

IN THE MATTER OF AN ARBITRATION

B E T W E E N:

TELUS

Employer

- and -

UNITED STEELWORKERS
TELECOMMUNICATIONS WORKERS UNION
NATIONAL LOCAL 1944

Union

Grievance re: A. Heywood
Termination (#2019.247)

A W A R D

BEFORE: Thomas Jolliffe, Q.C.

FOR THE EMPLOYER: Stephanie Henry, Co-Counsel
John Gilmore, Co-Counsel

FOR THE UNION: Joe Benn, Union Representative/Advocate
Randy Gatzka, Union Representative/Advocate

HEARING LOCATION: Calgary, Alberta (via Zoom)

HEARING DATES: October 1 and 2, 2020
November 4, 2020
November 16, 18, 19 and 20, 2020
December 21 2020
January 21, 2021 (Argument)

Date Award Issued:
May 17, 2021

This matter concerns the grievance filed on behalf Angela Heywood, a Client Care Representative III employed in TELUS' Calgary operations until her termination, allegedly for cause, imposed immediately following the investigative meeting held on December 10, 2019. The intentional actions of which she stands accused were said to be a clear breach of the Employer's published Ethics Policy and Code of Conduct, and constituting a fundamental violation of the requisite trust placed in employees regarding business information and security, thereby rendering her employment untenable for it being irreparably damaged. The evidence presented at the arbitration hearing centred on whether, as alleged, the grievor knowingly set out to disrupt the Employer's internal computerized information network on September 19, 2019, its Google Drive system utilized in the grievor's area of work, by removing access ordinarily available to various affected management level employees. Such denial of access pertained to the current and continuously updated information contained in a particular filing system known as BDO Google Drive, containing materials originating with external customers and vendors, or generated in the field by TELUS staff. Her alleged actions were seen to have potentially impacted the ongoing operational needs of managers and front-line staff needing to receive and react to the information contained therein on a current and updated basis.

The defence theory, advanced by the Union, was that through the grievor's unknowing mistake ("human error") she had somehow denied system access to some managerial level employees, possibly also at least one immediate bargaining unit coworker in her area, coming about when she was trying to be helpful by inputting some process changes into the system. It asserts there to have been no degree of animus on her part, no plan to disrupt the computerized information system. The grievor has maintained a complete denial throughout, including the investigation process

and the arbitration hearing, of any knowingly dishonest activities, and the Union puts the Employer to the strict proof of its allegation of intentional wrongdoing. There has been no stipulation as to any agreed facts.

The principal issue in this matter is whether there is sufficient proof of intentional wrongdoing to substantiate the allegations which, if proven, the Employer contends would have to be considered fatal to the employment relationship. The Union has asserted in the alternative that even were some level of intentional wrongdoing to be proved, or some level of recklessness on her part, it would still be a matter of examining whether discharge was warranted and my needing to review all the circumstances and the mitigating aspects as per the *Wm. Scott & Co.*, 1976 CarswellBC 518 (Weiler) outline, and the *Steel Equipment Co. Ltd.* (1964)14 L.A.C. 356 (Reville) factors discussed at pp. 40-41. Notably the grievor has no prior discipline on her employment record, and had received internal performance awards.

It is to be noted at outset that the grievor's actions and intentions related thereto require an examination of her credibility when placed alongside the documentary evidence and testimony of others, including the testimony of two expert witnesses.

Background:

By the time of her termination, the grievor had been employed 7½ years, working in Calgary and performing client care duties since 2016 as a member of its Outside Drop Solutions (“ODS”) team. As with her immediate coworkers, the grievor's day-to-day duties involved dealing with the Buried Drop Orders (“BDO”) work, meaning they handled information received into the computerized system, including orders compiled for the front-line managers who are involved in

organizing and instructing appropriate solutions dealing with existing copper cable. Since 2017 the grievor's team had been working with a computerized information storage and retrieval system, specifically programmed to their organizational needs, known as BDO Google Drive, with the incoming information needing to be coordinated thereon pertaining to necessary repairs or replacements of damaged in-ground lines utilized for customers' telephone, Internet and TV connections. Some of the information stored and transferred to the front line managers came from customers or vendors. Some information required updating from the field as needs developed, such as sketches of work to be completed, and documents pertaining thereto, cancellations, and any number of progress reports and logs. The usual team actioned duties involving receiving, digitally storing and distributing such information within the BDO Google Drive system. They came within the supervisory scope of Tanya Dhillon who was Team Manager, Order Resolution Team ("ORT"), under which umbrella was the ODS team comprising some 13 members in 2019 including those focussing on the BDO related duties as was the grievor.

By Ms. Dhillon's description given in testimony, the BDO work involved mostly ensuring that the variety of customer services maintained through the in-ground cable system was working, including those dealing with "held orders" for cable servicing or installation needing their attention. Certainly, the incoming orders, updates or revisions, covering ongoing or anticipated projects are needed to be readily available for operations' management reasons. It requires the information – the history, the interactions and what work needs to be done – to be stored in the internal recording system as information inputted and disseminated by team members for operational decision-making and managerial review. Typically, contact was being made with the BDO team through its voice mail accessed by customers or vendors or supervisory staff, or through the Internet, their not taking

telephone calls during their normal day shift hours and not being subjected to close monitoring of the work they were performing. Admittedly, dealing with underground cable repairs and replacement of copper lines to be actioned through the BDO network could take months to unfold, depending as it does on coordinating any number of front-line/operational requirements to move the project from start to finish.

The BDO work, it can be succinctly said, involved the free flow and storage of information moving into and out of the Google Drive information system as required for operational purposes, necessarily to be reviewed and updated as the need arose. The grievor, as with other team members, in accessing the system often had to deal with operational issues affecting the incoming and outgoing buried drop order information in situations requiring immediate answers in line with an escalation spreadsheet. They always had complete access to all the documents stored on the BDO Google Drive operating system which needed to be frequently accessed and updated. The information, whether interactive notes or supporting documentary materials, coming into the system was able to be shared, modified and edited, even deleted, by the grievor and her immediate coworkers in making it accessible and available for review by front-line supervisory staff in providing their directions. Information continuously flowed into and out of the system, and needed to be reviewed, conserved and updated within the BDO Google Drive as needs developed. It was how a project could be assessed and managed in its progressing from one level to the next. There was no past history of adverse events or difficulties with this computerized organizational system or those doing the BDO work understanding their role in making the information available to those with appropriate access.

The Field Construction Manager in Calgary at the time, Kathy Midwood, was the Employer's local point of contact for its civil build work program. As was the situation with ODS Team Manager,

Ms. Dhillon whose responsibilities include the BDO team, Ms. Midwood understood they all had a close working familiarity with the Google Drive program they accessed daily, no less so by the grievor. By Ms. Midwood's description, she respected the grievor's ability and established performance level in handling the full scope of team responsibilities, knowing that she was being "utilized a lot". She was aware that the grievor had proven herself over the years to be a valuable team member, relied upon and trusted by management persons and her bargaining unit colleagues for her work, and her cooperative approach, having earned the praise of supervisory staff. She knew that the grievor's performance success had been recognized through the Employer's internal awards' system. Ms. Dhillon testified that the grievor's proficiency in using Google Drive was well known, having observed other team members sometimes approaching her if they had any questions needing to be resolved. By her summary description, the grievor was "quite proficient" in the Google Drive system she had accessed daily since 2017. By her description, when the grievor's immediate supervisor through to 2018, Evan Peterson, transferred into a managerial position away from the ODS team, the grievor was viewed as having stepped into an informal lead role amongst her coworkers, having already been trained as a backup for her supervisor when needed. There is no doubt about her being accepted in the months leading up to her alleged wrongful behaviour as a well-appreciated team member in dealing with the BDO Google Drive information storage and retrieval system in its various facets.

September 2019 meeting:

The context of the management scheduled meeting in Calgary with ODS staff held on September 18, 2019, involved the apparent operational realities facing the Employer that certain work

was about to be largely replaced through the broadening implementation of its fiber-optic network. It meant a significant decrease in needing to utilize buried copper cable, including its in-ground replacement or repairs. The decision had been reached by higher management to “offshore” what remained of the BDO work, meaning that when implemented, there would be displacement of team members following their being declared surplus. According to manager Dhillon, it was hoped that the affected employees would all find suitable work outside the long-standing ODS setup, at the point of their needing to be relocated. She was aware that a possibility existed that on being displaced they would be assigned into front-line customer oriented work such as handling incoming telephone calls and dealing with whatever were the various individual servicing needs presented. Mr. Peterson, who by then was the Unified Helpdesk Team Manager, agreed in his testimony that it was essentially a matter of their needing to advise the assembled group that on their being displaced they likely would be moving into a direct customer facing role dealing with a wide array of incoming telephone initiated requests, including dealing with product inquiries and sales’ aspects, and not just working their usual daytime hours. Mr. Peterson testified that he had become somewhat concerned over the potential for individual acts of tampering with, or deleting, information from the computerized operating system and accordingly by then, approximately one month earlier, he had made copies of all stored files in BDO Google Drive, which is to say conserved the storage of inputted information current as of that date.

Ms. Dhillon convened the staff meeting on the afternoon of September 18, alongside Mr. Peterson, and the Operations Manager, Laurel Hatch, which included advising the BDO team members, five of whom were in attendance including the grievor, on what was expected would occur and the workplace options to be made available to them going forward, based on their seniority,

following their likely displacement. Both Mr. Peterson and Ms. Dhillon compiled notes at the time which were entered in evidence, with both of them testifying about the meeting. Their notes included detailing the questions received from team members concerning their future prospects with TELUS and what options were expected to be made available based on seniority.

By Mr. Peterson's notes, at the September 18 meeting, the grievor asked whether the customers would be advised of the upcoming changes, and how would their managers be affected. His response was that the focus of the meeting was on supporting the grievor and her coworkers moving forward, including everyone getting full training for whatever was to be their new role. One of the grievor's coworkers expressed concern that those working offshore would not fully understand the work, not living in the community, and that the team members should be involved in their training. Mr. Peterson recorded that the grievor mentioned it was "surprising how much copper was still out there" thereafter expressing her concern over the choices apparently going to be made available at some point for front-line work, not being something related to the construction work within her experience. Ms. Dhillon recalled the grievor asking about the status of their current ongoing files and all the signed documents on Google Drive, their "ongoing cases" as it were, and indicating concern for customers, in addition to their own future training. By Ms. Dhillon's description, the grievor asked whether there was a date yet set for relevant training to take place, which she recalled replying that the timing was not yet known. Mr. Peterson recalled that he reassured the grievor during the meeting in advising that wherever the team members were assigned following their work being moved elsewhere, they would have full training for their new roles. By his observation, the grievor appeared to have become upset, even showing some tearfulness over what she was hearing. By his description, in recognizing her distress and wanting to be supportive he

“decided to follow up” by “chatting” with her on the floor later that afternoon for about 15 minutes, using that opportunity to reassure her that the international employees receiving the work would be appropriately trained, as would she and the other team members on moving into whatever work to which they were eventually assigned. He recalled her advising that she was already seeking a promotion and he indicated that her application would receive his support, although shortly thereafter learning that she had been unsuccessful.

There followed a second meeting that same afternoon involving the ORT staff in Calgary, as many as 150 persons attending, convened by Ms. Hatch. It was explained in this larger group setting that their anticipated workload was going to be dropping to a lower level, and there would be some displacements.

BDO Google Drive access denial experienced:

Mr. Peterson, in his testimony, described having a workmanlike familiarity with the BDO Google Drive system. By his understanding there had never been any reported problems encountered by those doing the BDO information storage and retrieval work in their accessing and inputting it on a day-to-day basis following its implementation in 2017, at least not following a period of familiarization for those regularly working with it. The assigned users which included all the BDO team members, had gone about their usual business in dealing with the information as it was being developed, such as that relating to the activities of field construction managers in interacting with vendors, their marketing people dealing with a variety of employer-provided services, and the project coordinators and managers overseeing the work in which they were involved. He indicated being well aware that there are different levels of access to BDO Google Drive, some users having the ability

to only view the information, while others can share it, and some employees such as the BDO team members having full editing access relative to incoming and outgoing information. This is to say that those who need to stay current on recording the scope of planned and ongoing BDO work day-to-day, are relied upon to update information, and make changes thereon as required. They need to be able to advise others of the buried drop order situation as it progresses, store and coordinate information pertaining to whatever copper cable is required to be installed, changed, repaired or otherwise serviced by those working in the field. They can even make changes on who is required to have access at a given point in time, and to what information.

There is no doubt that on September 19, 2019, the day following the meeting attended by the grievor and her coworkers, there were a number of different keystrokes performed on the BDO Google Drive which resulted in this information system removing access to documents and folders from certain identified management employees. Indeed with the exception of one employee (Vera Yamniuk) all affected employees were working within the excluded managerial range of duties. These included Ms. Midwood, Ms. Dhillon and Mr. Peterson. They were witnesses in this matter, called to testify by the Employer.

Thereafter, on Monday, October 7, 2019 Ms. Midwood, being the first of these three management employees to recognize there was a denial of access in place affecting her, emailed the grievor, taken by her to be a point of contact on the BDO team. By Ms. Midwood's description, she advised the grievor that she had attempted to locate a project escalation sheet within the system and when she clicked on the link she was denied access, with the indication being that she needed to seek permission in order to access the system. She recalled that the last time she had utilized the BDO Google Drive had been at some point during the previous month, no difficulties encountered at that

point. Ms. Midwood received her reply from the grievor within approximately the next half hour indicating: “not sure what happened you were on there. I just removed you and added you back in. Let me know if you are still having issues”. We do know that she was not “on there” inasmuch as Ms. Midwood eventually learned that her access had been removed some three weeks earlier. Nevertheless, by Ms. Midwood’s description, she thought at the time that there must have been some kind of glitch in the system and never thought anything more about it at that point. She was not thinking about anyone having possibly done anything in September to have removed her access from the BDO Google Drive. She did not again interact with the grievor about her access being denied and then reinstalled, including not receiving any call from her to explain what had occurred from her perspective on how she could have been removed. As matters developed, three days later, on October 10, 2019, the grievor commenced a period of medically approved leave lasting until December 10, meaning that during those two months she did not access the BDO Google Drive, nor have contact with anyone in management.

By Mr. Peterson’s evidence, for his purposes, during several weeks following the September 18, 2019 meeting, it was convenient for him to work off his backup copy of the BDO information stored in his computer. His assigned duties over that time did not require him to address any updated BDO issues, having no need to consult any inputted BDO Google Drive information as it was being further developed. However on November 19, due to discussions he was having with stakeholders, he needed to apprise himself of some new processes. It required that he consult the current/updated work situation through documents coming into the information system. On his attempting to sign into the BDO Google Drive live material he found that his long-standing access had been removed. He was unable to gain entry into any folders or files. He immediately contacted Ms. Dhillon to start an

investigation over what had occurred. Were there a system difficulty, it would have to be corrected. At the same time, by his description, he was aware that one of the “nice features” of Google Drive was its ability to call up a historical record of all activities within the system. It allowed one with the appropriate access level to look at the complete history to the current time of anything planned or ongoing on any project, and everyone who had logged into the system for whatever purpose, including any changes within the system, such as having removed someone’s access. He knew that everyone’s access, and their activity therein, was a matter of record within the system’s internal memory. Upon his contacting Ms. Dhillon for her insight, she was quickly able to observe that she too no longer had access which led to her asking one of her ODS team members to immediately reinstate her access, following which she reinstated Mr. Peterson’s access. Ms. Dhillon advised her superior, Ms. Hatch, that they would be investigating what had occurred, she having also been denied access as were some other managers, including the Project Manager Drop Control Centre, the Vendor Manager Control Centre, all of them needing to be reinstated at that point. Nadeeshi Wickrama, a business analyst acting in a managerial/professional role at the time testified about her own experience in being denied access, her needing to utilize the BDO Google Drive when having to consult its stored and updated information. She too found herself unable to enter the system for any reason until she was reinstated by one of the grievor’s coworkers in November after requesting assistance.

On November 19, 2019, Mr. Peterson and Ms. Dhillon set about reviewing the activity log which they were able to print from the BDO Google. It included the various transactions occurring on September 19 keyed into the system under the grievor’s name. He could observe that the grievor had added another file folder to the BDO Google Drive, called BDO1. The BDO Google Drive printed readout, comprising 14 pages, was entered in evidence. Their reviewing it, particularly all the

grievor's entries, led to their concluding that on September 19, which is to say one day following the team meeting with Ms. Hatch, Mr. Peterson and Ms. Dhillon, unbeknownst to anyone in authority, and apparently without any discussion with anyone else that they knew about, the grievor had removed several named managers' access to all the folders and files in the system, including them, effectively shutting them all out from the information contained therein without their knowing what had occurred. He knew that the system does not issue alerts where someone's access is removed, and accordingly someone would only know they had been removed when they needed to access information stored thereon.

By Mr. Peterson's appraisal, as he went through his experience with and understanding of the BDO Google Drive, someone with the grievor's editing authority, as so too had her immediate team members, using her entry identity had worked their way down through the list of those managers who had access to the system and the information contained therein and removed their access. It affected one bargaining unit employee. He reasoned, from his own experience at that point, and familiarity with Google Drive, that it would have taken at least five separate keying "mouse clicks" to remove anyone's access altogether, needing to be repeated for each person so identified for removal, including needing to confirm each removal as the last step in the access denial process. He saw no issue about the grievor being able to accomplish that end had she been so inclined given her proficiency in the various processes under the BDO Google Drive, including dealing with allowing access, or removing it, and knowing how it would be gained or denied. Individuals would be subject to losing their access to files once their specific involvement in a project or event had been concluded, but not managers who had any number of reasons to be going in and out of the system looking to assess and act upon information contained therein. No BDO team member acting as an editor had any authority to remove

them. At that point he saw the likelihood being that for whatever reason the grievor had knowingly set out to disrupt managerial access to the Google Drive system.

Investigative meeting on December 10, 2019 and result:

The grievor returned to work on December 10, 2019 and was approached that morning to participate in an investigative meeting later that same day. She attended with Union representation to be asked questions by Ms. Dhillon. Mr. Peterson made typewritten notes as the meeting progressed, concerning which both he and Ms. Dhillon testified as to their accuracy. The grievor was taken to have acknowledged that a number of management people were linked to BDO Google Drive, with ongoing access to the information contained therein. On being asked why she would have opened a new folder BDO1, she said it was a matter of trying to help and “moving the stuff over and working in there”. On being asked whether she recalled making any changes to the BDO drive and what would be her intention on doing so, by Mr. Peterson’s recollection and as recorded in his notes, she responded: “Oh I can’t remember that far back”. She nevertheless went on to relate that Ms. Midwood had an issue in not being able to access the files, and saying “I might have removed everyone at that time. I don’t know if it was for access or anything like that”. She went on to say: “the only thing I can think of, and that [sic] I was messing around with it, and the BDO one (BDO1 folder) was the only one so that we could have access to everything” She was outright asked to explain why she had changed access to the documents responding: “again, I don’t know if I did, whether I did, as we do go back and forth on it”. She also indicated not knowing why someone would have been removed, which is also to say that someone had removed certain managers’ access to the BDO Google Drive system and its folders. She also said that she had not been acting maliciously, and “I could be more

careful playing with it”, that she was trying to get access for everyone. She went on to say that she would not have done it on purpose, would not have denied anyone access on purpose. She said: “I may have been trying to clean it up, that’s all”. She was also asked what she thought the potential impact would be for their leaders not having access to the information on the drive, answering: “probably make it really hard to look at the information in there”. In any event, she did not deny that she was the one who accessed the Google Drive on that day, and made whatever changes were inputted through her key stroking activity.

Suffice to say, Mr. Peterson and Ms. Dhillon were not persuaded that the grievor somehow could have innocently or mistakenly removed several managers’ access to the BDO Google Drive information sharing and storage system thereby possibly disrupting their work in any number of ways. The termination letter was issued that same day.

Grievor’s testimony:

The grievor in her testimony confirmed that she had no prior discipline record, and had received internally generated TELUS recognition and awards for the high level of her performance as a Client Care Representative, which is not disputed. She gave a brief description of the buried drop order work carried out by the BDO team, and more particularly her involvement, while explaining that she had no formal training in ODS team work at the start of her tenure seven years earlier, as opposed to undergoing a period of familiarization. Since 2017 she and her immediate coworkers had been working with the BDO Google Drive, this information sharing and storage system being new to her at that time. She had interacted over the Internet with a Google associate as she was learning and indicated becoming knowledgeable enough in due course to pursue the usual range of day-to-day

activities on Google Drive. She said that her gaining proficiency was basically accomplished through a “trial and error” approach. Together with her immediate coworkers, she always had editor access to the system which included her regularly inputting and conserving information in its BDO parent folder and various subfolders organized thereunder, dealing with the buried drop orders, and providing access for participating persons to the stored information where they were required to understand and deal with the documentation on file. As the grievor put it: “I could edit, delete, modify, do everything with it”. At the same time, by her description, she never had been formally trained on Google Drive which, she said, could have been an issue in what occurred on September 19, although not explaining why that would be the case. However, she admittedly had developed a familiarity in working with its parent folder set up, and creating various subfolders where needed, such as having a sketches’ folder, an escalation folder, or a folder dealing with a particular compliance issue in dealing with the City, and whatever other subfolders might be needed as instructed. She acknowledged having experience updating documents, working from numbers of templates, and dragging materials into the appropriate subfolder. The grievor did not shy away from the reality of the BDO Google Drive being the principal day-to-day office tool in her work. She described it as a “virtual filing cabinet”.

By the grievor’s recollection, Ms. Dhillon became her immediate superior in October 2018 having let her know at the time that she was new to the construction side of the TELUS operations. The grievor recalled there being numerous meetings with her concerning various projects as they were advancing toward initiation and/or completion, and the necessary day-to-day document storage by the team members in their accessing the BDO Google Drive. She said that with the majority of their outside dealings being with the various stakeholders, going back and forth with each other on

construction issues, she regularly had to implement changes needed to the attendant forms, entering and saving new and revised information as it was developed. There is no doubt that she was considered by her immediate coworkers, and supervisory staff, to be knowledgeable in the workings of Google Drive, offering assistance to others when needed.

In dealing with the September 18 meeting convened by management, the grievor did not deny that the downsizing decision conveyed at that time caused her to become upset, but not for her own situation at that point. She went on to say that she was “sad”, and worried over where her manager, Ms. Dhillon, might end up, but “not too worried” about herself inasmuch as she had already applied for different positions which had opened up for bidding. By her description, immediately following the meeting that afternoon as her coworkers were gathered around someone’s desk talking about what they had just heard, Ms. Dhillon walked up to them, saying to the effect: “you guys can help with the transition”, concerning which she recalled someone responding that she must be trying to rub salt in the wound. By the grievor’s description, some minutes later on returning to her desk, Ms. Dhillon walked over to say that she knew the grievor would help in the transition, to which request she responded that she would.

The grievor testified that in keeping with her assurance given to Ms. Dhillon to help in the transition, the next day, September 19, she decided she should start “cleaning up” old documents, knowing that her situation on the team, as she put it, was one of “kind of having responsibility for Google Drive” and recognizing that much of the information contained therein was out of date. It was time, she thought, to move out some of the irrelevant and out-of-date documentation in order to make it easier for anyone to navigate through the meaningful updated and current information contained in the various folders. She said she created another sub file, BDO1 in which she set about placing

whatever outdated information came to mind, such as documentation relating to a staff party which had been arranged the previous Halloween, and some potluck get-together documents, as examples. She said that she wanted to make sure the system was ready for the work to be shipped overseas, looking to help out in that she was invested in customers, and as she put it: “did not want to see a bump in the road for them, so I said I would help”.

The grievor testified that as she went about transferring some documents over to the BDO1 folder on September 19, 2019 they would be disappearing from the files where they had been previously stored in various subfolders, adding that she also set out to delete user names associated with these out-of-date documents, their not needing to be accessible by anyone going forward. She said she recalled an earlier experience with a certain named teammate whose profile had been deleted from the Google Drive upon her retirement, resulting in there being loss of access to documents she was associated with, although later recovered when her profile was reinstated a few days later. She said that her intention was to set up a new sub file and change ownership in order that nothing would be lost from the system, which presumably is to say a sub file dealing with out-of-date information. By her description, she started the process by removing various profiles because she believed that if she did not do so the information associated with them would disappear, her intention being to ultimately move everything into another folder and ensure everyone had access to it. She said she was not trying to change anyone’s access; was “just trying to make sure it all went smoothly”. According to the grievor she did not know there was any problem with anything she had done until Ms. Midwood advised her on October 7, 2019 that she had been denied access to the BDO Google Drive, which the grievor recalled immediately rectifying. No one else had indicated to her that there was any problem, and she was surprised that no one else took any issue with any similar situation if one

existed, until mid-November, by which time she was off work on medical leave. She knew that any of her immediate coworkers could have fixed any access problem had anything been brought to anyone's attention. She also recalled having removed access in the past on various occasions, in normal course, when there were business reasons to do so, such as someone not requiring any further connection with certain stored file material. She did not indicate that she had ever removed a manager's access without specific instructions.

The grievor testified that it was never her intention to sabotage the system in some way or deny various managers any access to BDO Google Drive, which activities would admittedly be contrary to the Code of Conduct and against TELUS' values and integrity requirements of employees. As it was, removing various persons' access, she said, was an error on her part, done by mistake, and she was only trying to "clean things up" for transfer of the Google Drive stored information offshore. She also testified that she continued working with Google Drive right up to the time she went on short-term disability three weeks later on October 10, which medical leave she explained was related to the anxiety and stress she was feeling over not being successful in the application process for a position she had been seeking, being "really upset about it" on being told a few days earlier. By the grievor's description, on coming back to work on December 10, 2019 she was fully prepared to start working in a front-line job dealing with customers were that to be her next assignment.

On being called into the investigative meeting the same day she returned to work, December 10, 2019, with Union representation, the grievor had been made aware that the BDO Google Drive access denial which she had fixed for Ms. Midwood on October 7 was also experienced by a number of other managerial level employees. She recalled it being put to her during her interview that she must have been upset with the Employer in order to have done what she did, bargaining unit access

not having been disturbed except for the one exception. She recalled indicating that she could not say how she had “messed up so much”, but that she was not trying to deny anyone’s access, was only attempting to extend ownership to another folder setup where she was trying to transfer filed materials.

Expert testimony:

There were two witnesses called to testify whose professional work includes digital forensics. One of them was called by the Union in continuing its evidence-in-chief subsequent to the grievor’s testimony, Tyler Hatch (no relation to manager Hatch). In proposing to have him review the situation as a consulting expert, the Union raised the possibility at hearing that in the grievor’s dealing with the BDO Google Drive as she had on September 19, 2019, the unfortunate results could have happened accidentally, even the possibility of only one click having removed access while she was innocently trying to reorganize files and secure proper ownership going to her team manager Ms. Dhillon. One of the other witnesses called by the Employer in its reply evidence after hearing Mr. Hatch’s evidence and reviewing his report, was Greg Bennett.

These two witnesses were able to pass the threshold for being declared experts for purposes of explaining the BDO Google Drive software and particularly the keystroke process for anyone setting out to deny a user’s access to its file folders. It is observed that Mr. Hatch is a Certified Computer Forensic Examiner (CCFE) and Certified Mobile Forensic Examiner (CMFE) having provided expert opinions in a variety of civil and criminal cases in the area of digital forensics. Mr. Bennett is a certified Google Sales Re-seller of Google Workspace (formerly G Suite) and has qualified himself as a Google Service Partner. He has regularly advised Google engineers and product

managers concerning the Google Cloud Technology and its products such as Google Drive. He has played a consulting professional role in implementing Google Drive throughout an extensive list of Google customers, often having acted as the middleman between Google and its customers as a technical advisor.

It is observed that when the Union sent its instruction letter to Mr. Hatch looking for his expert opinion on what had occurred, it advised him of its understanding that the grievor's manager had requested her assistance in the transition from in-house work to its being contracted out, that she believed she needed to change ownership of the documents to her manager Ms. Dhillon, and that she should do so by creating a new folder to copy the required files/folders into it. Ms. Dhillon's input was said to include having directed the grievor to clean up any old redundant files not needed in the new BDO1 folder. As their testimony unfolded, while there was some disagreement between Mr. Hatch and Mr. Bennett in their reports tendered in evidence as to the difference between "owner" and "editor" authority within the Google Drive system, through their examination-in-chief and cross-examination it became evident, firstly; a BDO team member such as the grievor exercising her authority as an editor was able to share, change and delete documents as needs be at the parent folder level, or at the subfolder or document level just as would the owner of a file or a folder. This is to say the grievor could apply the usual scope of editing activities contemplated by this information sharing and storage system. Secondly; her editing authority within the system extended to making changes such as deleting or adding access to the Google Drive system, including access to individual files and/or documents, and thereby to the information contained thereon at any storage level. Thirdly; it would have required five separate steps ("mouse clicks") to remove each selected person from having access to the Google Drive file system, to the point of actioning and ultimately confirming each denial

separately. It was known prior to these experts testifying that all but one affected person held managerial/supervisory status. Mr. Bennett, in his report, dealt with the mouse clicks needed for each access denial, which ultimately cannot be disputed, namely:

1. Click to select the file or folder.
2. Click to share icon (figure displayed) to access the “sharing with People and Groups” panel (i.e. the Sharing Panel).
 - a. Please note: The Sharing Panel will display the Users who have access to the folder (s) or file(s) selected
3. Click the drop-down to the right of the collaborator whose permissions you would like to restrict. The drop-down shows the current level of permission will expand to display the other available permission options.
4. Click to select the Remove option. A blue Save button appears.
5. Click the Save Button to lock the request.

The expert testimony detailed the least number of steps required to restrict a particular user’s accessing any folder or file in Google Drive, being the same with respect to the removal steps. Mr. Hatch acknowledged in his report that given the grievor’s status, not having administrative console access, her ability to remove users “would be to do so individually” were she to have editor status which we know she did, although apparently Mr. Hatch at one point did not have that information. Nevertheless he agreed that whoever had authority to do so, it would have taken a five-step process through actioning the mouse clicks. It means that assuming the editor has located the file or folder in Google Drive, the same five steps are the least number of clicks that can be used to restrict each person’s established access or remove it altogether, including to a parent folder which would have a cascading effect down through the subfolders. Here, as researched by Mr. Bennett, the effect was to restrict access of seven named managerial/supervisory level employees on a total of 1095

files/folders contained within the parent folder and its subfolders, after having altogether denied them their individual access to BDO Google Drive. It can be observed from Mr. Bennett's investigation that the large majority of the restricted user file combinations reflected in the screen shots he reviewed of BDO Google Drive pertained to Mr. Peterson. Mr. Hatch during his testimony agreed that the selection process of choosing various managerial employees from the "Sharing Panel" would have required some effort and thought on moving through the five-click process, although he estimated that these clicks could be accomplished by any knowledgeable person in an estimated 1 to 3 seconds, which is to say possibly without giving it too much thought as to the exclusionary/access denial track being taken. Nevertheless each removal, as the final mouse click, was separately confirmed.

Mr. Bennett in dealing with the prospect that inputting denial of access through the five click process for each person could have been undertaken inadvertently and by mistake, or in an effort to give everyone access or ownership to repositioned file material, reported that the seven unique combination of managerial/supervisory users thereby restricted, which is to say picking and choosing certain individuals who had their user access to file material denied, meant that the full removal process concerning them was conducted at least seven times, i.e., the required five-steps were undertaken a minimum seven times start to finish in completing the task. There was one bargaining unit coworker who was removed in the same fashion. He further reported it was observable thereafter that from September 19, 2019 through October 10 when the grievor had started her medical leave, she had not restored file access to any of the specifically restricted management/supervisory persons, excepting Ms. Midwood, who we know from her testimony had contacted the grievor on October 7 over not having any access which the grievor immediately rectified for her, but no one else. His review disclosed that on September 19, 2019 the grievor gave "comment access" to an ODS team

member, Ms. Wickrama on a New Copper drop order requisition, but otherwise she was restricted and there were no file activities respecting anyone else.

Mr. Bennett from his BDO Google Drive investigation, in considering whether any files had been created or moved, observed that the folder named BDO was renamed BDO1 by the grievor, and a folder named BDO1 was added to the BDO folder. He reported that access was restricted to six items (folders) including two folders with the name BDO1 for users Peterson and Dhillon. But by his examination, covering the time period extending from September 19 through to October 10 when the grievor went on leave, there was no “clean up” of the system indicated, which is to say in consulting the Activity Log entries there were no recorded instances of the grievor moving, uploading or copying documents into the BDO1 folders, nor the BDO Drive itself, nor was there any deletion of any documents such as the mentioned Halloween or potluck party materials. He also reported that there was no need for the grievor to have ever changed ownership of files and folders in order to be able to share access to any files or folders in that she had edit access to it all. Existing users did not need any change of ownership to share documents over which the grievor had edit access within the BDO folder.

Additional Employer reply evidence:

In addition to having had Greg Bennett provide evidence, both in writing and through his testimony, in reply to the grievor’s testimony and Tyler Hatch’s evidence, the Employer also re-called both Evan Peterson and Tanya Dhillon.

Mr. Peterson testified that certain information contained in the instruction letter provided by the Union to its expert Tyler Hatch, as entered in evidence, namely that the grievor was asked by her

manager to get the Google Drive documents ready for the transition from in-house work to the announced outsourcing, was not a correct description. He said that he was involved in organizing the transition of work anticipated to be going to TELUS International. By his description, the grievor's assistance on any level was never contemplated nor asked for, and not discussed with her or any other bargaining unit member. More particularly, he testified that during the September 19 smoke break after the meeting he did not ask the grievor for her help on organizing documents going over to TELUS International or cleaning up any files, or doing anything in connection with the coming transition. He also testified that by his examination of the BDO Google Drive and its activity details during the relevant time period, he observed that there had not been any uploading, adding to, or copying into that folder or subfolders by her. While the grievor apparently created a new folder, BDO1, he could see that she had never transferred any documents into it, nor, by his examination of TELUS' own internal audit information covering Google Drive, had she ever uploaded any documents anywhere into Google Drive after September 19, 2019. Her input activity on that day was to have denied access to the various management persons. One of her coworkers had thereafter uploaded a single document, no other instances during the material time.

Ms. Dhillon testified in reply that the grievor was a valuable member of her team, having helped her in the past in providing access to some items on the BDO Google Drive which were needed for consultation purposes. She had appreciated the grievor's work in her always being available to answer any questions arising from time to time about this information sharing and storage system. It was Ms. Dhillon's view, which she considered was generally shared by others, that the grievor possessed a high level of proficiency on BDO Google Drive. She testified that the grievor never asked for any formal training on the system after being introduced to it in 2017 and had been

working with it as a principal workplace tool thereafter. She was aware that all the team members working on buried drop order issues shared access and worked on a collaborative basis within the ODS set up. She also testified that on the same afternoon following the September 18, 2019 meeting where the “offshoring” intentions were discussed, once back together on their own floor within the TELUS building she decided to visit with her team where they were clustered around a desk. She noted that some of them were seeming to be upset about what they had heard. By her description, while standing with them, she did not ask the grievor specifically to transition documents, or to do anything else at that point, but wanted to smooth things over and let them all know in their brief interaction that afternoon that they were still working as a team. By her recollection, she said: “you guys will help right”. She said she did not assign anyone to do anything on Google Drive at that point relating to any upcoming transition of work over to TELUS International, or ask anyone to strip documents off the system such as any materials related to whatever celebrations or potluck dinners or anything else. The topic of clearing out documents or transferring them over to other folders, or denying access to anyone, or providing her with more file access than she already had, was never raised with her or anyone else on the team at any time. Thereafter transitioning ODS work over to TELUS International has proven to be a slow process.

Employer Argument:

The Employer acknowledges that it has the onus under the *Wm. Scott & Co.* outline to show that it had just a reasonable cause for some form of discipline, which is to say the grievor misconducted herself as alleged; secondly, show that her conduct was serious enough to justify discharge which it asserts has been met by proving her to have acted dishonestly and in breach of the

fundamental rules for employment requiring loyalty and integrity, being antithetical to the core values of TELUS' operations; and thirdly the arbitrator should not substitute any alternative lesser penalty given the various factors needing to be considered in a matter of proven and obviously unremorseful dishonesty. At outset of its written argument submitted by counsel, the Employer has acknowledged that its case against the grievor is primarily circumstantial in nature, asserting that when the total impact of the documentary evidence and testimony is considered, it should be clear enough that the grievor knowingly removed various managers' access to large swatches of documents on the Google Drive system. Her actions were described as being intentional. In all probability she was acting out with malicious intent in that she had no valid business reasons to do what she did and would have been aware of the immediate consequences, namely disrupting several managerial persons' utilizing BDO Google Drive, their not being able to access any updated and ongoing information contained therein in a large number of files as needs required.

As counsel noted: there is a serious credibility issue in this case with the grievor having maintained a complete denial of any intentional wrongdoing. The Employer relies on *Faryna v. Chorney* 1951 Carswell BC 133 (B.C.C.A.) at paras. 9 and 10 concerning the often cited litigation advice that one needs to consider in dealing with the issue of witness credibility. It has become a reliable touchstone in labour arbitration matters, and cautions that credibility cannot be gauged solely by whether an interested witness' personal demeanour would seem to carry conviction of the truth, but rather as Justice O'Halloran famously put it: one's story "must be subject to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in

that place and in those circumstances...” Ultimately, the evidence in that particular civil litigation matter coming from a critical witness was found to be “entirely inconsistent with the preponderance of the probabilities that rationally emerge out of all the evidence in the case”, and was rejected.

I am urged to conclude in dealing with the “serious credibility issue in this case”, there are many aspects in such an assessment needing to be weighed against the grievor, in considering the combined effect of the documentary evidence, the expert evidence, the testimony from the Employer’s management level witnesses, all of which stand out as contradicting the grievor’s various explanations of what occurred. Counsel submitted that the Union has advanced no credible or plausible alternative explanation for the grievor’s conduct in its continuing to deny the logical explanation to be taken from the evidence, namely that she unfortunately had set out to show her disapproval or frustration on learning that the work in her department was going to be off shored to TELUS International.

From their review of the evidence, the Employer’s co-counsel, Ms. Henry and Mr. Gilmore, have submitted that the probability which rationally emerge from the evidence in this case, including the expert evidence from Mr. Bennett which they detailed at some length, not refuted by Mr. Hatch’s testimony, is plain enough. It is that the grievor for purposes related entirely to her own negative feelings on being advised at the September 18, 2019 meeting that her work was going to be outsourced, decided to disrupt managerial access to BDO Google Drive. She did so by denying various managers’ access to its numerous folders and documents contained therein, one manager after the other. The reasonable conclusion was that her actions were a premeditated, if unwise, reaction to her obvious displeasure over what she was hearing about the likelihood of being shortly displaced into other less enjoyable work, and she acted as she did the very next day. It cannot be missed that the

steps leading to removing any permitted user's access to file material required five separate mouse clicks, able to be done by a team member with editor status, which included the grievor. And as described by counsel: "while simple, required thought and confirmation", ultimately impacting a total 1097 files/folders. On Mr. Bennett's examination of the system, the grievor did not restore anyone's access between September 19 and October 10 except for one person we know to be Ms. Midwood, who complained on October 7 and required immediate attention. This expert witness's investigation showed that there were numerous entries in the activity log for September 19, all but one requested by the grievor, and hers all relating to denying access, which is to say allowing access to remain in place on the targeted files/folders only for those persons not being denied. Notably, counsel submitted, there was no transfer of information from BDO Google Drive to BDO1, nor any cleaning up or culling out of materials, then or in the days to follow. The grievor should be considered sufficiently knowledgeable in the Google Drive product after having worked with its BDO applications over the previous two years, reasonably observed by her immediate coworkers and managers to have a high level of proficiency. Training should not be considered an issue, something which was never requested.

At the same time, Ms. Henry and Mr. Gilmore submitted, we know from the testimony of Ms. Dhillon that despite the grievor's version to the contrary, she did not ask the grievor to remove her access or anyone else's access to the BDO drive following the meeting dealing with the anticipated offshoring of work. She did not ask the grievor to clean up any documents at that point. She did not ask the grievor to assist in setting up TELUS International with access to files or in any way rework, reorganize, transition files, or change anyone's individual access to those files. There was no specific request for any immediate assistance, no need to change any ownership issue on any files which the

grievor tried to insert into her explanation of what she did, although what she did was simply deny access to the various chosen managerial individuals and one bargaining unit member. They submitted that there was no realistic conclusion to be drawn that Ms. Dhillon asked the grievor, or anyone else on the BDO team, to make any changes to the BDO Google Drive at that point, nor do any “cleanup” as was also the evidence from Mr. Peterson who was clear in testifying that he never asked the grievor to assist in transitioning any work related to the upcoming transitioning to TELUS International. There was no indication of any plan yet being in place to deal with the documents stored in BDO Drive, certainly no instructions in that respect given to anyone on the BDO team. For the moment at least their normal duties were continuing as always.

Ms. Henry and Mr. Gilmore in their submissions also referenced the grievor having been contacted on October 7, 2019 by Ms. Midwood, which is to say some three weeks after tampering with the BDO Google Drive, who advised that she had somehow been removed from accessing certain materials stored therein that she was needing to consult. We know that it caused the grievor to respond in her reply email that she was not sure what happened but saying “I just removed you and added you back in”, and that Ms. Midwood should let her know if she was still having issues. However, it should not be missed that it was not a situation where the grievor had just removed her and then was adding her back in. She had been one of the management persons removed on September 19 and in order to placate her, possibly avoid any investigation, the grievor was wisely adding her back in without further ado. At that point, counsel submitted, the grievor had no reason to be untruthful, unless to attempt a cover up what she had done on September 19, hoping that no one would discover her actions. At the same time, one should consider, she took no steps to rectify the situation for everyone which could have made it apparent as to what had occurred were it to prompt

an investigation at that point. From her perspective, perhaps it was better to deal only with the one person who had complained, and admit nothing. She may have been thinking that the denial situation would not have lasted very long, would have been quickly caught and corrected as some computer glitch, and fixed by someone with only a time-limited amount of inconvenience, with no one being the wiser, or at least she would not be implicated. It did not turn out to be the case. Thereafter, when brought into the investigative meeting, counsel described the grievor as having been evasive and not forthright, her saying that she did not have a good recollection, was only “messaging around with it”, and “may have been trying to clean it up, that’s all”, and was trying to get access to all of it for everyone. Her approach was not to admit any intentional wrongdoing, but “I could be more careful playing with it”. She was not about to come clean on what she had done. The Employer views her actions at that time as amounting to an unremorseful denial of her clearly intentional behaviour of removing management access, which continued through the arbitration hearing.

I am urged by Ms. Henry and Mr. Gilmore to consider that the grievor’s dishonest, unethical, interference with documents critical to the Employer’s copper cable business in targeting various managerial employees’ ability to do their jobs by denying them their usual access to reference files and folders as needed is just such an employment ending activity. Her actions should be viewed as having seriously undermined the essential element of trust required of her going forward as an employee. Her deliberate and intentional interference with managerial access to corporate documents thereby acting to negatively affect its business interests, combined with her dishonesty throughout these proceedings should require that the integrity element of the employment relationship has been broken beyond repair and the discharge should be upheld on that basis. In their submitting that the Employer had led clear and cogent evidence that the grievor’s conduct on September 19, 2019 was

intentional, and that she must have been aware of and taken to have intended the consequences of her actions, counsel acknowledge that the evidence was circumstantial. That issue was covered in paragraphs 75 - 77 of the Employer's written brief. It reads as follows:

75. While the evidence in this case related to the Grievor's intentions is circumstantial in nature, TELUS submits that the law is clear that in civil cases, circumstantial evidence is treated like all other types of evidence, where the weight accorded to same depends on the strength of the inferences that can be drawn. The onus is on the employer to establish through evidence that the circumstances are consistent with the Grievor's culpability and inconsistent with other plausible (*not possible*) explanations. Thereafter, the onus shifts to the Grievor to lead evidence of plausible (*not possible*) exculpatory explanations undermining the employer's evidence. Thereafter, the trier of fact must assess whether the Grievor's fault is the preponderant explanation of the circumstances.

(Italics theirs)

76. The law does not require the Employer to explore and identify all possible explanations. TELUS has advanced clear and cogent evidence that preponderant explanation of the circumstances is that on September 19, 2019, the Grievor intentionally removed manager access to the BDO Drive and that in so doing, she understood and intended the consequences of her actions, namely to prevent managers from accessing the documents and the information contained therein. As noted by Arbitrator Wallace in *Wood Buffalo*, supra:

- 50 In my view, the discussion in *Boeing* is sound and should be applied to this case. The onus is on the Employer to establish through clear and cogent evidence that the circumstances are consistent with the Grievor's culpability and inconsistent with other plausible explanation. The weighing of the evidence is to be done on the "single civil standard" of the balance of probabilities: *McKinley v. BC Tel*, [2001] 2 S.C.R. 161 (S.C.C.). **However, it is not for the Employer to identify all the other "plausible explanations" for an event said to establish misconduct. It is enough for it to establish a prima facie case that the Grievor's fault is more likely than not to be the cause of the facts said to establish misconduct. That will throw an evidentiary burden on the Grievor to lead evidence of any plausible - not just possible - explanations not already accounted for by the Employer's evidence, or to**

lead evidence undermining the Employer's evidence. When the evidence is complete, the trier of fact should examine the evidence in total to determine whether overall, the Grievor's fault remains the preponderant explanation of the circumstances - again, that it remains more likely than the cumulative probability of other plausible explanations that the Grievor was guilty of the misconduct charged.

(Emphasis theirs)

77. TELUS submits that it has met its evidentiary onus and the preponderance of evidence strongly indicates that the Grievor's conduct on September 19, 2019 was deliberate and intentional and that she intended the consequences of her actions. The Union has failed to lead any credible evidence of any *plausible* alternative explanation for the Grievor's conduct.

(Italics theirs)

It cannot be avoided, the Employer asserts, that the grievor continued her dishonesty by maintaining a complete denial of intentional wrongdoing, never having expressed any remorse for her acting-out behaviour. She has continued her denial through this arbitration hearing in refusing to acknowledge the intentional and deliberate nature of her actions, the acceptable behaviour of a disgruntled employee. The Employer has cited the summary remarks contained in Brown and Beatty, *Canadian Labour Arbitration* (loose-leaf, 2016 version), at ch. 7:3330 where it is stated:

An employee's trustworthiness can be called into question by acts of dishonesty that do not involve deprivation of property or a financial loss. Indeed, some behaviour is so unethical and so inconsistent with the goals and objectives of an enterprise that it raises real doubts about the employee's capacity and or willingness to adhere to the most fundamental rules of honesty and loyalty. Employees who have been found to be unfaithful to the core values of their vocations and liable to serious disciplinary sanctions, including loss of employment include: [thereafter providing numerous examples of unethical/dishonest behaviour such as falsifying or altering documentation, or data]

Counsel cited numbers of cases where terminations have been upheld for employees caught in a dishonest activity thereafter maintaining their untruthfulness and lack of forthrightness through the investigation and the eventual hearing, having quoted the arbitrators' remarks from several of

these cases on how maintaining a dishonest position irretrievably damages one's position of trust with the employer. See for example arbitrator Wallace's award in *Wood Buffalo*, supra, where the discharge of a mechanic in a municipal maintenance shop was upheld where he dishonestly denied having damaged some equipment and attempted to cover up his negligence. The arbitrator observed that while dismissal was not the inevitable result of an employee's dishonest conduct: "it remains the case that serious dishonesty of any type is very often considered by arbitrators to be antithetical to the relationship of trust that must be the foundation of the employment relationship" (para. 74). Also see *Insurance Corporation of British Columbia and Office & Professional Employees' International Union, Local 378*, 1997 CarswellBC 3021 (Glass) where the discharge of an insurance adjuster was upheld where he had falsified information and documents relating to a claim, accessing databases in order to do so, and being guilty of some "creative deception" in the way he acted. His disbelieved version during the investigative interview was not that he had only suffered from a lapse of memory or confusion as to which file he was working on. Also see *Kohler Ltd. v. Hytec Employees Assn.* 2007 CarswellBC 3365 (Coleman), where the fraudulent behaviour associated with sick leave abuse resulted in upholding the termination where there was never any admission of wrongdoing. See also *OPSEU and Peterborough Regional Health Centre (Blondeau)* 2019 CarswellOnt 21229 (McIntyre) where a clerk in a medical unit had levied false allegations against a coworker with whom she had a difficult working relationship concerning her allegedly observing the coworker accessing her medical files. The intention eventually revealed was to get her coworker fired. The employee had continued with her false narrative during the investigation process before admitting she was lying. In upholding the discharge the arbitrator observed that the grievor worked in a position of trust. The described actions which included blatantly lying to her manager and other members of management,

persuaded her that reinstatement “would be untenable” despite there being a number of mitigating factors, including the employee’s 12 years of unblemished employment and dedication to her workplace.

The Employer holds the position that having proven the essential dishonesty and lack of integrity associated of the grievor’s actions sufficient to impose the ultimate workplace penalty, any review of possible mitigating factors did not favour reinstatement. In addition to citing *Wm. Scott & Co.*, supra and *Steel Equipment Co. Ltd.*, supra, the Employer also relies on the outline of possible mitigating factors addressed in *Canadian Broadcasting Corp. v. CUPE*, 1979 CarswellNat 1023 (Arthurs). In that case, after determining that there have been serious financial misconduct incompatible with the discharge of the person’s fiduciary responsibilities, approaching the border of criminality, the arbitrator ultimately determined there were sufficient reasons for the discharge to be reduced to a lesser penalty. Professor Arthurs considered the issue of possible mitigating factors, including whether there had been a bona fide confusion or mistake by the employee as to whether he was entitled to do the act complained, his inability at the time to appreciate the wrongfulness of his action, whether it was impulsive and non-premeditated, the relative trivial nature of the harm done, frank acknowledgement, existence of a sympathetic personal motive for dishonesty, future prospects for likely good behaviour, and economic impact. Counsel submitted that when such an examination is undertaken here, given the seriousness of the grievor’s misconduct, once the credibility issue has been determined against her, the premeditated nature of what she did and her continuing deceit made evident, there are insufficient mitigating circumstances to allow reinstatement in this case. There are no factors presented which could be taken as sufficiently mitigating to reduce the discharge decision to a lesser penalty. The grievor has never stepped away from the essential dishonest explanation she

provided, nor is there any reason to believe that the employment relationship could be successfully reestablished given the facts of the matter as the Employer asserts have been proven.

Union Argument:

The Union asserts that the circumstantial case against the grievor based on how the Employer comprehends the evidence does not meet the *Wm. Scott & Co.* test for the discharge decision to be upheld, based as it was on alleged intentional dishonest conduct, in that the evidence just as plausibly reveals only the grievor's misguided and mistaken attempt to provide her technical assistance in furthering the announced transition of work to TELUS International. The Union acknowledges there is a significant credibility issue, but by its assessment it is one that should be resolved in favour of the grievor. The Union holds to the view that the termination was unjust in that the evidence against the grievor does not support the Employer's theory in any compelling fashion. As Mr. Benn put it in argument: "all of this is wrong", meaning the Employer's view of the circumstantial evidence on which it relies to support the discharge. He submitted that there has been no adequately proven sabotage, on clear and cogent evidence, which means no finding of any untruthful descriptions from the grievor should be made concerning her evidence on how she went about attempting to assist the changeover of work to TELUS International. I am urged to find that indeed it was a situation of the grievor "messing up" as she put it in testimony, in looking to help out the transition process. The system access difficulties experienced by some management persons, it was said, more likely resulted from human error in her managing the computerized information system on that day, September 19, 2019. Nevertheless her intentions were sound, as she believably described them, and she should be viewed as only trying to be helpful in providing some reorganization of file material. Any evidence to the

contrary is purely circumstantial and, counsel submitted, does not bear up well against her testimony.

In this respect, the Union has referenced the grievor's seven years of unblemished record, and accolades received from the Employer, lending an element of credibility to her description, her having worked as a responsible and trusted Client Care Representative. Her employment background does not suggest she would ever knowingly set about to sabotage anything within BDO Google Drive, including managerial access to its filed materials. I should carefully consider in dealing with the issue credibility that the grievor unreservedly stands by her testimony that she understood she was being asked to assist in the transfer of materials to TELUS International, which is what she was setting out to do by creating the BDO1 folder and attempting to change ownership to Ms. Dhillon in order for files to be moved over from the older BDO filing system. She created the BDO1 folder in order that nothing would be lost from the main folder. Her testimony should be accepted that "she did what she believed needed to be done to assist the transfer".

I am urged to find that the grievor's testimony does not misalign in any substantial way with Mr. Bennett's evidence concerning her admitted actions of creating the BDO1 file, that which she would have had no reason to do if she were only attempting to sabotage management access to all BDO information. The key aspect to be taken from her interaction with Ms. Midwood was that she restored her access immediately on being told that it was being denied. She was not trying to provide a full explanation of what may have occurred. A careful reading of the December 10, 2019 investigation notes will show that she was simply trying to get across to her interrogators that she did not know what went wrong, she was only trying to be helpful, there being insufficient evidence to the contrary. It may well be that she had taken it upon herself to act outside her usual role, without any precise instructions as to how she was to be helpful, which does not equate with having acted with malice or wanting to

disrupt the information system. The evidence should be viewed as showing a better likelihood that she simply misunderstood what was occurring, or how it should best be handled, in trying to set up a separate storage system within another folder, BDO1 as she named it within the Google Drive system. It was not as if what she did could not have been easily detected by someone simply wanting access and then looking to see why they were not getting it, as happened with Ms. Midwood. Her reinstatement of access was immediate. Further, one should consider that there was no real proof of any damage, in that when someone needed fresh information presumably they would be seeking reinstatement of their access which, as with Ms. Midwood, would be done immediately.

In acknowledging that wilful destruction or serious interference with an employer's property raises substantial doubt whether such an employee can be trusted going forward in the employment relationship, Mr. Benn submitted that it is necessary to contrast that kind of activity where malice and forethought is proven with what the Union contends occurred here, which is to say a situation brought about as a result of the grievor's mistaken path that she was assisting management with transitioning work by creating a new file folder and having it in mind to separate out irrelevant or outdated materials. The Union cites what it views to be a seminal arbitration award, *Sifto Canada Corp. v. C.E.P.* 2010 Carswell Ont 9228 (Luborsky) for the arbitrator's recognition that one's intention to cause harm or have willful disregard for the employer's property is an essential element of the offence of workplace sabotage, which is to say a knowing intentional act to bring about the desired wrongful end. The arbitrator stated at para. 43:

Nevertheless, arbitrators have also considered the motive or mental state of the employee in determining the proper characterization of the offence. If the damage or destruction of the employer's property is found to be the unintended outcome of some wrongdoing or carelessness and where there is no malice or hostility demonstrated towards the employer, the offence is not seen as serious, although in discharge cases it

often results in the substitution of a significant disciplinary penalty.

And at para. 45 arbitrator Luborsky stated:

In general, these cases define sabotage as a deliberate act resulting in damage or destruction to the employer's property, product and/or business interests. Intention to cause harm or wilful disregard of company property is seen as an essential element of the offence of workplace sabotage and the employer must demonstrate on a balance of probabilities as part of the mindset of the employee before it can appropriately impose the most severe of industrial consequences for that conduct alone, even for a first offence. Damage caused through purely accidental circumstances attracts the least of sanctions, and damage of the employer's property lack of care by the employee often warrants in itself an intermediate disciplinary response.

As it turned out, the facts of the *Sifto* case did not well serve the aggrieved employee's interests, eight years employed, found to have damaged company equipment and caused disruption to the employer's operation while the midst of a "prank". While arbitrator Luborsky was impressed by the employee's genuine apology and expression of remorse he considered that the combination of deliberate actions that had included his violation of several important safety rules in the context of a hazardous work environment, his wilful disregard for the employer's property and production interests, his repeated untruthful denials during the investigation culminating in "suspect testimony" before the arbitrator, led him to determine that the discharge was within the range of appropriate sanctions. He determined that there were insufficient grounds to exercise his discretion to reduce the discharge to a lesser penalty for what was said to be his "admittedly 'stupid' behaviour".

The Union contends that in dealing with the grievor's actions, it has not been proven there was any intention to harm anyone, or do damage to TELUS' operations, nothing done wilfully as part of an improper mindset. Rather, it all unfolded as a matter of human error. Mr. Benn submitted that notably there was no evidence the grievor deleted or destroyed any files which is to say she has not been shown to have sabotaged any materials or information. Her having removed some persons from their access

to Google Drive should be accepted as her misguided attempt to change ownership on the files which she understood were going into transition mode, done with an eye toward her providing assistance. It is not unknown, he submitted, that misguided attempts at dealing with some workplace issue or other can result in loss at some level, but not amounting to any wilful attempted sabotage. Counsel cited *Burns Meats and U.F.C.W., Local 832*, 1994 CarswellMan 652 (Teskey) where an employee working on the line in a meat processing plant had dropped a pen into a meat grinding cavity while returning it to a coworker standing nearby. It later ended up in a package of pepperoni, the offending package eventually tendered in evidence. Having reviewed the testimony, the arbitrator was not able to equate what had occurred with an act of deliberate sabotage or wilful destruction of company property. Arbitrator Teskey noted the basic question to be whether he was satisfied by cogent, clear and convincing evidence that the company had established its cause of action. He did not accept that the evidence was sufficiently persuasive that there had been any intent to commit a deliberate act of sabotage to the company's product. He determined that it was best described as an act of carelessness, not dishonesty, allowing him to substitute a lesser penalty for the discharge. As he succinctly described it: "the nature of the conduct here is not as serious as other misconduct which might reasonably attract the disciplinary response of discharge.... In this instance, I think that something less than discharge is appropriate and sufficient to balance the legitimate concerns of all involved..." In reaching this conclusion the arbitrator had accepted the aggrieved employee's explanation which was basically that she had not been paying close attention in handing over the pen to a coworker, there being no persuasive testimony to the contrary. It was not considered a matter of the employee having acted dishonestly. The Union looks for a similar conclusion of non-intentional mistake in assessing the grievor's activities.

See also cases dealing with careless activities not amounting to sabotage, such as *Babine Forced Products Ltd. v. U.S.W.A., Local 1-424*, 2006 CarswellBC 3408 (Lanyon) where discussion centered on the issue of wilful damage to the employer's property where an irritated worker in a lumber mill had been observed on video hitting saws with a metal bar while changing the blades thereby damaging the carbide teeth which the employer interpreted to be an act of sabotage. The arbitrator observed that wilful conduct was amongst the most serious of employment offences although needing to distinguish between damage that was accidental or as a result of carelessness, such as horseplay, and damage that resulted from one's wilful activities. He reasoned that "accidental or careless conduct attracts less serious forms of discipline than does wilful or intentional damage to an employer's property". While the arbitrator was able to conclude that what the employee had amounted to wilful damage, again, it was not a matter of any intentional sabotage which would have been more serious, leading him to reinstate the employee after reviewing the mitigating circumstances, including having noted that he had been employed 29 years, had a clean, even "exemplary" record, took responsibility for what he had done on viewing the video of the event, and such misconduct was taken to be out of character for him. It could be observed that the case would seem to fall under the general category of cases showing the employee to have acted spur of the moment and out of a momentary aberration as opposed to being premeditated.

In all, the Union contends that the evidence against the grievor has not been shown on any cogent, clear and compelling way that she knowingly set out to intentionally disrupt BDO operations as would be the Employer's theory, as opposed to her setting out to help in the transition. She no doubt had caused some disruption through some managerial persons being removed from having access to the BDO Google Drive stored materials through her attempting to make some helpful changes to this

filing system, but done mistakenly. Accordingly there was no cause for termination against this valuable, and internally decorated employee who has no past discipline.

Employer Reply:

Ms. Henry and Mr. Gilmore submitted that despite the Union's attempt to reconstruct the facts of the matter, the Employer should be taken as having met its onus of proving, on balance, what was alleged in the termination letter, namely that the grievor's misconduct included multiple instances on September 19, 2019 of intentionally interfering with corporate documents and the corporate document filing and accessing process, by denying access to numerous managerial level persons. She thereby fundamentally violated the trust relationship and demonstrated a clear lack of judgement and integrity to the point of irreparably destroying the employment relationship. The Employer still holds to the view that when all the parts and parcels of the grievor's actions are considered, it was a malicious activity on her part done the day following being told that there was going to be a transition of her BDO duties to TELUS International, which planned transition obviously was not occurring overnight. They submitted that despite the grievor wanting one to believe that she was somehow acting on instructions, the evidence from Mr. Peterson and Ms. Dhillon was clear enough that they had not asked her to become involved in any way, no involvement expected of any team members at that point, other than seeking their cooperation whenever needed. Nor was it ever shown that anyone from the grievor's BDO team had anything to do with transitioning the work and information associated therewith in the weeks to follow.

Further, counsel submitted, she was not asked to clean up any documents and no cleanup happened. No information was deleted, not the Halloween party documents nor the potluck dinner

documents, nor any other documents. She was never asked to assist anyone with anything. No TELUS International team was even identified for her to deal with. No one required her assistance on anything at that point, and indeed it can be observed that the grievor's only activity in the BDO Google Drive after September 18 was on the very next day doing her numerous entries, all but one of which had to do with denying access to various management level employees from some 1067 files within numerous folders attaching to the BDO Google Drive. There was no reorganizing any materials contained in these folders. As it was, the grievor did not do anything on that day rationally connected to the upcoming yet to be finalized transition situation, nor in the three weeks which followed prior to her going off on illness leave. She did not work toward redistributing any information from one file to another or reestablish anyone's access, except Ms. Midwood who approached her directly. She did not communicate to anyone during that time what she had done. She presumably was hoping that her involvement would not be discovered.

All in all, the Employer views the Union's characterization of the grievor's actions as somehow only being a misguided attempt to change ownership on the files for some reason, clean files up, whatever that means, wanting to re-distribute them into another folder, to be the wrong description of what occurred. Counsel realistically submitted that it was a matter of her simply denying access to various management persons from the parent file, folders and subfolders on the BDO Google Drive, and not restoring anyone except Ms. Midwood when she was alerted to the problem by her not having access when she needed it. During all that time the grievor had no further entries into the BDO Google Drive until told by Ms. Midwood to restore her access. She was not moving information about from one file to another during that time. In all, the grievor's explanation should not be believed in the face of the substantial and compelling circumstantial evidence indicating her guilt in the nature of intentional

harm wanting to be caused to the Employer.

Conclusion:

On my reviewing all the material evidence submitted in this matter, including the Google Drive activity readout information produced for my examination, the testimony from the Employer's manager level witnesses, the two expert witnesses who compiled their reports and testified, and the grievor, I am satisfied that the Employer's case against the grievor in its alleging intentional wrongdoing reveals a compelling array of facts. It has led me to conclude that despite the allegations against her being pursued on the basis of circumstantial evidence, meaning that no one was present to see what she did, and provide firsthand information on that basis, nor can it be said anyone was able to get inside her mind in terms of exactly what she was thinking at the time on accessing the BDO Google Drive as she did on September 19, 2019, on balance, she acted with wrongful intent to disrupt corporate operations by using her editor level authority in accessing this computerized system and effectively shutting entry into its parent file, various folders and subfolders to the several named managerial level employees.

In my view, the grievor's version of events simply does not bear up on one assessing the evidence covering what we know to have occurred, leading to one gaining insight into the reality of the situation. The preponderance of evidence against her does not indicate that she entered the BDO Google Drive system to innocently rearrange files, cull out surplus information or out of date materials, or needed to change ownership of any information to anyone other than already addressed by the system for some considerable time. I accept that despite the grievor's testimony, amounting to a full denial of any intentional wrongdoing in her professing to have acted in furtherance of instructions, or even through an innocent personal inclination to help out, the far better likelihood is to be taken from the

testimony of Mr. Peterson and Ms. Dhillon, who I accept testified in forthright and entirely satisfactory fashion. It is that no one was seeking her involvement in doing anything within the BDO Google Drive respecting the upcoming transition of work, there being no reasonable expectation for her or anyone else on the team to become involved at that point in “messing around” with the computerized filing system, as the grievor put it, not on the day following the September 18, 2019 staff meeting, nor, one might expect, at any time during the days or weeks which followed. Notably, she did not do anything which one might associate with someone actually reorganizing file materials, whether or not misguided at the time. The evidence of Mr. Bennett is revealing in this respect. She sought no specific instructions, nor did she tell anyone what she had done.

I cannot accept that the grievor in actuality received any instructions to do anything in the nature of rearranging the Employer’s organizational file material contained within its Google Drive system, and realistically she could not have held the expectation of having some ill-defined participation at that point. The testimony of Mr. Peterson and Mr. Dhillon is plain enough in that respect, and is quite compelling. One might also observe that it was not as if the transitioning to TELUS International was occurring the next day. In any event, the remote possibility of her thinking about rearranging file material, and changing ownership, being the grievor’s explanation, ultimately had nothing to do with her specifically and methodically denying various management persons their access to the BDO Google Drive system and thereafter not reinstating any of them until dealing with Ms. Midwood three weeks later on October 10, during which time she had not even been accessing the system for any reason. She had not been moving anything from one file to another file. As the expert reporting revealed, other than creating folder BDO1, she never actually rearranged anything nor culled any materials from currently organized files. Subsequent to September 19, she stayed off the system, there being no further activity

on her part until October 7 when she quickly dealt with Ms. Midwood's complaint about being denied access.

In my reviewing the evidence, I cannot accept that anyone in the grievor's position as a BDO team member, a subset of the ODS team, could have reasonably or realistically ever thought that it rested with her to make any significant changes to the BDO Google Drive, which is to say deny access to various managerial level employees for any reason, without any discussion of what should be done and receiving plain instructions. She acted as she did the very next day following the September 18, 2019 meeting, concerning which indications were she had become emotionally affected by what she was hearing, obviously not wanting in the near future to transition into frontline customer relations work. At the same time it bears observing that the BDO Google Drive is essentially the team's principal organizing and filing tool which plainly means that keeping it accessible for analysing and moving forward on project related information is critical.

As it was, it was only those exercising managerial responsibility (except for one coworker) who were affected, such as Mr. Peterson, Ms. Dhillon and Ms. Midwood amongst others who were denied access. Their denial was solely actioned by the grievor in applying the five keystrokes each time she was denying access to someone that day, the last keystroke in each case confirming the removal. She acted alone, and did not reveal what she had done to anyone. Her key stroking activities did not include moving any file material about, changing it from one file or folder to another, although she did create a separate folder BDO1 which remained empty. The expert testimony did not reveal any culling of any information. One could observe that she had the night of September 19 to assess what she had done and correct it, step back from what might well have been an impulsive act brought about by the emotions created by the staff meeting held on the previous day, but she did nothing, except prolong the

organizational difficulty she had created.

One might well surmise that it may have been playing on the grievor's mind that at some point what she had done in removing file access from various management level employees would be discovered, but query what was she to do once having removed the people that she did, five keystrokes for each manager being denied access as explained in evidence. One could suspect that she may have considered correcting the damage she had done by reinstating everyone, or perhaps simply thought she should do nothing as it was possible no one would be the wiser as to what had occurred. It would seem she took this latter course as it was the situation with respect to Ms. Midwood on October 7, 2019 who only knew that she was having an access difficulty and directly approached the grievor to correct the problem, which she did, no doubt looking competent in doing so. The grievor could have easily determined whether the denials she had inputted three weeks earlier remained intact for the other persons affected, or perhaps they had already found their way back into the system, perhaps not. The grievor did not go about assessing the ongoing situation for the other affected persons at that point, which is to say did not reinstate anyone else. She presumably could have used her editor status and simply entered the system to see which managers were still being denied access, and correct the situation. We know that Mr. Peterson remained off-line for accessing current and updated file material, as did Ms. Dhillon, for the next month. Indeed, it may well be that the best inference to be taken from her dealing with Ms. Midwood as she did is that the grievor simplified her situation to the point of thinking the best approach was to leave it alone and let people find out for themselves, look to their own solutions, their hopefully thinking there had been a glitch of some kind, possibly being reinstated by someone else one at a time.

However, it cannot be avoided that the grievor, after dealing with Ms. Midwood at which time

she concocted an explanation for her, did nothing to correct the situation for anyone else, apparently willing to have people find out for themselves and look to their own solutions, In short, the grievor distanced herself from the problem she had created. Given her experience and understanding of Google Drive I cannot accept that somehow she did not know exactly what had happened, what her key stroking activity had achieved on September 19, 2019. Ultimately one might also observe that what was driving her thinking, both at the time of deciding to wilfully deny managerial access to a large swath of files, thereby disrupting corporate information for those people making the managerial decisions, and later when she sat back and took no self initiated steps to correct the situation, stands as a mystery which does not detract from the seriously wrongful nature of what she did.

Unfortunately for the grievor what did occur, which effectively upset the apple cart as it were, was the full-blown investigation initiated by Mr. Peterson in November 2019, in wanting to learn what had happened to cause the numerous BDO Google Drive access denials, which had caused him to lose current access to over 1,000 files and folders. The investigation quickly placed the grievor at the centre of the access denial issue without any way out. The system's activity log pinpointed her involvement.

What we have, I am satisfied, based on the compelling circumstantial evidence presented against the grievor, including Mr. Peterson's initial review of the grievor's September 19, 2019, BDO Google Drive actions in reviewing the activity log, together with the expert reports and testimony, is a recognizable trail of serious employee wrongdoing launched and advanced by the grievor from the point of inputting the access denials, prolonging her wrongdoing by failing thereafter to input any corrective measures except for Ms. Midwood on being requested, and thereafter continuing her denial of intentional wrongdoing during the investigation stage and again during the arbitration hearing itself. In my view her acting out against her Employer, as alleged, has been made apparent on clear and cogent

evidence, including her effort in prolonging the deceit.

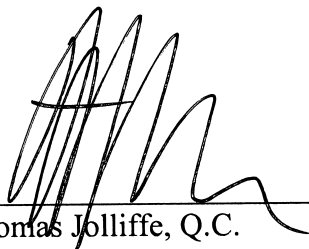
In reaching this conclusion I have found that the credibility issue in assessing the grievor's testimony, in terms of one needing to recognize the probabilities as reasonable in that place and at that time, strongly point in the direction of identifying her initial wrongful actions, and then accepting that she thereafter prolonged her denial to the finish line. In my view the evidence mounted against her has not been successfully refuted and simply cannot be offset by the grievor's explanation of mistake, or "messaging around" with the computerized system whether it be in connection to her current or past explanations for what she did. It may have started out as an ill-advised "prank" as an emotional reaction to the upcoming outsourcing of work, her conduct no doubt wrongful from the start, but which she should have immediately corrected. I accept that this initial misconduct matured into a workplace transgression fundamental to the employment relationship, in keeping the access denials in place past that first day, and never revealing what she did. The grievor's actions unquestionably adversely affected the corporate information system, most notably with respect to Mr. Peterson, keeping in mind the large number of files which he could not access for updated information. There has been no admission by the grievor of intentional wrongdoing at any point. In my view she has shown herself no longer able to maintain the trust and confidence of her employer as to her honesty and integrity going forward.

There are no compelling mitigating circumstances to be taken from the evidence presented capable of preserving the employment relationship once having found that after initially acting out against her employer by knowingly inputting the access denials, not forthwith correcting the situation, denying any intentional wrongdoing during the investigation process, and thereafter continuing the charade in the manner she chose through to providing what I accept was knowingly misleading testimony during the arbitration hearing. She may well have been a respected and appreciated employee

prior to September 19, 2019, about which there was little doubt from the evidence presented, but unfortunately for the grievor I have concluded that her intentional wrongful conduct, prolonged and hidden as it was, and her subsequent denial of having acted out against her employer in doing what she did, such denial never abandoned by her, in the circumstances presented, has effectively destroyed the employment relationship.

This grievance is respectfully dismissed on the basis of the evidence provided at hearing and for the stated reasons set out herein, in that the Employer has substantiated its grounds for termination.

DATED at Calgary, Alberta, this th 17 day of May, 2021.



Thomas Jolliffe, Q.C.