Date: 20090126

Files: 566-02-800, 842, 843, 949 and 1268

Citation: 2009 PSLRB 8

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

MAHALINGAM SINGARAVELU

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

Indexed as
Singaravelu v. Deputy Head (Correctional Service of Canada)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Grievor: Yavar Hameed, counsel

For the Respondent: Karen Clifford, counsel

Decided on the basis of written submissions
filed November 12 and 25 and December 3, 2008.

I. Request for recusal

[1] Mahalingam Singaravelu ("the grievor") worked as an engineering supervisor, 1st class, for the Correctional Service of Canada (CSC) ("the respondent") in Kingston, Ontario. His bargaining agent is the Public Service Alliance of Canada. However, the grievor is represented not by his bargaining agent but by counsel.

[2] In one of his grievances (PSLRB File No. 566-02-1268), the grievor disputes the respondent's decision to place him on leave without pay on January 25, 2007, after an occupational health and safety assessment, which would have found that the grievor was not fit to work at the CSC in any capacity. The grievance was filed on February 26, 2007, and was referred to the final level of the grievance procedure on April 4, 2007. The grievance was referred to adjudication on May 22, 2007. The respondent replied to the grievance at the final level of the grievance procedure on August 27, 2007.

[3] In his other four grievances, the grievor disputes four short-term suspensions that the respondent imposed on him. Those suspensions were served in November and December 2006, and the grievances were referred to adjudication in February and March 2007.

[4] It was agreed with the parties to group the evidence for the five grievances. Six hearing days have already been held in Kingston, Ontario, from July 29 to August 1, 2008 and on October 16 and 17, 2008. During those six days, the respondent produced its evidence on the five grievances. Shortly after the sixth day of the hearing, the grievor requested that the adjudicator recuse himself. The purpose of this decision is to deal with that request.

II. Summary of the arguments

A. For the grievor

[5] The grievor argued that the adjudicator has not treated him fairly. He based his argument on several incidents that occurred during the hearing.

[6] On October 17, 2008, during the testimony of one of the respondent's witnesses, the grievor observed counsel for the respondent making head gestures to influence the testimony of the witness. In acting in that manner, counsel for the respondent was coaching her witness and manipulating his responses.

[7] On October 16, 2008, the grievor requested permission to make an audio recording of the proceedings. The adjudicator denied his request. Later, while the grievor was outside the hearing room, counsel for the respondent examined the grievor's materials in the hearing room to verify whether he had recording equipment. The adjudicator did not object to that behaviour.

[8] On October 16, 2008, the adjudicator refused the grievor's request to cross-examine the respondent's witnesses. That refusal prevented the grievor from making his concerns known during the hearing.

[9] The adjudicator allowed the respondent's witnesses to testify about unrelated matters that discredited the grievor. The adjudicator also accepted as evidence a decision against the grievor made by the Occupational Health and Safety Tribunal despite the objection made by the grievor's counsel that the grievor had applied to the Federal Court for judicial review.

[10] The adjudicator induced some of the respondent's witnesses to reply that they did not remember, as an answer to some questions asked during cross-examination. The adjudicator indicated to them that there was nothing wrong with answering, "I do not remember."

[11] During the middle of the day on October 16, 2008, the adjudicator changed the set-up of the hearing room in a way that facilitated the respondent's counsel in guiding her witnesses.

[12] The adjudicator allowed a Union of Solicitor General Employees representative to attend the hearing and to speak with his members, who were witnesses, during a break while those witnesses were presenting evidence. The adjudicator also allowed Theresa Westfall, the first witness who testified for the respondent, to attend the hearing while two other witnesses testified for the respondent. The adjudicator permitted Ms. Westfall to speak with those witnesses in the hearing room.

[13] The grievor asks that his request for recusal be dealt with by a different adjudicator who could hear evidence on the allegations. The adjudicator against whom the request is presented should not resolve the issue of the existence of a reasonable apprehension of bias against him. That places the adjudicator in the unenviable and arguably conflicted position of assessing his own impartiality.

[14] The grievor refers me to the following case law: *Committee for Justice and Liberty et al. v. National Energy Board et al.,* [1978] 1 S.C.R. 369; *Chow v. Treasury Board (Statistics Canada),* 2006 PSLRB 71; *R. v. Valente*, [1985] 2 S.C.R. 673; *Bell Canada v. CTEA*, 2003 SCC 36; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; and *CUPE v. Ontario (Minister of Labour)*, 2003 SCC 29.

B. <u>For the respondent</u>

[15] The respondent argues that the grievor's allegations of coaching witnesses during their testimonies are offensive in the extreme. It is possible that the grievor observed neck movements from counsel for the respondent since she has been undergoing treatment for a neck and shoulder problem. Any such movements were not related to the case.

[16] As a general rule, the Public Service Labour Relations Board ("the Board") does not allow its proceedings to be recorded. The grievor did not provide any evidence of exceptional circumstances that would require deviating from that practice. Furthermore, the grievor's allegations about his notes being scrutinized are offensive. The set-up of the room was such that it was necessary to pass by the grievor's table to exit the room.

[17] The adjudicator's refusal to allow the grievor's request to directly cross-examine witnesses does not represent a denial of his rights under natural justice. At all times, the grievor was represented by counsel, and his counsel cross-examined witnesses. The grievor was granted breaks to confer with his counsel whenever he wished.

[18] There is no basis to the allegation that the adjudicator allowed the respondent's witnesses to testify about unrelated matters that discredited the grievor. The respondent has the burden of proof in disciplinary matters, and it needed to explain the circumstances to the adjudicator.

[19] The allegation that the adjudicator induced some witnesses to answer that they did not remember is clearly inappropriate. One witness became frustrated during his testimony, and the adjudicator simply reminded him that it was not an incorrect answer if he could not in fact remember.

[20] The adjudicator changed the hearing room's set up on the respondent's request to minimize the potential discomfort of the witnesses regarding their proximity to the

grievor and to facilitate communication in the room which had a high noise level from fans and other ventilation equipment. The grievor's counsel raised no objection to the placement of the witness table.

[21] The grievor raised no objection during the hearing about the presence of a union representative in the hearing room. Furthermore, the adjudicator provided all witnesses with the usual cautions about when a recess or break occurs in the hearing and a witness is testifying. Ms. Westfall did nothing other than exchange pleasantries with other witnesses.

[22] The respondent submits that the grievor has not shown any basis, in fact or in law, for the recusal of the adjudicator in this matter. The respondent refers me to the following case law: *Committee for Justice and Liberty et al.*; *Chow*; *Arthur v. Canada (Attorney General)*, 2001 FCA 223; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.R. 817; *Pugh v. Deputy Minister of Justice et al.*, 2008 PSST 0023; *Rhéaume v. Canada*, [1992] F.C.J. No. 1131 (FCA) (QL); *Bagri v. Canada (Attorney General)*, 2006 FCA 134; and *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793.

III. Reasons

[23] In his request, the grievor made several allegations that the adjudicator did not treat him fairly. The grievor asks that the decision on the recusal of the adjudicator be made by a different adjudicator.

[24] Requests for recusal presented to the Board have always been handled by the adjudicator who heard the case. That practice was followed in the cases referred to by both parties, and also in *McElrea v. Treasury Board (Industry Canada)*, PSSRB File No. 166-02-28144 (19990211), *Ayangma v. Treasury Board (Department of Health)*, 2006 PSLRB 64, *and Laferrière v. Deputy Head (Canadian Space Agency)*, 2008 PSLRB 53. I see no reason to depart from that practice, and I believe that I am the most qualified person to assess any allegation of bias related to my own rulings and to my own behaviour in this case.

[25] To dispose of the request for recusal, I am guided by the jurisprudence on reasonable apprehension of bias. *Committee for Justice and Liberty et al.* established the applicable principles:

. . .

> *. . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."*

. . .

[26] *Adams v. British Columbia* (*Workers' Compensation Board)* (1989), 42 B.C.L.R. (2d) 228 (B.C.C.A.) explained the type of evidence required to demonstrate an appearance of bias:

. . .

> *sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it* [the allegation] *is made will not bring an impartial mind to bear . . . suspicion is not enough.*

. . .

[27] Therefore, the grievor must demonstrate that beyond mere suspicion, in all probability a reasonable and well-informed person would believe that I am biased and that I would not decide this case fairly. In support of his request, the grievor referred to incidents that occurred during the six days of the hearing. I will comment on those incidents and assess, as a reasonable person would do, if they contain grounds to support the allegation of bias.

[28] I did not observe counsel for the respondent coaching her witnesses or manipulating their responses through head gestures. She might have made head gestures for reasons unrelated to the hearing simply, as she argued, because she is undergoing treatment for a neck or shoulder problem. It might also have been related to a gesture of empathy for a witness who seemed very fragile and vulnerable when he testified. However, at no time did I perceive that counsel for the respondent was coaching her witnesses during examination-in-chief or cross-examination. I believe a reasonable person observing the same events would arrive at the same conclusion.

[29] It is true that, on October 16, 2008, the grievor requested that he be allowed to record the proceedings and that I denied his request. It has been the Board's practice

not to tape or otherwise record its proceedings nor to allow the recording of proceedings at the request of a party. The policy foundation of such a practice is the desire to not overly judiciarize the Board's processes and hearings and, as much as possible, to maintain the informality that has characterized the operation of labour tribunals in general. Rare exceptions to the rule have been made, mostly in cases of great complexity when hearings last for several weeks. Considering the Board's policy and considering that the adjudicator responded to the grievor's request as he would have responded to a similar request by the respondent, a reasonable person would not have concluded that the adjudicator's refusal represented a bias against the grievor.

[30] Two of the allegations made by the grievor were related to the physical arrangement of the hearing room. It is true that counsel for the respondent had to walk by the grievor's table to exit the hearing room. At no time did I observe her viewing the grievor's material. In her argument, the respondent counsel denied having done so. I believe her. But even if she had done so, a reasonable person would not conclude that I am biased because I tolerated something that I did not know occurred. It is also true that, at the respondent's request, the witness table was moved from being closer to the grievor's table to being closer to the respondent's table. I granted the request to facilitate communication during examination-in-chief. The grievor's counsel made no comments during the hearing about the change in seating arrangements. A reasonable person would not have concluded that this change in the set-up of the hearing room represented a bias against the grievor.

[31] It is true that I refused the grievor's request to cross-examine some of the respondent's witnesses himself on October 16 and 17, 2008. I refused his request because I believed that the hearing would be much more efficient if the grievor's counsel handled the cross-examination alone. I suggested to the grievor that if he had questions for the witnesses, he could pass them on to his counsel who could then ask them. The grievor's counsel asked for several recesses to speak with the grievor during cross-examination to prepare some questions. All requests for recesses were granted so that the grievor would have all the time he needed to pass on his questions to his counsel. In ruling as I did, I did not break any rule of natural justice, and I did not act in a biased manner against the grievor. I believe that a reasonable person would not conclude that my denial of the grievor's request represents a bias against the grievor.

[32] I allowed the respondent to present its evidence on the circumstances that led it to impose disciplinary action against the grievor. Most of the evidence presented was directly related to the motives for discipline. It is true that counsel for the grievor objected to the introduction of a decision from the Occupational Health and Safety Tribunal. I reserved my ruling for later and took note of the objection. I did not necessarily see the relevance of the document at the time but decided not to refuse because it could become relevant later on. Furthermore, the fact that the decision of that tribunal was under judicial review did not prevent me from accepting it as evidence at the hearing. I believe that a reasonable person would not conclude that my possible acceptance of that document as admissible evidence represents a bias against the grievor.

[33] Contrary to the allegation made by the grievor, I did not induce witnesses on October 16 and 17, 2008, to reply that they did not remember as an answer to some questions asked during cross-examination. Rather, I indicated to them that there was nothing wrong with answering "I do not remember" when they did not remember specific events that occurred in 2003 and 2004. Those witnesses had all retired since the events took place, and it was obvious at the hearing that they were not in a position to answer with a clear "yes" or a clear "no" to some specific questions asked by the grievor's counsel. I felt that it was appropriate to inform them that a person can answer that he or she does not remember when it is the case. I believe that a reasonable person would not conclude that such a comment represents a bias against the grievor.

[34] The grievor alleges that I allowed a union representative to attend the hearing as an observer. The Board's hearings are public, and there was no reason to prevent the union representative from attending the hearing. The grievor also alleges that I allowed the witnesses to talk with the union representative when in recess. The same allegation was made about Ms. Westfall. During the hearing, I provided every witness with the usual caution about when a recess or break occurs in the hearing and a witness is testifying. I did not observe any violation of that caution, and the grievor's counsel did not bring any such violation to my attention. The first occasion on which I became aware of the allegation was while reading the grievor's request for recusal on November 12, 2008. A reasonable person would not conclude bias on my part for not having intervened in an alleged violation of which I was not aware.

[35] At no time during the hearing did I act in a manner that would represent a bias against the grievor or an action favourable to the respondent. I believe a reasonable person considering my rulings and behaviour at the hearing would arrive at the same conclusion.

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

(The Order appears on the next page)

V. Order

[37] The request for recusal is dismissed.

[38] The Board will determine the dates for the continuation of the hearing in consultation with the parties.

January 26, 2009.

Renaud Paquet,
adjudicator