

# COURT OF APPEAL FOR ONTARIO

CITATION: Canadian Office and Professional Employees Union v.  
Yellow Pages Group Company, 2012 ONCA 448  
DATE: 20120626  
DOCKET: C54481

Cronk and Epstein JJ.A. and Strathy J. (*ad hoc*)

BETWEEN

Canadian Office and Professional Employees Union

Applicant (Appellant)

and

Yellow Pages Group Company

Respondent (Respondent)

Bernard Hanson, for the appellant

Sonia Regenbogen and Trevor Guy, for the respondent

Heard: March 20, 2012

On appeal from the order of the Divisional Court (Jennings, Aston and Wilton-Siegel JJ.) dated June 21, 2011, with majority reasons by Aston and Jennings JJ., reported at 2011 ONSC 1774, 338 D.L.R. (4<sup>th</sup>) 182.

**Epstein J.A.:**

## OVERVIEW

[1] This is a wrongful dismissal case in a unionized context. The sole issue involves the appropriateness of the penalty imposed on the employee, Mr. Ferreira, in response to a finding of misconduct.

[2] Mr. Ferreira started working for the respondent, the Yellow Pages Group Company, as a sales consultant in January 1989. On March 5, 2009, Yellow Pages terminated the employment relationship on the basis that Mr. Ferreira had abandoned his position. He grieved this termination through his union, the appellant, the Canadian Office and Professional Employees Union (the “Union”). The arbitrator dismissed Mr. Ferreira’s grievance. Similarly, the Divisional Court dismissed the Union’s application for judicial review of the arbitrator’s award. With the leave of this court, the Union appeals.

[3] The parties agree that the only contentious issue between them concerns the arbitrator’s finding that Mr. Ferreira’s misconduct warranted the termination of his employment.

[4] For the reasons that follow, I would allow the appeal.

## **THE FACTS**

[5] Yellow Pages provides its employees with a short-term disability benefit plan administered by Medisys, a third party. On January 12, 2009, Mr. Ferreira began a short-term disability medical leave with a diagnosis of severe hypertension and work-related stress. On January 20, 2009, Mr. Ferreira attended a medical assessment with his physician, Dr. Da Silva. The doctor filled out a medical form referred to as an Attending Physician’s Statement. Mr.

Ferreira faxed the form to Yellow Pages. Yellow Pages then provided the form to Medisys.

[6] Medisys, needing more information, sent Dr. Da Silva a follow-up questionnaire on February 4, 2009. However, the doctor did not get around to completing it. As a result, Medisys wrote to Mr. Ferreira on February 16, 2009, advising him that as of January 23, 2009, his disability benefits had been terminated on the basis of insufficient medical evidence. In this letter, Medisys indicated that if the additional information was not received by March 3, 2009, Mr. Ferreira's file would be closed.

[7] On February 18, 2009, Yellow Pages sent a letter to Mr. Ferreira advising him that since his disability claim had been denied, he was obligated to return to work by February 20, 2009. Upon receipt of this letter, Mr. Ferreira spoke to a representative of Yellow Pages whereupon he was told that his employment would be terminated unless, by March 3, 2009, he returned to work or provided the required medical evidence supporting his absence.

[8] Mr. Ferreira promptly made an appointment with Dr. Da Silva and saw him on February 25, 2009. The doctor wrote a letter to Medisys dated March 2, 2009, in which he expressed his view that Mr. Ferreira was unable to return to work. He sent this letter by regular mail on March 2 or 3. However, because the letter was not received by the March 3 deadline, Yellow Pages took the position that Mr.

Ferreira had abandoned his position. When, on March 5, Mr. Ferreira was informed of this, he immediately obtained a copy of Dr. Da Silva's March 2 letter and faxed it to Yellow Pages.

[9] However, the letter had no impact on Yellow Pages' decision. As far as the company was concerned, the employment relationship was at an end.

## **THE DECISIONS BELOW**

### **(1) The Arbitrator**

[10] The arbitrator held, at para. 160 of his reasons, that the question before him was whether Mr. Ferreira's "failure to meet a clearly articulated expectation, with clearly articulated consequences, allowed [Yellow Pages] to conclude that [he] accepted the consequences" – namely dismissal.

[11] The arbitrator found that Mr. Ferreira knew he had to arrange for his doctor to provide Medisys with more information within a certain time frame but failed to do so. He reasoned that in the face of having a clear understanding of the consequences of failing to comply, Mr. Ferreira unreasonably left the matter in his doctor's hands. He did so at his peril. When the doctor let him down by not delivering the letter to Medisys on time, Mr. Ferreira should be held to the sanction of which he was well aware.

[12] The arbitrator recognized that, although termination was a severe penalty for a 20-year employee with a previously unblemished record, it was not

unreasonable given that Mr. Ferreira, without explanation, had failed to keep the company informed of his availability to perform his functions as an employee of the company. In circumstances where Mr. Ferreira knew the consequences of not meeting the timeline Yellow Pages imposed and where he could easily have taken steps to ensure that he met that timeline, he had no one but himself to blame for defaulting. In these circumstances, there was nothing unfair about sanctioning Mr. Ferreira in the manner that had been explicitly made known to him.

[13] Finally, the arbitrator held that Mr. Ferreira's lack of candour throughout the arbitration process was relevant in that it struck at his ability to reintegrate into the workplace. For this reason, Mr. Ferreira was not entitled to mitigation of his termination.

## **(2) The Divisional Court**

[14] In the Divisional Court, the majority expressed the view that the most basic obligation of an employee is to report to work or to explain the absence and that an employee's failure to do either can amount to just cause for dismissal. The majority noted the arbitrator's holding that Mr. Ferreira was clearly warned of the consequences of his failure to comply with his employer's specific requests relating to his obligation to provide complete and timely information about his work status and that he had the power to avoid those consequences. This,

together with the arbitrator's finding that Mr. Ferreira was not a good candidate for reintegration into the workplace, was sufficient to support the conclusion that dismissal was within the range of reasonable outcomes available to the arbitrator.

[15] Wilton-Siegel J., in dissent, would have set the arbitrator's award aside as unreasonable and remitted the matter back to the arbitrator for a reconsideration of the appropriate award. He held that the arbitrator's reasons did not contain the necessary factual support for the conclusion that Yellow Pages had just cause to terminate Mr. Ferreira's employment. Significantly, in terms of the issue on appeal, he further found that the reasons failed to demonstrate that the arbitrator considered whether Mr. Ferreira's conduct was such that it gave rise to a genuine concern about the viability of an ongoing employment relationship. For this reason, the decision of the arbitrator was unreasonable.

## **ISSUES**

[16] As previously mentioned, the only issue before this court is whether the conclusion of the majority of the Divisional Court that the arbitrator's decision regarding the termination of Mr. Ferreira's employment with Yellow Pages was reasonable, should be upheld.

## ANALYSIS

[17] The arbitrator was required to determine whether the penalty Yellow Pages imposed – termination of the employment relationship – was justified in the light of the misconduct in issue.

[18] In *McKinley v. BC Tel*, 2001 SCC 38, [2001] 2 S.C.R. 161, the Supreme Court made it clear that the principle of proportionality is the focus in the determination whether termination of an employment relationship is the appropriate sanction in response to employee misconduct. The requisite balancing of the severity of the conduct in issue with the severity of the penalty reflects an acknowledgment of the importance of work to a person's life and identity. The analysis is a contextual one with the unique facts of each case ultimately informing the key issue whether the employee's misconduct is reconcilable with sustaining the employment relationship.

[19] In this case, the relevant conduct is limited to Mr. Ferreira's failure to comply, without explanation, with the time-line Yellow Pages imposed on him to provide further medical information. The concerns the arbitrator expressed about Mr. Ferreira's lack of candour in the arbitration process are not relevant to this analysis as any dishonesty on Mr. Ferreira's part at that stage played no part in Yellow Pages' decision to terminate his employment.

[20] On the arbitrator's findings, the only dishonesty remotely connected with the events leading to the end of the employment relationship was Mr. Ferreira's misrepresentation of his blood pressure to a Medisys representative. However, this was not a conversation that involved Yellow Pages. There is no evidence that it factored into Yellow Pages' decision to treat Mr. Ferreira as though he had abandoned his position with the company.

[21] With respect to the arbitrator's comment that Mr. Ferreira's lack of candour may interfere with his ability to reintegrate into the workplace, I note that the record contains no evidence to support a finding that there would be any such difficulty.

[22] I am therefore of the view that the majority of the Divisional Court erred in two respects in dismissing the Union's application for judicial review of the arbitrator's award.

[23] First, they failed to examine whether the arbitrator's reasons demonstrate that he considered the matter contextually and balanced the nature and seriousness of Mr. Ferreira's misconduct with the severity of the sanction imposed – a sanction that terminated a previously unblemished 20-year employment relationship.

[24] Second, with respect, the majority was wrong to rely on the arbitrator's finding that Mr. Ferreira was less than completely honest in his conduct within the



arbitration proceedings. As I have indicated, this factor was irrelevant to Yellow Pages' decision to terminate Mr. Ferreira's employment and could not provide retroactive justification for that decision.

## **DISPOSITION**

[25] I would allow the appeal and remit the matter back to a different arbitrator for a reconsideration of the appropriate sanction.

[26] In accordance with the agreement of the parties, the appellant is entitled to its costs fixed in the amount of \$10,000, including disbursements and applicable taxes.

Released:

"JUN 26 2012"

"G.J. Epstein J.A."

"EAC"

"I agree E.A. Cronk J.A."

"I agree G.R. Strathy J. (*ad hoc*)"