Public Service Alliance of Canada et al v Dominion Diamond Ekati Corporation,
2019 NWTSC 59

Date: 2019 12 20
Docket: S-001-CV-2018-000 129

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

PUBLIC SERVICE ALLIANCE OF CANADA and THE UNION OF NORTHERN WORKERS

Applicants

-and-

DOMINION DIAMOND EKATI CORPORATION

Respondent

MEMORANDUM OF JUDGMENT

[1] This is an application by the Public Service Alliance of Canada and the Union of Northern Workers (the "Union") for judicial review of an arbitrator's ruling upholding an employee dismissal.

BACKGROUND

[2] The Respondent ("DDEC") employed K as a heavy equipment operator at its mine from 2003 until he was dismissed in January of 2015. His job was considered safety-sensitive.

[3] K has a substance use disorder related to alcohol. DDEC has a policy and program to assist employees who have substance use disorders, which includes assessment, residential treatment and aftercare. K used the program twice.

[4] K entered into a Terms of Participation agreement that set out his responsibilities under the program. Among other things, it required him to follow

up with any recommended post-treatment recommendations failing which, he could be dismissed from employment. In K's case, he was required to abstain from mood-altering substances, attend a minimum of three self-help meetings a week and to call in to a Substance Abuse Professional (SAP) once a month for nine months following the residential treatment portion of the program.

[5] The dates on which K was to make the calls were provided to him in writing by his SAP. The first call was to be made on June 3, 2014. The correspondence identifying the dates included the following notes:

> It is your responsibility to call. Failure to do so will be interpreted as non-compliance.
>
> All progress and non-compliance in completing these recommendations and monitoring program will be communicated to your employer.
>
> After three consecutively missed or a total of four missed check-ins, [the monitoring agency] will cease to follow/monitor completion of all recommendations, and notification will be provided to your employer.

[6] K missed the first scheduled call. K's SAP notified K and DDEC of this by email. A manager, Mr. Robertson, followed up with a telephone call to K on June 10 and a meeting with K the next day. K was given a copy of the schedule, with the dates and warnings highlighted. He was reminded of his responsibility to make the calls and warned that his continued employment would be reviewed if he was removed from the monitoring program. K made the next four monthly calls as scheduled.

[7] DDEC was advised on November 6, 2014 that K missed the call that was scheduled for November 4. Mr. Robertson asked K to call his SAP. He warned K that missing the calls would result in him being removed from the monitoring program and place his continued employment in jeopardy. K called his SAP and left a message on November 10.

[8] The next call was scheduled for December 2, 2014. K did not make the call. Mr. Robertson learned of this through the SAP. K explained he had been in a rush due to a crew changed and had forgotten. K called the SAP the following day and apologized.

[9] K missed the next call, which was to take place January 6, 2015. His father had passed away on December 17, 2014. He was on bereavement leave until

December 28 and then he returned to work at the mine on December 29. K called his SAP on January 8, 2015 to apologize for the missed call. According to the arbitrator's reasons, K testified that he did not call because he was still mourning his father's passing and was not thinking straight; however, the arbitrator noted that K had not mentioned his father's death to either his SAP or Mr. Robertson in subsequent conversations.

[10] The monitoring agency advised DDEC that K had now missed three consecutive calls and four calls in total. Accordingly, the monitoring agency would no longer monitor K.

[11] The Head of Human Resources, Ms. MacPherson, decided to dismiss K. She testified at the arbitration hearing. Because those hearings are not typically recorded, there is no transcript of her evidence. The arbitrator summarized it at paragraphs 108 and 109 of his decision:

> MacPherson decided to dismiss K because of his failure to call in despite numerous attempts to explain his obligation to do so, an issue with a return to work testing (a urine sample was outside the required temperature range), and the fact it was the second time he went through the Program. It struck MacPherson that K had made all scheduled calls before he entered residential treatment. She concluded K did not have valid reasons for missing the calls and was disregarding the program.
>
> MacPherson did not give K another chance based on her experience and her understanding of expert advice that to help someone complete the program it is essential to hold them accountable for their actions. In MacPherson's view, K had chosen to disregard his agreement to complete the Monitoring program. It was significant to her that he had missed a total of four calls and three consecutive calls without a good reason. It was also notable to her that K had the means to leave a message in advance that he would not make a call.

[12] In a letter dated January 22, 2015, DDEC advised K that his employment was terminated because of his failure to make the telephone calls to his SAP. It stated, in part:

> [K], compliance of *[sic]* this program was very important for you to be successful in your employment with DDEC. Due to your non-compliance, I can only conclude that you have not taken the full steps required to be successful in this program . . .

[13] The Union grieved the dismissal on K's behalf. The arbitrator heard evidence from K's SAP, a psychiatrist and a psychologist (both of whom were tendered as experts in addiction treatment), representatives from DDEC management, and K.

[14] The basis of the grievance is summarized by the arbitrator at paragraph 316 of his decision:

> K's grievance rests of the following critical assertions. First, the Union submits that K simply forgot to make the monitoring calls and was otherwise compliant. Second, the Union argues that [the SAP] essentially said "hello and goodbye", such that there was no therapeutic purpose to a monitoring program over which K had no meaningful input. Third, the Union adds that K was not adequately warned each time he missed a call that his employment was in jeopardy. Fourth, the Union argues the Employer denied K the benefit of union representation afforded under the Collective Agreement.[1]

[15] On the first issue, the arbitrator found that K did not forget to call the SAP but rather, *decided* not to call. At paragraph 325 of his decision he stated:

> I find that K decided to stop calling because he did not believe the calls benefitted him. He disregarded the fact that the calls provided valuable feedback to the [SAP] about his recovery. Accordingly, MacPherson was correct in her view that K had chosen to reject the Monitoring component of the Program – regardless of known consequences.

[16] He noted that each time K missed a call he was reminded of the need to comply and the consequences of failing to do so. In reaching this conclusion, he relied on evidence from Mr. Robertson and the SAP and he rejected K's evidence about why he did not call.

[17] With respect to the second issue, the arbitrator noted at paragraphs 78 and 79 of his decision, that K testified the calls were fifteen to twenty seconds in duration; that he did not know why he had to make the calls; that they did not help him; that he considered them "just another obstacle"; and that he started to slip because when he called, the SAP simply thanked him for calling and did not remind him of the next call.

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[1] In this application the Union did not argue the arbitrator erred in his conclusion regarding K's right to union representation. Accordingly, I have not addressed it in these reasons. it is unnecessary to go into that in any detail.

[18] This was in contrast to the SAP's evidence. At paragraph 77 the arbitrator noted that the SAP testified that during the calls he went over a number of topics with K. He asked K how he was doing generally; whether K remained abstinent; whether he attended his self-help meetings; and whether K required help at work. The SAP said the calls typically lasted a couple of minutes and that K responded positively when he was questioned.

[19] The arbitrator accepted the SAP's evidence on this point. His reasons are set out in paragraphs 327 to 340 of his decision, and summarized at paragraph 331:

> In making this assessment, I have considered K's, Robertson's and [the SAP's] testimony in light of the whole of the evidence. In summary, I find the credibility of K's entire account falls short in three independent respects. First, there are troubling internal inconsistencies in K's testimony as well as differences with the documentary record. To cite one example, I have already explained why I do not accept K's claim that he just forgot to make the monitoring calls. Second, there are inconsistencies between accounts K's *[sic]* provided initially to the Employer and his testimony in this proceeding. Finally, I find that K's narrative is not in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in the conditions at hand . . .

[20] The arbitrator determined that the requirement for the monthly telephone calls served a therapeutic purpose. In doing so, he relied on evidence that this form of monitoring was recommended by K's SAP, as well as the psychiatrist's opinion that an employee who is unwilling to comply with aftercare recommendations presents a significantly higher risk of relapse and, consequently, safety risks in the workplace. The arbitrator concluded that K had fair warning of the consequences of failing to comply.

[21] The Union did not allege discrimination at the arbitration hearing. DDEC raised it in its own arguments, however. Its position was, among other things, that K's dismissal was justified as a result of either insubordination or a non-culpable refusal by K to facilitate reasonable accommodation, a responsibility which rested on him. It argued there was no basis to find DDEC discriminated against K in dismissing him, or that additional accommodation was required, because there was no evidence that K's disability prevented him from complying with the monitoring program.

[22] The arbitrator addressed the issue of whether the circumstances raised a *prima facie* case of discrimination. He applied the test set out in *Moore v British*

Columbia (Ministry of Education), 2012 SCC 61 at para 33, [2012] 3 SCR 360 and others, that is, that the Union had to establish K had a disability; that he experienced adverse treatment; and that it would be reasonable to infer his disability was a factor in that adverse treatment. He determined that no *prima facie* case had been made out, stating, at paragraph 382:

> It is common ground K was disabled by a [substance use disorder]. There was adverse treatment in that K's termination was based on his non-compliance with the program. However, the Union argued that K's failures to call were due to forgetfulness and did not attempt to link that conduct to his [substance use disorder]. I conclude on the facts and circumstances before me that K was terminated because he refused telephone monitoring and that K's disability was not a factor in his dismissal. Accordingly, K's termination does not give rise to a *prima facie* case of discrimination.

[23] In upholding the dismissal, the arbitrator found that K deliberately chose not to make the calls and that he had failed in his responsibility to do everything reasonably possible to facilitate a reasonable accommodation. He concluded that the non-compliance was serious, given DDEC's need to promote conditions that supported K's recovery and, at the same time, provide a safe workplace. He stated, at paragraph 387:

> At the time of dismissal, K's failure to make three consecutive calls raised a reasonable question as to whether he had his [substance use disorder] under control and whether he was fit to continue work at a safety-sensitive job. It is true the Employer had other means to observe the Grievor, but none were equivalent to monitoring phone calls with a SAP. It is one thing to confide one's personal struggles to a trained SAP; it is an entirely different matter to have those conversations with one's boss . . . The Union correctly observes that K did not wholly reject treatment. He had passed drug tests albeit there is some evidence he did not regularly submit the required proof of attendance at AA meetings. Nonetheless, I find that K rejected a material element of a reasonable offer of accommodation. He chose not to do everything he reasonably could to restore his health and employability.

THE STANDARD OF REVIEW

[24] Both parties submit that the standard of review is reasonableness and I agree. This is a deferential standard under which the reviewing court looks for justification, transparency and intelligibility in the decision, as well as whether the decision falls within a range of possible, acceptable outcomes. So long as the outcome is within that range, the reviewing court must not substitute its own

opinion for that of the decision-maker. *Dunsmuir v New Brunswick,* 2008 SCC 9 at para 47, [2008] 1 SCR 190. That range of outcomes will be informed by the facts and law, and by the context in which the decision is made. *Canada (Citizenship and Immigration) v Khosa,* 2009 SCC 12 at para 59; *Catalyst Paper Corp v North Cowichan (District)* 2012 SCC 2 at paras 17-18, [2012] 1 SCR 5.

ISSUES

[25] The Union advanced a number of grounds for judicial review in its Originating Notice; however, what this Court is asked to decide is whether the arbitrator's conclusion that DDEC was justified in dismissing K for missing the monitoring calls is reasonable. Each party's position is summarized below.

THE PARTIES' POSITIONS

The Union

[26] The Union contends the arbitrator erred in determining there was no *prima facie* case of discrimination and, in making that finding, failing to consider whether DDEC had accommodated K to the point of undue hardship.

[27] With respect to the finding that there was no discrimination itself, the Union says the arbitrator ignored DDEC's evidence, provided through Ms. MacPherson, which suggested K's disability *was* a factor leading to his dismissal. It also argues that this contradicted the arbitrator's own analysis, which concluded, among other things, that the monitoring calls were rationally connected to K's treatment plan and risk of relapse, which, in turn, informed DDEC's decision to dismiss him.

DDEC

[28] DDEC says that the arbitrator's decision should be upheld. First, it points out that during the arbitration, the Union did not attempt to link K's substance use disorder to his failure to make the required calls, nor that K's dismissal gave rise to a *prima facie* case of discrimination. Therefore, it cannot raise the issue on judicial review.

[29] Second, even though the Union did not raise discrimination in the grievance, the arbitrator nevertheless considered it and his finding *prima facie* discrimination had not been made out was reasonable.

ANALYSIS

[30] It is clear from the record that the fact of K's substance use disorder was of central importance in the grievance. His dismissal was based on a failure to comply with the requirements of a treatment program in which he was participating because of his disability. It could be reasonably expected that the spectre of discrimination would arise in this context.

[31] The fact that discrimination was not raised by the Union at the arbitration makes it difficult for the Union to now argue that the arbitrator's conclusion was unreasonable and that he ought to have found that discrimination was at the heart of the dismissal.

[32] Like all decision makers, labour arbitrators are tasked with deciding the questions put before them, based on the evidence the parties adduce. It is not for a decision-maker to speculate about what evidence might have been adduced or what issues and arguments could or ought to have been raised. It would also be inappropriate for an arbitrator, who must be and be seen to be impartial, to jump in and start raising issues or making arguments on behalf of the parties. Those are matters of strategy, best left for the parties' respective advocates. Based on what was in front him, the arbitrator's reasoning in concluding there was no *prima facie* discrimination is entirely sound.

[33] It is open to the Court to exercise its discretion and allow arguments not raised before the administrative tribunal to be made on judicial review. However, that discretion should be exercised sparingly. In *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association,* 2011 SCC 61, Rothstein, J. set out the rationale:

> [23] Generally, this discretion will not be exercised in favour of an applicant on judicial review where the issue could have been but was not raised before the tribunal.
>
> [24] There are a number of rationales justifying the general rule. One fundamental concern is that the legislature has entrusted the determination of the issue to the administrative tribunal . . .As this Court explained in *Dunsmuir*, "[c]ourts . . . must be sensitive . . . to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated

> to administrative bodies by Parliament and legislatures" (para. 27). Accordingly, courts should respect the legislative choice of the tribunal as the first instance decision maker by giving the tribunal the opportunity to deal with the issue first and to make its views known.
>
> [25] This is particularly true where the issue raised for the first time on judicial review relates to the tribunal's specialized functions or expertise. When it does, the Court should be especially careful not to overlook the loss of the benefit of the tribunal's views inherent in allowing the issue to be raised.
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> [26] Moreover, raising an issue for the first time on judicial review may unfairly prejudice the opposing party and may deny the court the adequate evidentiary record required to consider the issue. [case citations omitted]

[34] There is nothing before me that suggests it would be appropriate to exercise discretion and conduct my own analysis of the discrimination question on judicial review.

[35] The Union suggested that the issue of discrimination could be remitted to the arbitrator for consideration. That could be a solution in some circumstances, but respectfully, I do not think it would be appropriate here. That would give the Union the unfair advantage of being able to take a completely different position to what it advanced at the hearing. Having argued in the first instance that K's disability did not prevent him from making the calls, the Union cannot now go back, in the face of that evidence, and ask the arbitrator to find that his disability *was* a factor in his non-compliance.

[36] I turn now to the arbitrator's finding that K's dismissal was not discriminatory. I find his conclusion was reasonable.

[37] As stated by McLachlin, CJ (as she was then) in *Stewart v Elk Valley Coal Corp* [2017 SCC 30 at para 42, [2017] 1 SCR 591 "[…] the mere existence of addiction does not establish *prima facie* discrimination". In this case, the only connection between K's failure to make the calls and his substance use disorder was the fact that he was required to make them as part of his treatment plan, to which he had agreed to adhere. His disability was part of the narrative, but that is all. The Union's position at the arbitration was that K had *not* relapsed, that he was fit to work and that there was no therapeutic reason for K to make the calls. There was nothing related to K's disability that prevented him from making the calls. In the circumstances, it was reasonable for the arbitrator to conclude that K's

dismissal was not an act of discrimination, but rather, was based on K's deliberate choice not to comply with the terms of the treatment plan. It was also reasonable for him to decline to conduct an undue hardship analysis.

[38] One of the key elements underpinning the Union's assertion in this application is that the arbitrator ignored or failed to properly take into account DDEC's evidence, tendered through Ms. MacPherson, that K's disability was a factor in his dismissal. Respectfully, I do not agree that this is the only interpretation of her evidence. In the overall context, what the arbitrator reported her evidence to be in his reasons is equivocal. It could just as easily be interpreted as something Ms. MacPherson considered in determining whether K was aware of the consequences of non-compliance.

[39] That there was evidence suggesting that relapse is a common occurrence in addiction recovery does not change this. Again, it was part of the narrative. The evidence explained why, in a safety-sensitive workplace, monitoring programs – and adherence to them - are important. Relapse was not advanced as a reason for K's failure to make the monitoring calls. The arbitrator considered this evidence in his analysis, along with everything else. His decision is not at odds with either the evidence or his assessment of it.

CONCLUSION

[40] The arbitrator's decision is reasonably supported by both the evidence and the law. Accordingly, it should remain undisturbed.

[41] The application for judicial review is dismissed.

[42] Having prevailed, the DDEC is entitled to the costs of this application. If the parties are unable to agree on the scale of costs, or if they wish to make additional submissions on them, they may speak to the matter in chambers.

K.M. Shaner
J.S.C.

Dated at Yellowknife, NT, this

20th day of December, 2019

Counsel for the Applicants:	Andrew Astritis
Counsel for the Respondent:	Kim Thorne and Brandon Hillis

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