

Case Name:

**Hendrickson Spring (Stratford Operations)
v. United Steelworkers of America,
Local 8773 (Zaharia Grievance)**

**IN THE MATTER OF an Arbitration
Between
Hendrickson Spring Stratford Operations (The Employer), and
United Steelworkers of America Local 8773 (The Union)
AND IN THE MATTER OF the Grievances of
Costel Zaharia - Written Warning &
Termination**

[2012] O.L.A.A. No. 440

No. MPA/Z200892

Ontario
Labour Arbitration
Stratford, Ontario

Panel: K.A. Hinnegan (Arbitrator)

Heard: July 25, 2012.
Award: August 13, 2011.

(10 paras.)

Labour arbitration -- Evidence -- Witnesses -- Credibility.

Labour arbitration -- Discipline and discharge -- Grounds -- Misuse of computer.

The grievor, an electrician, was terminated for misappropriation and misuse of company computer software and hardware. He also improperly accessed the Internet through the employer's computer system, and skirted the company's firewall, thus potentially exposing the computer system to a virus. The grievor denied all allegations of misconduct. The union submitted that the employer had failed to prove its allegations.

HELD: Grievance dismissed. The grievor's evidence was not credible. The arbitrator accepted the employer's evidence that the grievor had, on one occasion, connected his cell phone to a company laptop computer to access the Internet for personal reasons and, on another occasion, had loaded a personal CD into the computer. In view of the grievor's continued denial of the obvious and, therefore, the absence of any remorse for his actions, his short service, and the absence of any mitigating factors in his favour, there was no basis for interfering with the penalty imposed by the employer.

Appearances:

For the Employer: Ted J. Kovacs, Shelley Mayer & Others.

For the Union: Wade Blair, Stephen R. Banks & Others.

AWARD

1 The Grievor had been employed as an electrician for approximately nine months at the time of his termination on May 15, 2012. The grounds for the termination are set out in the termination letter as follows:

"... your misappropriation and improper use of Company computer hardware/software, your improper and unauthorized installation of software for personal use on the Company's computer system, your improper access of the internet through the Company's computer system, and your improper skirting of the Company's firewall (potentially exposing the system to a virus), and your having done so on Company time. During the investigation you were dishonest and showed no remorse or contrition."

2 There were three previous disciplines on the Grievor's record -- a counselling and two written warnings, one of which was grieved and is before me here unresolved. However, in the circumstances of the grounds for termination and the evidence received at the hearing, I find it unnecessary to consider those here or to resolve the grieved written warning. That is because, if proved, the allegations in the termination letter justify termination in all of the circumstances here.

3 The Grievor denied virtually all of the computer misconduct alleged by the Employer and the position advanced by the Union at the hearing, perhaps with sonic measure of reluctance given the evidence received at the hearing, was that the Employer had failed to prove its allegations.

4 In taking the position he did, the Grievor effectively reduced the issue here to one of credibility

between himself and the Employer's principal witness, Alejandro Calderon, the company Reliability Specialist.

5 The evidence of Mr. Calderon is summarized as follows. On April 25, 2012, he came upon the Grievor in the maintenance huddle room using his cell phone connected to a company laptop computer to access the internet and watching videos unrelated to company business. He told the Grievor that, given the risk of corrupting the computer, what he was doing was prohibited by the Employer. Two weeks later, on May 8th, he again found the Grievor in the huddle room on company time surfing the internet through a personal CD loaded into the computer. When questioned about what he was doing, the Grievor actually showed Mr. Calderon the personal CD he had installed in the computer.

6 During the ensuing investigation, the Grievor essentially denied everything as alleged by Mr. Calderon above. At the hearing, he maintained that denial and flatly declared that virtually everything Mr. Calderon had claimed about the two computer incidents was, put simply, a barefaced lie.

7 The obvious difficulty with that charge by the Grievor against Mr. Calderon is the complete absence of any suggestion of some motive on his part for making it all up, not just once but on two separate occasions. In my experience, without some motive for doing so, a co-worker does not generally make up stories about another co-worker serious enough to potentially result in the loss of his employment if accepted by management. That said, the greater difficulty for the Grievor in persuading me to accept his version of the events over that of Mr. Calderon is the nature and content of the testimony of each at the hearing. In my view, Mr. Calderone gave his evidence in a straightforward and factual manner and was unshaken in cross-examination. He had no reason to lie about what happened and I can conceive of no reason whatsoever to find that he was lying in what he reported about the relevant events concerning the Grievor's computer activity on the days in question.

8 On the other hand, the Grievor's testimony, virtually throughout, was at the other end of the credibility spectrum. If there remained any doubt about his credibility versus that of Mr. Calderon, it should have been put to rest during his cross-examination when he acknowledged for the first time that he did have a cell phone attached to the company laptop on April 25th. However, he then went on to claim that he was simply charging it on the computer. When asked why he had not disclosed that to anyone previously, including his Union representatives, his answer was that no-one had asked him before, a nonsensical response in all of the circumstances here.

9 Needless to say then, I unreservedly accept the evidence of Mr. Calderon in all relevant respects and reject that of the Grievor where it differs from his. In view of the Grievor's continued denial of the obvious and, therefore, the absence of any remorse for his actions, his short service, and the absence of any mitigating factors in his favour, there is no basis whatsoever for interfering with the penalty imposed here.

10 In the result, I must find that there was just cause for termination and that grievance is denied, thereby rendering the grieved written warning irrelevant in the circumstances.

Dated: August 13, 2012

K.A. Hinnegan - Arbitrator

qp/s/qlspi