File: 166-2-26646

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

STEPHEN LAU

Grievor

and

TREASURY BOARD
(Revenue Canada - Customs and Excise)

Employer

Before: Yvon Tarte, Deputy Chairperson

For the Grievor: David Landry, Public Service Alliance of Canada

For the Employer: Debra Prupas and Cassandra Kirewskie, Counsel

Heard at Toronto, Ontario,
December 5, 1995.

The Grievance

On August 23, 1994, Mr. Stephen Lau was discharged from his employment as customs investigator in Toronto. The letter of discharge (Exhibit E-1) which sets out succinctly the reasons for the termination reads in part as follows:

> *The Departmental Security Directorate investigation into allegations that you attempted to extort money from Base Information Technology (BIT) has been completed.*
>
> *Based on the results of the investigation, the evidence demonstrates that you attended the premises of Base Information Technology on June 13, 1994, and attempted to extort a sum of money ($23,000.00) from Eugene Lo, President of Base Information Technology.*
>
> *Through your actions you have demonstrated that you lack the trustworthiness, judgment and sense of responsibility necessary to function as a Customs Investigator. Your actions in this regard constitute a serious violation of Sections 8, 9, and 11(a) and (b) of the Departmental Code of Conduct and Appearance.*
>
> *This constitutes a major infraction that, having regard to your duties as a Customs Investigator compromises your relationship with the Department. You have lost the Department's trust and confidence and, as a result the Department can no longer continue to employ you.*
>
> *You are hereby advised that your employment with the Department of Revenue Canada, Customs, Excise and Taxation is being terminated for cause effective the close of business August 23, 1994, by the authority granted to me pursuant to subsection 12(3) of the Financial Administration Act and in accordance with paragraph 11(2)(f) of the Financial Administration Act.*

Mr. Lau's grievance against termination was presented to the employer on September 15, 1994 and referred to adjudication on May 24, 1995.

The Facts

Several witnesses were heard. The versions of events presented by the employer and the grievor are diametrically opposed. Those versions are as follows.

The Facts According to the Employer

On June 9, 1994, Joe Ralbosky, a colleague of the grievor, was the investigator in charge of the execution of a search warrant at the premises occupied by Base Information Technology (BIT), a company involved in the sale and repair of computers.

A few days before, Mr. Ralbosky had asked the grievor to accompany him during the search of the BIT premises. In addition, another six or seven investigators accompanied them. Approximately one-half day was required to execute the search warrant.

Joseph Chow, an employee of BIT, was present during the search. He is an acquaintance of the grievor, having participated in the same martial arts course for approximately five years. Mr. Chow indicated that he likely offered on June 9, 1994 to his boss, Mr. Eugene Lo, the owner of BIT, to telephone Mr. Lau and attempt to ascertain what was going on. Mr. Lo photocopied Mr. Lau's business card, which he had received earlier during the search, and gave the copy to Mr. Chow.

On June 10, Mr. Chow attempted unsuccessfully to reach Mr. Lau. Mr. Lo stated that he was told on the 10th by Mr. Chow that the latter had been unable to reach the grievor. Mr. Chow on the other hand testified that he did not talk to his boss on the 10th.

On June 13, 1994, Mr. Allan Shin, the sales manager of BIT, noticed Mr. Lau walking back and forth outside the BIT premises at 9:30 a.m. Since his boss, Mr. Lo, was in a meeting, Mr. Shin advised Mr. Chow of the grievor's presence.

Mr. Chow stated that he first met Mr. Lau on the 13th at about 9:45 - 10:00 a.m. The two went for coffee at a restaurant across the street. Mr. Chow estimated their time in the restaurant at about 45 minutes to one hour. Mr. Chow indicated that the grievor told him, at the restaurant, that Mr. Lo was in deep trouble but that he could

fix everything for $23,000. Following their meeting at the restaurant, Mr. Chow escorted Mr. Lau back to the BIT offices where the grievor met with Mr. Lo. Mr. Chow declined the grievor's request that they both talk to Mr. Lo.

Mr. Lo stated that the meeting with the grievor lasted approximately one-half hour, between 10:20 and 10:50 a.m., during which Mr. Lau told him that documents had been found during the search which might show willful tax evasion which in turn could lead to several criminal charges. Those charges according to the grievor could lead to important fines (five counts at $25,000 each) and even possibly a jail term. Mr. Lo was shocked, he did not believe he had done anything wrong intentionally.

Mr. Lau then suggested that he and his team could help and that $23,000 would practically ensure the disappearance of his troubles. Mr. Lau asked Mr. Lo to consider his offer and get back to him by Thursday, June 16, before the file was transferred to another level in the Department. Mr. Lau also stated that he would return the $23,000 if criminal charges were in fact laid.

After the grievor left, Mr. Lo contacted his accountant, Eric Chan, who in turn reached Anthony Chan, a friend who works for Revenue Canada - Taxation. A meeting was set up for 7:00 p.m. at the BIT offices.

At the meeting, Mr. Anthony Chan suggested that Mr. Lo contact the R.C.M.P., a suggestion rejected by Mr. Lo. At about 7:30 p.m., Mr. Lo phoned Mr. Chow to ask him to contact the grievor to tell him that he would not pay. Both Messrs. Shin and Chow indicated that they were told in mid-afternoon by Mr. Lo that he wanted them to meet with Mr. Lau to tell him he would not pay. Mr. Lo was adamant these instructions were only given after the 7:00 p.m. meeting.

Mr. Chow testified that he phoned the grievor twice on June 13, once unsuccessfully at the office and once at home. During the second conversation, Mr. Chow asked Mr. Lau to go for a drink at a hotel, but then changed his mind and suggested they meet at the BIT parking lot. Mr. Chow acknowledged suggesting to Mr. Lau that they might go for some lap dancing or to a massage parlor. Mr. Chow indicated however that he was not serious when he made those suggestions.

Messrs. Shin and Chow met with Mr. Lau at the BIT parking lot. Mr. Shin stayed in the car while Mr. Chow approached the grievor to tell him Mr. Lo would not pay. Mr. Shin did not hear this conversation which lasted only a few minutes. On June 14, Mr. Chow advised Mr. Lo that he had spoken to Mr. Lau the night before to tell him that no money would be paid.

On or about June 27, Mr. Anthony Chan had lunch with a friend, Norm Okawa, a customs investigator and colleague of Mr. Lau. Mr. Chan related in passing that a customs investigator had attempted to extort $23,000 to make criminal charges in a customs investigation disappear.

The matter eventually came to the attention of Gary Colgan who was then Regional Manager of Customs Investigation. Following some verification of the allegations by Mr. Colgan, an internal investigation was launched by departmental headquarters in Ottawa. Mr. Colgan indicated that his initial reaction was that the accusations against the grievor were not true. He now believes they are. On June 30, Mr. Colgan met with Mr. Lau to advise the grievor of the allegations which had been made against him. According to Mr. Colgan, the grievor appeared very surprised that these allegations had been made.

Mr. Lau was discharged on August 23, 1994. One week later, while Mr. Lau's desk was being cleaned out by Ms. A. Johnson, a letter was found. Mr. Landry objected to the production of this correspondence since it did not relate to the grounds for termination. Ms. Prupas argued that the letter was relevant since it related directly to issues of trustworthiness, judgment and sense of responsibility raised in the letter of discharge (supra). I decided to allow the letter to be entered as an exhibit and reserved on Mr. Landry's objection as to relevance.

The letter (Exhibit E-10), dated December 13, 1992, is addressed to the president of a company in Thailand. It reads:

> *Re:* *<u>Crocodile Oil dealership in Canada</u>*
>
> *During the month of October this year, I was a tourist in Thailand and purchased a small bottle of crocodile oil at 60 B of your currency. This oil really works.*

> *I wish to apply for exclusive dealership for this product in Canada and wish that you will instruct me of the procedure. In the meantime, please forward me a dozen (12) of the large crocodile oil (At the time of visit it was 100 B each) at your earliest convenience. Please bill me at the above address. For the importation documents, ensure that you will remove the labels and labelled as something else without your identification.*
>
> *Wishing you a Merry X'Mas !*

Mr. Colgan indicated that crocodile oil was a controlled substance and its importation without the appropriate permit was prohibited by the *Export and Import Permits Act*, the Import Control list and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). He referred to CITES control list No. 10 (Exhibit E-13) which specifically covers "crocodylia". Certain crocodile and alligator species, covered by Appendix I of the control list, are said to be "rare or endangered and trade will not be permitted for primarily commercial purposes". Other crocodile and alligator species, covered by Appendix II of the control list, are not currently rare or endangered. Generally trade involving these reptiles "must be covered by an appropriate Convention export permit issued by the government of the exporting nation before entry to or export from Canada will be allowed". No evidence was adduced by the employer to show under which category the Thai crocodiles were covered.

Mr. Colgan also referred to the departmental Code of Conduct and Appearance (Exhibit E-4) which requires that every employee discharge his or her responsibilities "with integrity, efficiency and in such a way as to command a high degree of trust, confidence and respect on the part of other departments and agencies, departmental clientele and the public at large". In addition, the Code requires that employees such as Mr. Lau, who are Peace Officers under the Criminal Code (see extract, Exhibit E-7), "have an added responsibility to conduct themselves in a way that is not only above reproach but which is demonstrably above reproach in the eyes of the general public".

During the departmental investigation, Mr. Colgan determined that it took approximately 20 minutes to drive from the office of Mr. Lau's dentist to the BIT premises. This verification was conducted to check out an alibi raised by the grievor.

The test was conducted during mid-afternoon when traffic was light. All speed limits were observed. Mr. Colgan admitted during cross-examination that his estimate of 20 minutes for the drive between the dentist's office and BIT might be a bit low.

The Facts According to the Grievor

The grievor presented a version of events that was substantially different than what precedes. Mr. Lau has worked for the federal government for 17 years. He was employed as a customs inspector in August 1992.

On June 9, 1994, the grievor was involved in a search of the premises of a computer business (BIT) owned by Eugene Lo. He had been asked to help out in this search by a colleague, Joe Ralbosky. During the search, Mr. Lau and Mr. Ralbosky gave business cards to Mr. Lo.

At some point during the search he recognized Joe Chow, an acquaintance he had met previously while taking martial arts course. The two exchanged pleasantries.

On June 13, 1994, Mr. Lau had taken the day off. He dropped his son off at school at 8:45 a.m. and then proceeded to his dentist's office for an appointment at 9:15 a.m. Mr. Lau was at the dentist's office until 10:10 a.m. This evidence is corroborated by Julie Allaire, a dental assistant and receptionist who works in the office of Dr. Lee, Mr. Lau's dentist. Ms. Allaire also indicated that it takes approximately five minutes to leave the doctor's office and exit onto the street with a vehicle parked in the parking garage.

Mr. Lau indicated that he left the parking garage at his dentist's office at approximately 10:15 a.m. and proceeded to a nearby Canadian Tire store. From this store, the grievor then proceeded to the residence of Lilly Quan, his sister. He arrived at his sister's place between 10:45 and 11:00 a.m. and left before 11:30 a.m. in order not to be seen by his brother-in-law who was scheduled to come back home at 11:30 a.m. Mr. Lau wanted to discuss with his sister what they should do with their mother who was getting on in age and not feeling well.

Ms. Quan testified that her brother was at her house on June 13, 1994 between 10:00 and 11:00 a.m. She remembers the date clearly because her brother showed her a letter (Exhibit G-3) from the Mon Sheong Home for the Aged which stipulates that

certain documents must be returned before June 15, 1994 and then told her that they had only two days to make up their minds.

Mr. Lau got some lunch after he left his sister's residence and then went shopping for groceries. He returned home at approximately 2:15 p.m. At approximately 4:00 p.m., the grievor received a call from Mr. Chow who wanted to have a drink with him. They agreed to meet at 9:00 p.m. at a local hotel. Mr. Lau explained that earlier in 1994 Mr. Chow had talked to him during a martial arts graduation party about fraudulent activities in the computer business. Mr. Lau believed that Mr. Chow now wanted to give him more information about these activities.

One hour later Mr. Chow again phoned the grievor to suggest they meet instead at 9:30 p.m. in the BIT parking lot. Mr. Chow indicated he had something to do at the office. He also told the grievor that they could take in some lap dancing later on. Mr. Lau testified that he wanted to cancel the rendezvous after Mr. Chow had hung up but did not know how to reach him.

Mr. Lau met with Mr. Chow at the BIT parking lot. Mr. Chow suggested they go to a nearby massage parlor which would give them a discount. Mr. Lau refused. The conversation ended shortly thereafter and they each went their own way.

Mr. Lau was not aware of the serious allegations against him until June 30, 1994 when he met with Messrs. Colgan and Moyle. On July 5, 1994, the grievor was given details of the accusations made by Mr. Lo and his employees. On July 14, 1994, Mr. Lau was interviewed for about three hours by the departmental investigator. He was discharged on August 23, 1994.

When asked why the employer's witnesses would lie about his conduct, Mr. Lau surmised that the false accusations were likely retaliatory for his involvement in the investigation and successful prosecution of several Chinese computer businesses.

Mr. Lau testified that he has no financial difficulties. His wife also works and they have very few debts. The grievor's disciplinary record is clear.

Mr. Lau explained that the label removal instructions in the "crocodile oil" letter had been given to avoid the hassle of having to get to and clear customs on

Front Street, in Toronto. It was not his intention to avoid customs payment, which would have been minimal. Finally, he was not aware at the time that the crocodile oil was a banned or controlled substance especially since it was derived from "domesticated" reptiles. The grievor indicated that he never in fact received the oil he had ordered on December 13, 1992.

Arguments

For the Employer

In a case such as this one, the employer needs to prove that the misconduct alleged has occurred and that the penalty imposed was appropriate. The employer need only show on a balance of probabilities that the grievor attempted to extort money from Mr. Lo.

The "crocodile oil" incident is relevant since it relates to the original grounds for discharge, that is: lack of trust; lack of judgment; breach of the Code of Conduct; and the violation of certain statutes Mr. Lau was charged to enforce. McIntyre (Board file 166-2-25417), Tran (Board file 166-2-23878) and Re McKendry and Deputy Minister of Department of Regional Economic Expansion (1973), D.L.R. (3d) 305, (F.C.A.) stand for the principle that evidence of misconduct obtained by an employer after discharge may be introduced at an adjudication hearing if the new misconduct is closely related to the original grounds for discharge or constitutes an alternative justification for the termination. The employer therefore contends that the discharge of the grievor may be maintained on the sole basis of the "crocodile oil" incident even if one concludes that the alleged extortion has not taken place.

Although there are time discrepancies in the evidence presented, there can be no doubt that Mr. Lau was at the BIT premises on the morning of June 13, 1994.

The credibility of witnesses in this case is extremely important. In Faryna v. Chorny, 4 WWR (NS) 171, Mr. Justice O'Halloran of the B.C. Court of Appeal sets out certain useful guidelines to assess the question of credibility.

The evidence of the employer's witnesses is to be preferred to the version of events presented by the grievor, portions of which only came out at this hearing.

Both the extortion attempt and the "crocodile oil" letter constitute clear violations of the Code of Conduct (Exhibit E-4). Mr. Lau is a peace officer who has shown total disrespect for the statutes he is obligated to enforce. His conduct in the "crocodile oil" incident casts a shadow across all of his testimony. Mr. Lau is not to be believed or trusted. On the other hand, Messrs. Lo, Chow and Shin have no reason to lie about the extortion incident.

The Matthews (Board file 166-2-20753) and Pauzé (Board files 166-2-25320 and 25321) decisions show that conduct which shows lack of judgment and integrity will necessarily lead to discharge.

For the Grievor

The penalty of discharge would have been appropriate in this case if Mr. Lau had in fact been guilty of attempted extortion. The fact is, however, that he was not. The grievor had absolutely no motive to engage in such irrational and unorganized conduct. The evidence clearly moves that Mr. Lau could not have been at the BIT premises between 9:30 and 10:30 a.m. on June 13, 1994 as is alleged by Messrs. Lo, Chow and Shin.

The testimony of these last mentioned witnesses was often contradictory and totally unbelievable. The meeting at the BIT parking lot on the evening of June 13, 1994 was likely set up to "get something on Mr. Lau". Why else would Mr. Chow suggest that they go to a massage parlor or for some lap dancing. In fact, there really was no reason for a meeting between Mr. Chow and Mr. Lau if the only thing that had to be said was that Mr. Lo would not pay.

The actions and statements of Messrs. Lo, Chow and Shin indicate that they were trying to harm Mr. Lau, the only oriental on the investigation team and a person who had been involved in the prosecution of several other Chinese computer businesses.

The *Public Service Staff Relations Act* directs that an adjudicator hear only matters that have gone through the appropriate grievance process. In such a context, the "crocodile oil" incident is not properly before me and should not be used to justify Mr. Lau's discharge. It constitutes a completely new unrelated ground for termination. Messrs. Brown and Beatty, Canadian Labour Arbitration, Third Edition, section 7:2200, discuss these issues at length. The grievance should be allowed.

Reply of the Employer

The fact that there exists some contradictions in the testimony of Messrs. Lo, Chow and Shin supports the fact that they are telling the truth. If there was a conspiracy to "set up" Mr. Lau, surely they would have gotten their stories straight.

There are also inconsistencies in Mr. Lau's testimony and those must be taken into account in assessing credibility. Mr. Lau acted irrationally and got caught. Now he must pay the price for his wrongdoing.

Reasons

The parties to this adjudication have tendered diametrically opposed versions of events on June 13, 1994. On the balance of probabilities, I must conclude that Mr. Lau did not attempt to extort money from Mr. Lo.

The testimony of Ms. Allaire was not challenged. I accept it without hesitation. It was therefore impossible for Mr. Lau to be at the BIT premises on June 13, 1994 at the time stipulated by the employer's witnesses. Most of the employer's witnesses were interviewed shortly after the incident by the departmental investigator. Their versions of the alleged incident were fresh in their minds but they were likely unaware that the grievor had an ironclad alibi.

The grievor has always maintained his innocence. His version of events has been consistent throughout.

I might add that this case has been plagued by language problems. Some of the witnesses who appeared before me with the help of an interpreter initially gave their version of events to the employer in the English language. This may well have been at the root of some of the confusion which exists in this case.

Mr. Justice O'Halloran in Faryna v. Chorny (supra), at pages 174 and 175, stated eloquently certain principles which are useful in assessing the credibility of witnesses:

> *But the validity of evidence does not depend in the final analysis on the circumstance that it remains uncontradicted or the circumstance that the judge may have remarked favourably or unfavourably on the evidence or the demeanour of a witness; these things are elements in testing the evidence but they are subject to whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time: see In re Brethour v. Law Society of B.C. (1951) 1 WWR (NS) 34, at 38-39.*
>
> *If a trial judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, see Raymond v. Bosanquet Tp. (1919) 59 SCR 452, at 460. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial judge and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.*
>
> *The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story 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 conditions. Only thus can a court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skillful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.*
>
> *The trial judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial judge with a divine insight into the hearts and minds of the witnesses. And a court of appeal must be satisfied that the trial judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.*

The testimony of the grievor was as credible as the testimony of Messrs. Lo and Chan. It has, however, the added advantage of agreeing with the clear and believable testimony of Ms. Allaire.

I must add that the conduct which Mr. Lau is accused of engaging in borders on the irrational. Why would any person intent on committing extortion publish the fact by discussing the crime with an employee of the intended victim?

Having concluded that the misconduct for which Mr. Lau was discharged has not been proven, I must now decide what to do with the "crocodile oil" incident. The McKendry, Tran and McIntyre (supra) cases stand for the principle that an adjudicator should accept evidence of misconduct discovered after discharge as long as that evidence is relevant to at least the issues raised by the case. They do not support the position that grounds for termination can be altered following discharge. An employee is entitled to know why he has been fired and if he or she is not satisfied with the reasons given by the employer, a grievance may ensue.

Section 92 of the *PSSRA* allows that only grievances which have come through the appropriate grievance process may be referred to adjudication. The Federal Court

of Canada stipulated in Burchill v. Attorney General of Canada 1981] 1 F.C. 109, that a grievor could not at adjudication alter the nature of the case which had been presented on his behalf during the grievance process.

The converse of that notion is that the employer has no authority under the *PSSRA* to solely justify a discharge at adjudication on grounds which are different from those discussed during the grievance process.

In other words relevant evidence of misconduct discovered after discharge may, in a proper case, be used to coroborate the basis for the discharge. However, where the actual ground on which the discharge is based is not established, after discovered evidence cannot be used to justify the discharge.

It is always inappropriate to condemn someone without the benefit of due process. The perils of doing so are even greater in this case where the employer acknowledged that the "crocodile oil" incident was not fully investigated. Nor must I add was the applicability of the various import/export rules properly assessed to the facts of this case. It might well be that the farm crocodiles of Thailand are an Appendix II species under the CITES control list (Exhibit E-13) for which only an export permit from the Thai government is required before entry to Canada.

The grievor's suggestion in his "crocodile oil" letter that an imported product be improperly identified is certainly wrong and may well deserve sanction. The nature and severity of that punishment can only be determined after the necessary checks and balances have taken place.

The grievance of Mr. Lau is allowed. All references to Mr. Lau's discharge shall be removed from the employer's files. Mr. Lau is to be reinstated without loss of pay and benefits. The parties have three months from the release of this decision to agree to the amount owing to the grievor, failing which either party may, within two weeks thereafter, refer the question to me.

Yvon Tarte,
Deputy Chairperson

OTTAWA, February 9, 1996