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Mixed Results for Corrections Officer Terminated for Dishonesty

By: Linda McKay-Panos

Case Commented On: *Alberta Union of Provincial Employees v Alberta*, [2018 ABQB 524](#) (AUPE)

Justice GS Dunlop of the Alberta Court of Queen’s Bench recently heard an application for judicial review of a three-day suspension and termination of a long-standing employee of the Province of Alberta. For just about 30 years, Todd Ross (Ross) was a Correctional Peace Officer (CPO) employed by the Province. He was a member of the Alberta Union of Provincial Employees (AUPE) and was also a union representative (AUPE at para 1). In April 2013, a new Edmonton Remand Centre opened (AUPE at para 2). Ross had been terminated on June 28, 2013 on three grounds:

- His communication with management about the new Edmonton Remand Centre in April 2013; Ross wrote and sent two emails to the Executive Director and the Assistant Executive Director of the new Edmonton Remand Centre, which the arbitrator had described Ross as ‘insolent, insubordinate and untruthful’; Ross had also erred when he addressed his comments to the Deputy Minister and the Assistant Deputy Minister;
- His actions when he was relieved with pay on April 26, 2013; and
- His actions while he was on leave with pay after April 26, 2013; the employer alleged that Ross had induced other CPOs to engage in an illegal strike between April 26 and May 3, 2013—however, the arbitrator held that this allegation was not proven (AUPE at paras 10 and 11).

In a decision on this matter released April 14, 2015, the arbitrator held that the termination was an excessive response to Ross’s misconduct in the two emails; Ross’s dismissal was set aside and replaced with a six-month suspension starting from June 28, 2013 (AUPE at para 11).

One week after the arbitrator’s decision, on April 21, 2015, Ross admittedly told a television reporter that he had been fired by the Province shortly after the new Remand Centre had opened for speaking out about safety at the new facility (AUPE at para 12). The employer argued that Ross’s statements were false and defamatory. Ross was suspended for three days without pay (AUPE at para 12).

Ross successfully grieved the three-day suspension. The arbitrator held that the television reporter had made a ‘one-off background comment’ about Ross’s 2013 suspension that was peripheral to the main story, which was actually about an assault that had taken place at the Edmonton Remand Centre; a CCTV video of the assault was aired on the evening news. The arbitrator noted that Ross had some latitude as a spokesperson for the membership (he was a

union representative), held that this incident did not warrant a suspension and ordered that Ross was to be reimbursed for any loss of pay and benefits resulting from the three-day suspension (*AUPE* at para 13).

Justice Dunlop noted that the standard of review was reasonableness, and then held that the arbitrator's decision about the three-day suspension was "within the range of possible, acceptable outcomes" (*AUPE* at para 14). Justice Dunlop dismissed the employer's application for judicial review of the arbitrator's decision regarding the three-day suspension (*AUPE* at para 6).

However, Ross was not so fortunate when it came to his termination. The employer alleged that Ross was not honest with respect to the investigation of a leak to the media of the internal CCTV video, and had therefore tampered with the investigation (*AUPE* at para 3). The arbitrator had overturned the termination of Ross's employment and ordered that he be paid damages in the amount of one year's salary (the arbitrator did not order that Ross be reinstated) (*AUPE* at para 4). In concluding that Ross should have been suspended, the arbitrator had relied on four mitigating factors:

- Ross's long service with the employer;
- Ross's work as Chapter Chair of the Union Local and a leading member of the planning committee for the new Edmonton Remand Centre;
- Ross had not played a central role in recording the leaked video; and
- Lack of sufficient evidence that Ross had leaked the video (*AUPE* at para 17).

The arbitrator would not have ordered reinstatement because Ross's dishonesty made the continued employment relationship impossible (*AUPE* at para 18). The arbitrator had also found that Ross had repeatedly lied to fellow employees who were investigating the leak of the video; the arbitrator noted that these lies had continued throughout the arbitration hearing (*AUPE* at para 7).

Justice Dunlop held that the appropriate test for employee dishonesty should be found in *McKinley v BC Tel*, [2001 SCC 38 \(CanLII\)](#), a case that was not cited to the arbitrator by either party. He pointed to the following passage (from *McKinley* at para 48):

In light of the foregoing analysis, I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.

In this situation, because Ross's dishonesty made his continued employment impossible, following *McKinley* made the arbitrator's solution (damages in lieu of reinstatement)

unreasonable, as the employer had just cause for dismissal with no notice and no damages (*AUPE* at para 18). Justice Dunlop quashed the arbitrator’s decision regarding Ross’s termination and substituted his own decision upholding termination (*AUPE* at para 22).

The Union is appealing the ABQB decision. See: Paige Parsons “Union to appeal ruling on remand Centre guard’s termination” [July 19, 2018 *Edmonton Journal*](#).

It may be that some think Ross was actually fired for being a whistleblower. He may have thought he would be protected by the *Public Interest Disclosure (Whistleblower Protection) Act*, SA 2012 c P-39.5 (*PIDA*), but Ross did not follow the procedure for disclosures set out in the *PIDA* (sections 5 to 15.1); the *PIDA* clearly does not protect from reprisal those who do not follow the *PIDA*’s requirements (e.g., those who make a public disclosure), see Government of Alberta [Employee Factsheet](#).

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