

Toronto Transit Commission v. Amalgamated Transit Union Local 113
(443/11; 2012 ONSC 3175)

Indexed As: Toronto Transit Commission v. Amalgamated Transit Union, Local 113

Court of Ontario
Superior Court of Justice
Divisional Court
Swinton, Pepall and Harvison Young, JJ.
May 31, 2012.

Summary:

A Toronto Transit Commission (TTC) station collector, provided Metropasses to nine customers (valued at \$108 each) and, in error, credited their bank accounts instead of debiting them when they paid with debit cards. The result of these transactions was a loss to the TTC in the amount of approximately \$1,744. The station collector was suspended for four days without pay and agreed to repay the loss through payroll deductions of \$100. The TTC took the position that the station collector should repay this money as it constituted a "shortage" within Article V, Section 11 of the collective agreement. The union referred the matter to arbitration, alleging that the discipline was unjust and that the payment by the station collector was inappropriate. The arbitrator found that the station collector had been negligent and reckless, and that the four day suspension was warranted. The arbitrator also agreed that the loss was subject to a provision in the collective agreement that required employees to "repay to the Commission any shortages" in their funds, and agreed that the loss in issue was a "shortage" within the meaning of Article V, Section 11. However, he held that the TTC could not recover any of the loss from the station collector on the basis that the TTC had failed to mitigate the loss suffered. The TTC applied for judicial review on the ground that the arbitrator erred in applying mitigation principles to bar the TTC from recovering the shortage of funds.

The Ontario Divisional Court allowed the application and quashed the award insofar as the arbitrator ordered the TTC to repay the monies paid by the station collector on account of the shortage.

Damages - Topic 1002

Mitigation - General principles - Duty to mitigate - A Toronto Transit Commission (TTC) station collector, provided Metropasses to nine customers (valued at \$108 each) and, in error, credited their bank accounts instead of debiting them when they paid with debit cards - The result of these transactions was a loss to the TTC in the amount of approximately \$1,744 - The TTC took the position that the station collector should repay this money as it constituted a "shortage" within Article V, Section 11 of the collective agreement - The station collector agreed to repay the loss through payroll deductions of \$100 - The union referred the matter to arbitration, alleging that the payment by the station collector was inappropriate - The arbitrator agreed that the loss was subject to a provision in the collective agreement that required employees to "repay to the Commission any shortages" in their funds, and agreed that the loss in issue was a "shortage" within the meaning of Article V, Section 11 - However, he held that the TTC

could not recover any of the loss from the station collector on the basis that the TTC had failed to mitigate the loss suffered - The TTC applied for judicial review on the ground that the arbitrator erred in applying mitigation principles to bar the TTC from recovering the shortage of funds - The Ontario Divisional Court allowed the application - The arbitrator's reasons did not meet the standard of reasonableness - First, the conclusion that a duty to mitigate arose in these circumstances where the obligation was to repay a debt was unreasonable, because the duty to mitigate at common law arose from breach of contract or tort, and the obligation to avoid damages caused by breach - The reasons did not indicate recognition of the common law principles or explain why they should not apply here where the obligation was to repay a debt - Second, the arbitrator's reasons did not explain why there should be a duty to mitigate, given the language of the collective agreement, which appeared to clearly contemplate repayment of any shortages - See paragraphs 11 to 23.

Damages - Topic 1002

Mitigation - General principles - Duty to mitigate - A Toronto Transit Commission (TTC) station collector, provided Metropasses to nine customers (valued at \$108 each) and, in error, credited their bank accounts instead of debiting them when they paid with debit cards - The result of these transactions was a loss to the TTC in the amount of approximately \$1,744 - The TTC took the position that the station collector should repay this money as it constituted a "shortage" within Article V, Section 11 of the collective agreement - The station collector agreed to repay the loss through payroll deductions of \$100 - The union referred the matter to arbitration, alleging that the payment by the station collector was inappropriate - The arbitrator agreed that the loss was subject to a provision in the collective agreement that required employees to "repay to the Commission any shortages" in their funds, and agreed that the loss in issue was a "shortage" within the meaning of Article V, Section 11 - However, he held that the TTC could not recover any of the loss from the station collector on the basis that the TTC had failed to mitigate the loss suffered - The TTC applied for judicial review, asserting that the arbitrator's finding that the TTC did not take reasonable steps to mitigate the loss was not reasonable - The Ontario Divisional Court allowed the application - In concluding that the TTC had not met its duty to mitigate, the arbitrator's reasons did not meet the reasonableness standard - First, there was no reference in his reasons to the fact that the union bore the onus of demonstrating the TTC failed to mitigate its losses - Second, while he was critical of what was not done, there was no evidence or analysis with respect to what would have constituted reasonable steps, nor the extent to which the loss would have thus been minimized - See paragraphs 24 to 27.

Cases Noticed:

New Brunswick (Board of Management) v. Dunsmuir, [2008] 1 S.C.R. 190; 372 N.R. 1; 329 N.B.R.(2d) 1; 844 A.P.R. 1; 2008 SCC 9, reld to. [para. 10].
Manufacturers Life Insurance Co. et al. v. Granada Investments Ltd. et al. (2001), 150 O.A.C. 253; 2001 CanLII 2708 (C.A.), reld to. [para. 14].
Fischer v. Dyck Forages & Grasses Ltd., [2011] Man.R.(2d) Uned. 40; 2011 MBCA 47, reld to. [para. 14].
Ermineskin Place Ltd. Partnership v. Collins (1989), 99 A.R. 161; 1989 CanLII 3266

(Q.B. Master), refd to. [para. 14].
Pacific & Western Trust Corp. v. Gretchen Enterprises Ltd. (1989), 79 Sask.R. 308; 63 D.L.R.(4th) 764 (Q.B.), refd to. [para. 14].
Manitoba Association of Health Care Professionals v. Nor-Man Regional Health Authority Inc. (2011), 423 N.R. 95; 2011 SCC 59, refd to. [para. 16].
Michaels et al. v. Red Deer College, [1976] 2 S.C.R. 324; 5 N.R. 99, refd to. [para. 25].
Link v. Venture Steel Inc. et al., [2008] O.T.C. Uned. O67; 2008 CanLII 63189 (S.C.), affd. (2010), 259 O.A.C. 199; 2010 ONCA 144, refd to. [para. 25].
Branco et al. v. Ephstein (2006), 213 O.A.C. 24; 2006 CanLII 19941 (Div. Ct.), refd to. [para. 27].
Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board) et al. (2011), 317 Nfld. & P.E.I.R. 340; 986 A.P.R. 340; 424 N.R. 220; 2011 SCC 62, refd to. [para. 28].

Authors and Works Noticed:

Fridman, G.H.L., *The Law of Contract in Canada* (6th Ed. 2011), p. 730 [para. 14].

Counsel:

Frank Cesario and Elisha Jamieson, for the applicant;
Ian J. Fellows and Karen Ensslen, for the respondent.

This application was heard at Toronto, Ontario, on March 9, 2012, by Swinton, Pepall and Harvison Young, JJ., of the Ontario Divisional Court. The following judgment of the Divisional Court was delivered by Harvison Young, J., on May 31, 2012.

Application allowed.

Editor: Anick Ouellette-Levesque