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Citation: 2006 PSLRB 70

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

ANNIE TAILLEFER

Grievor

and

TREASURY BOARD
(Department of Foreign Affairs and International Trade)

Employer

Indexed as
Taillefer v. Treasury Board (Department of Foreign Affairs and International Trade)

In the matter of a grievance referred to adjudication pursuant to section 92 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Georges Nadeau, adjudicator

For the Grievor: Chantal Homier-Nehmé, Public Service Alliance of Canada

For the Employer: Jennifer Champagne, counsel

Heard at Ottawa, Ontario,
April 10 to 13, 2006.
(P.S.L.R.B. Translation)

Grievance referred to adjudication

[1] The grievor, Ms. Taillefer, was employed by the Department of Foreign Affairs and International Trade as an employee consultation specialist. She filed three grievances with respect to the employer's refusal to reinstate her in her position, her indefinite suspension during the investigation, and her dismissal.

[2] At the start of the hearing, anticipating the employer's evidence, the grievor's representative objected to the submission in evidence by the employer of the videotape recording made of the employee by the Quebec's Commission de santé et sécurité au travail (CSST). It was her opinion that the video recording was so prejudicial that viewing it would seriously prejudice the grievor's rights, rights protected by the *Canadian Charter of Rights and Freedoms* (*CCRF*). The employer stated that it was common for elements of evidence to be accepted on a preliminary basis in adjudication, subject to a final decision being rendered at a later time.

[3] Given the grievor's position in this matter, I decided to begin hearing the grievances up to the point of the introduction of the video recording in evidence. At that point, I would order an adjournment to render a written decision on the admissibility in evidence of said video. During the hearing, the employer wanted to adduce an investigation report that contained numerous pictures taken from the video recording. I refused to accept this document in evidence until I ruled on the admissibility in evidence of the video recording.

[4] This decision deals solely with this question and contains evidence adduced only to resolve this problem.

[5] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, this reference to adjudication must be dealt with in accordance with the provisions of the former *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (the "former *Act*").

Summary of the evidence

[6] During her testimony, Monique Lord informed us that she worked for CSST and that in 2003–2004, at the time of the relevant events, she held the position of rehabilitation consultant. She reported that, based on medical reports and internal

CSST consultations, she decided to recommend in December 2003 that the grievor be designated an "unemployable" person. The grievor had been absent from work since August 16, 2001, following a work-related accident. The progress notes in the CSST file were adduced in evidence (Exhibit E-4).

[7] Ms. Lord indicated that she contacted Gerald Redman by phone, the employee's supervisor, to inform him of the CSST's intentions. During that telephone conversation, Mr. Redman informed her of allegations that the grievor was not as incapacitated as she claimed. Employees had told him that the latter had allegedly been seen shopping in a shopping centre close to the CSST offices. On behalf of the employer, he objected to the imminent decision to have her designated as an "unemployable" person.

[8] In Ms. Lord's view, Mr. Redman does not have a personal interest in the case, since it involves a public employer. Ms. Lord reported the situation to her supervisor and a decision was made to request an investigation to verify the allegations brought to her attention. The investigation was authorized by the Regional Director, Chantal Lafrance. It was conducted by Alain Trudel, CSST investigator.

[9] In addition to her allowance for loss of income, the grievor received from CSST additional funds for personal assistance and transportation. These allowances must be reviewed periodically, and they were temporarily extended while waiting to confirm the action to be taken on the grievor's file.

[10] Medical certificates and assessment reports in the CSST file were adduced (Exhibits E-11 to E-19 and S-5 to S-7). They show that the grievor's physician confirms that the latter still requires home assistance and a means of transportation to get around, and that she suffers from multilevel pain. The assessments of Dr. Jean-Pierre Berthiaume, a psychiatrist, report a somatoform disorder, but, in Ms. Lord's opinion, the employee's physician did not accept that diagnosis.

[11] The CSST investigator, Mr Trudel, and Ms. Lord agreed to ask the grievor to attend a meeting on February 19, 2004, at the CSST office to verify her status. That verification was necessary anyway because of the need to ensure that the grievor was still eligible for the supplementary personal assistance allowances. It was also the opportunity to begin surveillance of the grievor. The interview began at 1:40 p.m. on February 19 and ended at 3:30 p.m. According to Ms. Lord, the grievor confirmed

during this meeting that she had pain on her right side and that she was unable to use her right hand, resulting in the need for assistance with her personal hygiene and meal preparation. Ms. Lord also indicated that the grievor, although she still owned her car and still held a driver's licence, stated that she no longer drove because she was unable to do so and that a friend came to drive her to the interview.

[12] Investigator Trudel stated that, during the initial evaluation of the file, he noted the discrepancy between the information in the CSST file on the grievor's functional capacities and the denunciation. Rather than trying to get more clarification on aspects of the denunciation from the employer and employees who allegedly made the allegations, Mr. Trudel chose to begin surveillance of the grievor's daily activities. He chose to proceed in this manner in order not to unnecessarily alert the grievor's fellow workers, and to protect the confidentiality of the file.

[13] The investigator testified that he gave a mandate to the BCS Investigation firm to proceed with surveillance of the grievor's activities. It was his responsibility to ensure that the surveillance was carried out within the legal framework. He told BCS Investigation to take pictures only when the grievor could be seen by the general public. Investigator Trudel received verbal reports by telephone from the individuals conducting the surveillance as it went along. It was up to him to decide if the surveillance should continue or end. Some editing of the videotape was done at the time that the images were transferred to VHS tape, and sections of the tape when the grievor did not appear were also removed from the final tape.

[14] Investigator Trudel stated that, given the observations made during the first day of surveillance and was continued the next day, on February 26 and 27, 2004 and March 16, April 7 and April 29, 2004. These dates were chosen because of the appointments that the grievor had to receive treatments related to her condition.

[15] In light of the observations made during this surveillance, on May 5, 2004, the CSST suspended, and eventually cancelled, the personal assistance allowance, as well as the income replacement allowance as of February 19. The application to review these decisions was denied on August 4, 2004 (Exhibit E-90). The grievor appealed the decision before the Commission des lésions professionnelles (CLP).

[16] With the support of her physician, the grievor tried to return to work gradually on May 25, 2004. The employer refused and the grievor filed a grievance against that decision.

[17] Gisèle Samson-Verreault, Assistant Deputy Minister, Human Resources, testified that when she was informed of the CSST's decision to suspend the income replacement allowance as a result of the allegation that the grievor had provided inaccurate information, she had no choice but to suspend her, on July 12, 2004, during the investigation. The employer tried to meet with her to get her version of the facts, but the meetings were cancelled for medical reasons. On December 20, 2004, the grievor was dismissed. It was Ms. Samson-Verreault's opinion that the CSST investigation clearly showed that the grievor had defrauded the CSST, and, consequently, her employer. She stated that she was angry when she saw the videotape. She found it unacceptable that an employee could behave in such a manner. Under cross-examination, she admitted that she had not followed the suggestion of the grievor's physician that she be examined by a Health Canada physician. In her opinion, the CSST decision settled the matter.

Summary of the arguments

For the grievor

[18] The grievor's representative argues that the grievor had been absent as a result of a work-related accident since 2001 and that she had always cooperated and positively responded to the CSST's many requests for medical assessments and treatment. She mentioned that, despite this good will, the employer, from the outset, had doubts (which are included in the CSST's progress notes), and she suggested that the employer had constantly suspected the grievor of faking her illness and encouraged the CSST to conduct an investigation. The representative points out that the employer refused to allow the grievor to return to work gradually, despite the recommendations of her physician.

[19] Relying on *Sabourin v. House of Commons*, 2006 PSLRB 15, the representative argues that there was a balance to respect between the grievor's right to privacy and the right of the employer to protect its legitimate interests. She states that the question of the admissibility into evidence of a video tape must respect the test established in *Sabourin*. There are two components to that test, set out in the form of questions. Was it reasonable, in all of the circumstances, to request video surveillance?

Was the video surveillance conducted reasonably? The representative adds that, although it was the CSST that ordered the surveillance, the Assistant Deputy Minister acknowledged that the videotape was a determining factor in her decision.

[20] The representative argues that the *CCRF* and the *Quebec Charter of Human Rights and Freedoms* provided for the right to be protected from unreasonable searches or seizures. The Department of Foreign Affairs and International Trade and the CSST must, as government entities, respect the prohibition against unreasonable seizures or searches.

[21] In the representative's view, the grievor's right to privacy was violated in contravention of the provisions of the applicable charters and, consequently, the evidence is illegal and the employer must be prevented from using it to justify the grievor's dismissal.

[22] The representative is of the opinion that the CSST and the employer did not demonstrate that video surveillance was reasonable in the circumstances. There was nothing in the complainant's conduct to warrant being suspicious of her. The CSST and the employer allegedly had to demonstrate that they had exhausted all other options before using video surveillance. The CSST or the employer could have contacted the physician or any other physician treating the grievor. The employer could have requested an independent assessment by Health Canada. This alternative was presented to Ms. Samson-Verreault, who declined it. No one verified Mr. Redman's allegations, not even Ms. Lord or Mr. Trudel. There was no inquiry made among the employees to confirm the validity of the allegations made by Mr. Redman.

[23] The decision to proceed with video surveillance was based on hearsay with no prior verification. Two months prior to the dismissal, the grievor's physician contacted Ms. Samson-Verreault by e-mail to suggest to her an assessment by Health Canada. Ms. Samson-Verreault rejected this suggestion. In the representative's view, Ms. Samson-Verreault preferred to jump to the CSST's conclusions, which were based on Mr. Redman's denunciation. No one checked the truth of those comments. The representative argues that this was a completely unreasonable manner in which to proceed.

[24] The representative also relies on *Canadian Pacific Ltd. v. Brotherhood of Maintenance of the Way Employees* (1996), 59 L.A.C. (4th) 111, in which the same

two-pronged test was used. In that decision, the videotape was accepted into evidence after it was established that the employee had previously defrauded the Workers' Compensation Board. In the case before us, the grievor had never defrauded anyone. She also mentions *Toronto Transit Commission v. Amalgamated Transit Union, Local 113* (1999), 95 L.A.C. (4th) 402, in which the adjudicators only accepted video surveillance as a last resort. She also notes that these adjudicators rejected the argument that as long as the surveillance is restricted to public places it is admissible. The representative drew my attention to *Centre for Addiction and Mental Health v. Ontario Public Service Employees Union (Conn Grievance)*, [2004] O.L.A.A. No. 457, in which the adjudicator ruled that, for surveillance evidence to be admissible, the employer must establish that, in all the circumstances, it was reasonable to undertake said surveillance.

[25] The representative points out that, in this instance, it is the CSST that ordered the surveillance, based on the employer's comments. In her opinion, the employer and the CSST were negligent, and even grossly negligent. She states that it should be remembered that in late January 2004, the CSST was prepared to consider the grievor "unemployable".

[26] The grievor's representative argues that the employer did not establish that it was reasonable to resort to video surveillance, and did not consider other means that were less intrusive into the grievor's private life. The surveillance was approved on the basis of hearsay. Ms. Lord requested an investigation even before meeting with the grievor, and despite numerous medical reports in the file from Dr. Suzanne Rydzik, psychologists and psychiatrists.

[27] The grievor's representative argues that the second component of the test also was not met. The surveillance was not conducted reasonably. It was only conducted on certain days over a three-month period. Since the surveillance was not constant, it is possible and probable that the grievor was filmed only on the days when she was not wearing her cervical collar or not using her cane.

[28] The grievor's representative points out that the adjudicator has the power to accept or reject an element of evidence. She submits that the videotape should not be admissible because it was obtained and made in violation of the grievor's rights, which is contrary to the federal and Quebec charters.

For the employer

[29] The employer's representative is of the opinion that the decision in *Sabourin* does not apply to this case and that there was no violation of the Quebec and federal charters. She adds that, even if these charters applied, the union did not show that the video surveillance was conducted unreasonably.

[30] The employer's representative points out that, although the decision to proceed with video surveillance was made in late January 2004 and actually took place in March and April 2004, the dismissal did not occur until December 2004.

[31] The representative argues that, in this case, it is the CSST that made the decision to conduct surveillance and it is the CSST that ordered BCS Investigation to conduct it. It is also the CSST that decided on the manner in which the surveillance would be conducted and that gave the instructions in this regard. Investigator Trudel's testimony about the specific instructions given to BCS Investigation is very clear. It is also the CSST that received the results of this video surveillance and the written report from BCS Investigation.

[32] According to the employer's representative, the employer was never involved in the decision-making process that led to the surveillance. The employer did not control the process, did not give any direction and could not intervene in any way. The representative pointed out that no one at the employer was informed of the CSST's decision to proceed with an investigation.

[33] The representative argues that what is at issue in this matter is the CSST's decision to proceed with surveillance. The Public Service Labour Relations Board (the Board) does not have the necessary jurisdiction to review a decision of the CSST. The employer was not involved at all in the CSST's decision. What the grievor's representative is trying to do is use a third party — in this case the employer — to attack the CSST's initial decision.

[34] In the view of the employer's representative, the evidence showed that the grievor challenged the decision to suspend the income replacement allowance and personal assistance allowance through the review processes and before the CLP. If the grievor had wanted to raise the question of the violation of her right to privacy, the appropriate forum would have been that provided in the act creating the CSST.

[35] The employer's representative adds that, if I must exclude the video evidence, that decision would have the effect of saying to the CSST, a provincial organization, that it based its decision on illegal evidence.

[36] The representative further argues that the reasoning used in *Sabourin* is not applicable in this case. Since the surveillance is not the result of an employer decision, and the employer did not have to decide whether or not there were reasonable grounds and could not control the process in order to ensure that the video surveillance was conducted reasonably, such an obligation cannot be imposed on the employer. In the representative's opinion, the decision to use surveillance belonged to the CSST, and a Board adjudicator does not have to decide if the test to justify surveillance has been met.

[37] The representative points out that, while the new *Act* gives an adjudicator the power to receive or exclude any evidence, regardless of whether it is admissible before any court, an adjudicator may not exclude relevant evidence without a valid reason.

[38] The representative adds that the decision to proceed with surveillance was not made by the employer. There is no basis for engaging the applicability of the federal *Charter*. Since the employer did not make the decision, did not control the process, and did not determine the manner in which the surveillance was conducted, the obligations arising from section 8 of the federal *Charter* and from the analysis in *Sabourin* cannot be imposed on it. The CSST acted alone and independently.

[39] The representative further states that, in the event that the *Charter* applied, there was no violation of the right to privacy in this case. The first step in such an analysis is to determine whether there is an expectation of privacy. If there is no such expectation, the analysis stops there.

[40] The representative comments that Investigator Trudel testified that he gave clear instructions to BCS Investigation to always film the grievor when she was visible to the general public, on public streets, and never in her home. Consequently, the representative argues that I cannot conclude that the video violated the grievor's privacy.

[41] It is the opinion of the employer's representative that it is not the Board's duty or within it jurisdiction to decide if the CSST had reasonable grounds to proceed with surveillance or whether the CSST complied with the *Charter*.

[42] In her opinion, the case law establishes a very clear and unequivocal consensus that an employee may not use his own turpitude and invoke his right to privacy in order to better defraud. The representative relies on *Eppele* c. *Hôpital Santa Cabrini*, [2000] J.Q. No. 2058 (C.S.), in which the admissibility of video evidence taken during surveillance ordered by the CSST was accepted. She also refers to *Syndicat canadien de la fonction publique, section locale 687* c. *Groupe TVA inc. (grief de Ouimet)*, [2000] D.A.T.C. No 712 and to *Syndicat des travailleurs et travailleuses de Bridgestone Firestone de Joliette* c. *Bridgestone/Firestone Canada inc.*, [1999] J.Q. No 3026 (C.A.), in which questions of admissibility of video evidence were dealt with, and to the paragraphs under heading 10-20 dealing with the same subject in *Evidence and Procedure in Canadian Labour Arbitration* by Gorsky, Uspich and Brandt at pages 10-20, 10-20.1, 10-20.2 and 10-20.3.

[43] The employer's representative argues that a Board adjudicator is not able to determine whether the CSST had reasonable grounds to proceed with surveillance or whether the surveillance was conducted reasonably, because that is not part of the Board's mandate. The Board's jurisdiction is to review decisions of the employer and not those of the CSST. She adds that the CSST terminated all allowances in May 2004, and it was following that decision that the employer conducted an internal investigation that resulted in the grievor's dismissal. While there is no question that the video played a key role, it is the CSST's decision to deem the grievor fit to work that influenced the employer's decision.

[44] The representative indicates that the rehabilitation officer, Ms. Lord, explained the circumstances of the decision to proceed with an investigation. The diagnosis was vague, there was no consensus in the file, and the CSST had received information that the grievor had been seen showing no functional limitation. She added that Investigator Trudel had testified about the direction and instructions given to BCS Investigation, which was mandated to conduct the surveillance. Referring to the meeting with the grievor on February 19, 2004, the representative points out that the primary objective of that meeting was to update the information in the grievor's file, and that this was a legitimate action given the fact that the CSST was the paying

organization. The meeting with the grievor to show her the observations and to give her a chance to explain occurred on May 3, 2004.

[45] It is the representative's view that there are enough elements to decide that the CSST had reasonable grounds to proceed with surveillance and that said surveillance was conducted reasonably.

[46] Commenting on the decisions submitted by the grievor's representative, the employer's representative indicates that in *R. v. Wong*, [1990] 3 S.C.R. 36 the ruling is on a criminal matter, which is not the case in this matter. In *Canadian Pacific Ltd.*, the video evidence was allowed and the dismissal upheld. In *Toronto Transit Commission*, the situations described involve much closer surveillance that infringes on privacy. Lastly, in *Centre for Addiction and Mental Health*, it is acknowledged that video surveillance is not necessarily illegal.

[47] The employer's representative argues that the decision may not have the effect of being a judicial review of the CSST's decision. The employer cannot be required to meet the analysis proposed in *Sabourin,* because it is not the decision-making organization and the CCRF does not apply.

[48] The representative continues by stating that, even if the CCRF did apply, there can be no expectation of privacy, because the video involved public facts and actions.

Reply

[49] In reply, the grievor's representative points out that Ms. Samson-Verreault was very clear and acknowledged that she had relied on the video surveillance when making her decision. The representative was also of the opinion that the employer had "substituted" its decision-making power for that of the CSST.

[50] The grievor's representative emphasizes that the admissibility tests for video evidence are set out in *Canadian Pacific Ltd.* and that it is clear that the employer must demonstrate that it was reasonable, in all of the circumstances, to use video surveillance. Even though it is not the employer that mandated BCS Investigation, it is the employer that made the denunciation without ever verifying the truth of the allegations. The decision to proceed with surveillance was made less than 24 hours after the denunciation. The employer had the burden to establish that the surveillance was reasonable in the circumstances, and it did not do so.

Reasons

[51] The question of the admissibility into evidence of a video recording has been the subject of numerous decisions. Adjudicator Mackenzie, in *Sabourin*, sets out the two-pronged test that the employer must meet for the evidence to be eligible:

> 1. Was it reasonable, in all of the circumstances, to undertake surveillance of the employee's off-duty activity?
> 2. Was the surveillance conducted in a reasonable manner, not unduly intrusive and proportionate?

[52] First, the employer asked me to dismiss the objection arguing that, since it was not the author of the video surveillance, it could not be required to ensure that the evidence in question respects the grievor's rights to privacy. I reject this approach. In my opinion, the employer is required to ensure that the evidence on which it bases its decision, in this instance the grievor's dismissal, respects its employee's fundamental rights. Simply because the evidence is collected by a third party does not mean it can come from any source and be collected under any circumstance.

[53] The approach set out in case law seems to me to be quite judicious in protecting the rights of the employee and those of the employer, and I believe that the test applies even if the employer is not the author of the surveillance.

[54] I also note that, in the case before us, it is not a matter of an activity during leisure time, but activities at a time when the grievor, absent from work, is receiving an income replacement and personal assistance allowance as a result of a work-related accident. The consequences of that accident have kept the grievor away from work since 2001. The question posed by the first component of the test still remains relevant, regardless of whether the activities take place during leisure time, work hours or authorized absences.

[55] As for the argument that the employer showed bad faith in having doubts about the grievor's disability from the outset, I reject it. Simply having doubts does not automatically mean a manager is acting in bad faith. I see no evidence of bad faith in this case to date.

[56] Having said that, the suggestion by the grievor's representative that the approach should have been to verify or investigate directly with the employees the

hearsay reported by the supervisor would have been even more detrimental to the grievor's privacy and reputation. The gossip sparked by such an investigation among fellow workers could have been even more damaging.

[57] As for the possibility of having the employee reassessed by her physician or another physician, it does not address the fundamental question posed by the denunciation. What was in question was not the medical diagnosis but the grievor's honesty. As far as I know, medicine does not offer honesty diagnoses.

[58] The CSST's decision to proceed with surveillance and to decide on continuing that surveillance depending on the evidence gathered is totally appropriate and completely justified given the CSST's file on the grievor, the renewed requests for personal assistance by her, and the denunciation. Investigator Trudel's testimony clearly establishes that the decision to continue the surveillance was decided as time went on, and was restricted to locations in full public view and on specific dates. This surveillance was the least intrusive means of quickly verifying whether the denunciation was valid or simply mean-spirited. If no questionable observations had been made at the outset, it can be assumed that the surveillance would have ended quickly without any consequence.

[59] In response to the objection by the grievor's representative, I find that the evidence meets the two-pronged test set out in case law. This evidence is admissible, and I allow the employer to adduce it in accordance with the usual applicable rules.

[60] After reviewing the evidence adduced and the arguments, I find that the objection made to exclude evidence relating to surveillance in the form of a video recording on the basis that it violates the Quebec and federal charters of rights must be dismissed.

[61] For all of the above reasons, I make the following order:

(The Order appears on the next page)

Order

[62] I allow the submission in evidence of the video recording made during the investigation conducted by the CSST, subject to the usual applicable rules.

[63] I request that the Board's Registry Operations set a time for the continuation of the grievance hearing on the merits.

June 2, 2006.

P.S.L.R.B. Translation

Georges Nadeau,
adjudicator