found that [the Grievor] did not suffer economic hardship as a result of being terminated (para. 216). The Board also found that [the Grievor] continued to lie, both during the investigative stage, and during her testimony (para. 217), and that she took no ownership of her wrongdoing, leaving the Board with little confidence that her conduct would not be repeated (para. 218).
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> [55] All of those findings are factors which, according to the common law and the applicable arbitral jurisprudence, weigh very heavily in favour of dismissal. Section 6-49(4) of the [*Saskatchewan Employment Act*, SS 2013, c S-15.1] gives the Board broad powers to substitute a penalty that it considers just and reasonable in the circumstances, but a just and reasonable penalty must take into account the applicable common law and arbitral jurisprudence.
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> [56] In this case, all of the facts found by the Board weigh in favour of termination. Apart from the fact that [the Grievor] had no previous record for discipline and the fact that, in the past, incidents of time theft had not been enforced by the Co-op, there were no other mitigating circumstances. Although there was evidence that employees had left work early and improperly marked time sheets before [the Grievor] did it, without suffering discipline, the evidence accepted by the Board was that, by the time [the Grievor] committed time theft, the Co-op had taken steps to make it clear to all employees that such action would no longer be tolerated. Furthermore, [the Grievor]'s conduct was exacerbated by the fact that she not only committed time theft herself but, as a supervisor, instructed a subordinate employee to commit time theft as well.
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> [57] Once an employee has been found to have committed serious misconduct, reinstatement is appropriate only if the evidence demonstrates mitigating factors which support the continued viability of the employment relationship. The absence of mitigating factors which support the viability of a continued employment relationship render a decision by a tribunal to reinstate an employee who has been dismissed is a leap of faith, and thus unreasonable: *Bhadauria*, at para 78. In this case, none of the findings of fact made by the Board point to the viability of a continued employment relationship going forward. Quite the contrary, in fact.

III. ANALYSIS

[24] As indicated, the Union takes issue with both the Chambers judge's conclusion that the Board's decision was unreasonable and, alternatively, with the fact that the Chambers judge reinstated the Grievor's termination rather than simply quashing the Board's decision. I will consider each of these matters in turn.

A. The reasonableness of the Board's decision

[25] In my opinion, the Chambers judge correctly concluded that the Board's decision was unreasonable within the meaning of the controlling authorities such as *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190. The key flaw in the Board's decision was the one identified by the Chambers judge – a failure to relate its own findings of fact to the relevant jurisprudence.

[26] The root question in determining whether a termination of employment is warranted in the context of acts of dishonesty is whether the trust crucial to the employment relationship can be restored. See: Donald J.M. Brown, Q.C. & David M. Beatty, *Canadian Labour Arbitration*, loose-leaf (Rel 41, December 2014) 4th ed, vol 1 (Toronto: Thomson Reuters, 2014) at 7:3314; *McKinley v BC Tel*, 2001 SCC 38 at para 48, [2001] 2 SCR 161. In this case, the Grievor, a supervisor, closed her store early and falsified her time sheets. She directed a subordinate to falsify his time sheets as well. She then lied to the Co-op when it investigated the situation and continued to lie while under oath at the arbitration hearing. Most significantly, and as the Board itself found, the Grievor failed to take ownership of her wrongdoing and gave no comfort that she would not repeat it. In light of those factual findings, I am at a loss to understand how the Board could have reasonably decided that a viable working relationship between the Grievor and the Co-op could be rebuilt.

[27] Arbitrators treat the falsification of time sheets as a form of theft or fraud. It is also clear that theft, including theft of "time", is viewed in the arbitral jurisprudence as a very egregious form of misconduct. Brown and Beatty provide the following overview of the import of the authorities in *Canadian Labour Arbitration* at 7:3310:

> Theft and related forms of dishonesty, such as fraud and unauthorized possession of company property, have always been characterized by arbitrators as among the most serious forms of misconduct that an employee can commit. Even something that may not seem so serious, such as charging long-distance telephone calls to an employer's account, can result in the imposition of very heavy sanctions, including discharge. Such behaviour is seen as antithetical to the trust that is an essential part of all viable and productive employment relationships. …
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> Although any act of dishonesty will raise questions about whether an employee is so untrustworthy as to preclude the possibility of his or her continued employment, theft is regarded as especially grave because it implies a deliberate intention to wrongfully take or use something that belongs to another. And because the mental element is the same,

> theft or unauthorized possession of another employee's or a customer's property, are also considered to be extremely serious offences. …

[28] The significance of the Grievor's dishonest conduct in this case was aggravated by her decision to lie to the Co-op and to the Board and by her failure to take ownership of her actions. Such a failure to acknowledge wrongdoing would typically be seen as a key factor weighing against the idea that an employment relationship can be restored. The following passage from Morton Mitchnick & Brian Etherington, *Labour Arbitration in Canada*, 2d ed (Toronto: Lancaster House, 2012) at 241–242 seems to fairly capture the overall sense of the arbitral decisions:

> In the face of dishonesty by the grievor during an investigation or in testimony at the arbitration hearing, arbitrators will often decline to substitute a lesser penalty for discharge, particularly in cases of theft or other forms of dishonest conduct. In *Shell Canada Ltd. and C.E.P., Local 835*, [2003] A.G.A.A. No. 65 (QL), where the grievor had been dismissed for theft, a board chaired by Arbitrator Sims held that the grievor's dishonesty in the course of the employer's investigation made him a poor candidate for reinstatement, despite 17 years of good service. Similarly, in *Peace Regional Emergency Medical Services Society and H.S.A.A. (Wilson)*, [2003] A.G.A.A. No. 67 (QL), a case involving discharge for sexual harassment, Arbitrator Moreau concluded that the grievor's failure to tell the truth at the hearing closed any window of opportunity for rebuilding the employment relationship.

See also, for example: *Sobeys West Inc. and UFCW, Local 1518 (Cahoon)*, 2015 CarswellBC 1391 (WL) (BC Arb) at paras 31–33; *Surrey (City) v C.U.P.E., Local 402*, 2007 CarswellBC 3846 (WL) (BC Arb) at paras 93–120; *Central Okanagan (Regional District) v Staff Assn. of the Regional District of Central Okanagan* (2003), 117 LAC (4th) 20 (BC Arb) at paras 62–63; *Cavic v Costco Wholesale Canada Ltd.*, 2012 ONSC 5307 at paras 44–45, 7 CCEL (4th) 1; *Overwaitea Foods/Save-on-Foods British Columbia v U.F.C.W., Local 1518* (2011), 204 LAC (4th) 404 (BC Arb) at paras 42–72; and *University of Saskatchewan and CUPE, Local 1975, Re*, 2014 SKQB 190, [2015] 4 WWR 813 at paras 40–44.

[29] But, of course, the present case involves more than the Grievor compounding the significance of her original dishonesty by lying to the Co-op and the Board. It involves the Board going so far as to make a positive and express finding that it had not been given a great deal of comfort that the Grievor would not repeat her wrongdoing. This is effectively a finding that the trust relationship central to the Grievor's employment relationship cannot be satisfactorily restored. Given that fact, the only reasonable course of action for the Board was to confirm the Co-op's decision to terminate the Grievor's employment.

[30] All of that said, the Union raises a number of specific concerns about the Chambers judge's reasoning and approach. Let me deal with them one-by-one.

1. The amount of time in issue

[31] First, the Union emphasizes that, as between June 30 and July 1, the Grievor left work a total of less than an hour before she should have. The Union asks how this small amount of time can reasonably be seen to justify the termination of the Grievor's employment. The answer, of course, is that the Grievor did more than just leave work early. As indicated, she deliberately filled out her time sheets so as to claim pay for time when she was not at the store. She was a supervisor and, in that role, directed a subordinate employee to fill out his time sheet improperly. She lied to the Co-op when it investigated allegations of time theft and she lied at the arbitration hearing. Most significantly, and as just noted, her ongoing dishonesty and failure to take ownership of her wrongdoing did not create any confidence that she would not repeat her misconduct in the future. In short, this is not a straightforward situation where an employee left work a bit early, was found out and then acknowledged his or her transgression. The Grievor's misconduct was considerably more serious than that.

2. The thefts of time not proven

[32] Second, the Union stresses that the Co-op had accused the Grievor of having stolen time, not just on June 30 and July 1, but also on July 21 to 25 and July 28 to August 1 when she was filling in as manager for Ms. Hall. The Union suggests the Grievor's termination cannot be upheld given that the Board found the Co-op's allegations about time theft during Ms. Hall's absence had not been proven. I am not persuaded by this line of argument either. The Chambers judge's decision was grounded on the time theft that occurred on June 30 and July 1, and on those incidents of theft only. The same holds true for this appeal. The question at hand is whether the Board acted unreasonably in setting aside the sanction of termination imposed on the Grievor for her misconduct on June 30 and July 1. The fact that the Co-op believed the Grievor had committed more extensive thefts of time is irrelevant to that question. In other words, the issue in this appeal is not "would the Co-op have terminated the Grievor's employment if it had involved misconduct only on June 30 and July 1?" Rather, the issue is "did the Board act unreasonably in deciding the Grievor's employment should not have been terminated for the time theft committed on June 30 and July 1?"

[33] A grievor does not receive an automatic discount from the disciplinary action taken by his or her employer simply because, at an arbitration hearing, the employer is not able to prove the full range of its allegations against the grievor. See: Ronald M. Snyder, *Collective Agreement Arbitration in Canada*, 5th ed (Markham, Ont: LexisNexis, 2013) at 512. To use a perhaps somewhat extreme example, imagine a situation where an employer dismisses an employee because the employer believes the employee has stolen $1,000,000 in five distinct and separate incidents involving $200,000 each. If the employer can ultimately prove only that the employee stole $600,000, does that mean the termination of employment, by definition, cannot stand? Obviously not. The issue will be whether, given the allegations of misconduct that have been made out at the arbitration hearing, the sanction imposed by the employer is just and reasonable.

3. Presumption of termination

[34] The third issue raised by the Union concerns the applicable arbitral jurisprudence. The Chambers judge concluded that the arbitral authorities see termination of employment as the presumptive sanction for theft. In his assessment, the authorities also suggest that significant mitigating factors can overcome this presumption.

[35] The Union submits that the Chambers judge misapprehended the applicable arbitral decisions. It argues there is no presumption that termination is the appropriate disciplinary response to employee dishonesty. At least in principle, this point is of some consequence because arbitral jurisprudence informs the question of whether the decisions of arbitration boards are unreasonable. Arbitrators are not bound by a strict doctrine of *stare decisis* but, where a consensus view exists, that consensus is a valuable benchmark against which to assess a decision challenged by way of judicial review. See: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 SCR 458.

[36] To make its point that the Chambers judge misapprehended the arbitral authorities, the Union refers to a rather extensive list of Saskatchewan arbitration decisions. In the end, I do not find those decisions to be particularly helpful in that they deal with an extremely disparate range of fact situations ranging from accessing confidential records (*Canadian Union of Public Employees, Local 5111 v Saskatchewan Assn. of Health Organizations (Priest Grievance)* (2011), 207 LAC (4th) 1 (Sask LA)) to using foul language (*Retail, Wholesale and Department Store Union, Local S-955 v Lilydale Inc. (Yaremko Grievance)*, 2015 CarswellSask 529 (WL)

(LA)) to assaulting a co-worker (*Saskatchewan Assn. of Health Organizations v Canadian Union of Public Employees, Local 3967 (Montgomery Grievance)* (2011), 203 LAC (4th) 1 (Sask LA)). Given the diversity of the factual circumstances covered by the Union's authorities, no principle of any utility for this appeal emerges from them.

[37] The more relevant and helpful arbitral decisions are those dealing with employee theft and dishonesty. There are certainly authorities suggesting that, at one time, termination was the presumptive consequence of an act of theft or dishonesty. For example, in *Saskatchewan Joint Board Retail, Wholesale and Department Store Union, Local 454 v Canada Safeway Limited*, 2004 CanLII 66213 (Sask LA), arbitrator Robert Mitchell, Q.C., in upholding the termination of a 23-year employee who stole two pizzas having a value of $5.00 each, observed that "[t]he presumptive penalty for theft by an employee is termination of employment". However, this sort of thinking appears to have given way to the one articulated by the Supreme Court in *McKinley v BC Tel* in dealing with the common law. There, the Court held that a contextual approach is to be used in determining whether an employee's dishonesty provides just cause for dismissal. See: *Canadian Labour Arbitration* at 7:3314; and *Labour Arbitration in Canada* at 251–252.

[38] In the end, however, the precise contours of any arbitral consensus in this area are ultimately of no consequence to the resolution of this appeal. That is so because the result is the same regardless of whether the analysis is based on a rebuttable-type presumption that dishonesty warrants termination or whether it considers dishonesty in context with reference to the severity of the employee's conduct and the sanction imposed.

[39] If the proper analysis is seen as involving the notion that an act of dishonesty will presumptively warrant dismissal, I see nothing in the facts here that could reasonably displace that presumption. As the Chambers judge noted, the only consideration that weighs in the Grievor's favour on this front is the fact that, in her three-year employment history with the Co-op, she had accumulated no disciplinary record. The relatively minor amount of time stolen by the Grievor might also be mentioned in this context but, as noted above, the seriousness of her original misconduct was compounded by her decisions to lie during the Co-op's investigation and at the arbitration hearing.

[40] If the proper analysis is contextual, as *per McKinley v BC Tel*, the result is the same. As noted, the Grievor was a supervisor. She directed a subordinate to file a false time sheet and lied both during the Co-op's investigation of her conduct and at the arbitration hearing, failed to take ownership of her misconduct and gave no comfort that she would not repeat it. There is nothing of consequence to neutralize the significance of these actions. Taking into account all of the relevant aspects of what happened here and considering the Grievor's conduct in context, the termination of her employment was the appropriate and just disciplinary response for the Co-op to take.

[41] In the end, therefore, I find that the Union's arguments about the nature of the relevant arbitral jurisprudence can have no impact on the bottom line of this appeal.

4. The lies seen in context

[42] Fourth, the Union suggests that the Chambers judge misunderstood the nature of the lies told by the Grievor or, to perhaps put the matter more clearly, it suggests the Chambers judge failed to see those lies in context. That context, says the Union, is that the Grievor was being accused by the Co-op, not just of stealing time on June 30 and July 1, but of stealing time on July 21 to 25 and July 28 to August 1 as well. I see little merit in this line of argument. The Board was very specific in its findings about the Grievor's failures to tell the truth and there is nothing in its decision to suggest the Grievor was somehow confused about the various kinds of misconduct she was or was not denying. Thus, by way of illustration, the Board wrote as follows in its decision:

> 208. The following facts have been established by the evidence:
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> …
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> (h) The Grievor said that she told Mr. Heibel not to close early on July 1 but he closed early regardless. She was his supervisor and it seems to the Board that if the Grievor really wanted the Store to stay open until 11 PM, she could have easily instructed him to keep the store open. We do not believe the Grievor's version of events.
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> …
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> (m) The Employer met with the Grievor on August 13 to discuss the Employer's concerns. The Grievor said that she did not close the store early on June 30 and July 1. The Grievor was not truthful. She also said that her timesheets for the period that she was standing in for Sam should have shown that she worked from

> 7:30 AM to 4:30 PM and further that her timesheets for the two evening shifts (June 30 and July 1) were accurate. This statement was untruthful.
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> (n) During the Grievor's examination-in-chief, she continued to state that she never closed the Store early. This was untruthful.
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> …
>
> 217. Particularly vexing the Board is the fact that the Grievor continued to lie stating that the Store had not closed early on two occasions, even during her examination-in-chief. This was not only untruthful, it was foolish. Not until cross-examination did the Grievor admit that she had closed the store early. Even then she was not forthcoming regarding her instructions to Mr. Walters regarding his time recording.

[43] In conclusion, there is no merit in the suggestion that the Chambers judge failed to see the Grievor's lies in their proper context.

5. The "range of possible outcomes" issue

[44] Fifth, the Union submits the decision of the Chambers judge cannot stand because he effectively acknowledged the reasonableness of the Board's decision and then simply substituted his view of the proper disciplinary response to the Grievor's actions for that of the Board. In this regard, the Union points specifically to paragraphs 53 and 58 of the decision of the Chambers judge where, according to the Union, the judge expressly acknowledged that the Board's decision fell within the range of reasonable outcomes for the matter before it but went on, nonetheless, to impose his views for those of the Board. Paragraphs 53 and 58 read as follows:

> [53] In this case, although the reasons given by the Board are clear and intelligible, and the end result falls within a range of possible outcomes, the end result is, in my view, an outcome that is not defensible in respect of the facts found by the Board and the applicable law.
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> …
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> [58] Given all of the negative findings of fact made by the Board, it was necessary for the Board to identify some significant mitigating factor or factors in order to justify a penalty less than dismissal. In its reasons, the Board referred to no significant mitigating factors, nor were any significant mitigating factors identified in the Board's findings of fact, or the evidence. In particular, all of the relevant factors that the Board identified in its reasons were factors which, according to the applicable jurisprudence - both judicial and arbitral - weigh in favour of dismissal. The Board did not identify any factors in its reasons which were indicative of a viable employment relationship going forward. In the absence of such reasons, the decision to reinstate Ms. Osbourne was a "leap of faith" of the kind described by the Supreme Court in *Bhadauria*. Therefore, while the decision in this case is one that falls within a range of possible acceptable outcomes, it is not an outcome which is defensible in respect of the facts before the Board and the applicable

> law. Applying the standard in *Dunsmuir*, therefore, I must conclude that the Board's decision was unreasonable.
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> (Emphasis added)

[45] As is apparent, the Union's argument involves a misreading of the Chambers judge's decision. The language the Chambers judge chose to use at paragraphs 53 and 58 is arguably not as clear as it might have been. However, it is obvious he was not accepting the reasonableness of the Board's decision and then, notwithstanding that, going on to say the decision was unreasonable and to impose his personal views as to the sanction that should have been imposed on the Grievor. The Chambers judge's comments to the effect that the Board's decision fell within a range of "possible outcomes" or "possible acceptable outcomes" can only be taken to mean he thought that, in an abstract or generalized sense, a four-month suspension without pay could be a reasonable sanction for the misconduct of closing a store early on a couple of nights. But, the Chambers judge's whole point was that the Grievor's conduct had to be seen in the context of the facts as found by the Board – facts that included the Grievor's instructions to a subordinate to falsify his time sheet, the Grievor's lying both to the Co-op during the investigation and at the arbitration hearing and, critically, the lack of any assurance that the Grievor's conduct would not be repeated. As the Chambers judge explained, there were no significant mitigating factors. It was in light of all of this, seen against the background of the governing legal principles, that he found the Board's decision to have been unreasonable.

[46] To sum up on the overall question of the reasonableness of the Board's decision, I find that the Chambers judge made no error in concluding as he did. Given its findings of fact, the Board's decision was unreasonable.

B. The decision to reinstate the termination

[47] The Union submits, in the alternative, that even if the Board's decision was unreasonable, the Chambers judge nonetheless erred by reinstating the Grievor's termination. It contends the Chambers judge should have quashed the Board's decision and remitted the grievance to the Board for reconsideration.

[48] There is no doubt that, as a general rule, a reviewing court should not substitute its own judgment for that of an administrative body. Normally, when a decision is quashed, the

controversy in issue is sent back to be dealt with afresh. That said, this principle is not absolute. While a court may not substitute its decision lightly or arbitrarily for that of an administrative body, there are narrow circumstances where this can be appropriate. The first is when returning the case to the administrative body would be pointless, such as when the body has been determined to be without jurisdiction. The second is when only one solution is possible, i.e., when any other solution would be unreasonable. See: *Giguère c Chambre des notaires du Québec*, 2004 SCC 1 at paras 65–66, [2004] 1 SCR 3; *Telus Communications Inc. and Telecommunications Workers Union*, 2014 ABCA 199 at para 35, 575 AR 325 [*Telus*]; *2274659 Ontario Inc. v Canada Chrome Corporation*, 2016 ONCA 145 at para 69, 394 DLR (4th) 471; and *Allman v Amacon Property Management Services Inc.*, 2007 BCCA 302 at para 9, 280 DLR (4th) 550 at 573; *Gehl v Canada (Attorney General)*, 2017 ONCA 319 at para 54, 413 DLR (4th) 1.

[49] The Chambers judge did not lay out his thinking with respect to why he elected to reinstate the Grievor's termination. However, it is apparent that he took that step because, given the Board's findings of fact, there was no other reasonable outcome for the grievance arbitration. Given those findings of fact and the relevant arbitral jurisprudence, I am not persuaded the Chambers judge made an error in this regard.

[50] In my view, this is a case much like *Telus*. There, the grievor's employment was terminated because he had lied about being too sick to work and had then played in a slo-pitch tournament. An arbitrator substituted a one-month suspension for the termination and a judge, on judicial review, then found the arbitrator's decision to be unreasonable and reinstated the termination. The Court of Appeal for Alberta upheld the Chambers judge's ruling and wrote as follows:

> [39] Here, the reviewing chambers judge correctly recognized that arbitrators are entitled to considerable deference. He also correctly recognized that reviewing courts function to protect parties and the administrative system from unreasonable decisions. Rather than usurping the proper functioning of administrative tribunals, this is a balancing that respects the role of tribunals to choose from among reasonable options and the responsibility of the courts to protect litigants and administrative schemes from unreasonable decisions. We find that the chambers judge's decision to uphold the termination was consistent with existent caselaw, public policy, and the supervisory role of the courts in the administrative process. This ground of appeal is dismissed.

[51] In summary, given the factual findings of the Board and given the applicable arbitral jurisprudence, there is only one reasonable outcome in this case. The Grievor took no ownership of her wrongdoing and the Board found as a fact that there could be no comfort she would not repeat that wrongdoing. In other words, the trust necessary to sustain the employment relationship between the Grievor and the Co-op had been fractured in circumstances where the Co-op could have no confidence it would or could be repaired. As a consequence, the termination of the Grievor's employment was the only reasonable bottom line at which the Board could have arrived. It follows that the Chambers judge did not err by reinstating the Grievor's termination.

IV. CONCLUSION

[52] For the reasons given above, the Union's appeal must be dismissed. The Co-op is entitled to costs in the usual way.

"Richards C.J.S."

Richards C.J.S.

I concur. "Herauf J.A."

Herauf J.A.

I concur. "Whitmore J.A."

Whitmore J.A.