

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

JOHN RICHARD McELREA

Grievor

and

**TREASURY BOARD
(Industry Canada)**

Employer

Before: [Jean Charles Cloutier, Board Member](#)

For the Grievor: [Pascale-Sonia Roy, Counsel, and
Lyette Babin, Professional Institute of the Public Service
of Canada](#)

For the Employer: [Kathryn A. Hucal, Counsel](#)

(Decided without an oral hearing.)

INTERIM DECISION

On July 14, 1997, the grievor grieved a two-week suspension without pay which the employer had imposed on him. This grievance was referred to adjudication on October 2, 1997. The hearing of this case began before me on March 23, 1998 and continued from March 24 to 27, 1998. The grievor was represented at the hearing by his bargaining agent.

On March 27, 1998, the grievor's bargaining agent requested an adjournment in order to obtain the services of counsel to represent the grievor for the remainder of the hearing. On April 2, 1998, the Board's Assistant Secretary informed the parties of the following:

The adjudicator after considering the arguments of the parties granted the adjournment on the condition that the hearing of this matter would proceed and continue at the point where the hearing was adjourned.

The hearing of this case continued on September 8, 1998, at which date the grievor's counsel presented a written request for leave to re-open the cross-examination of the employer's witnesses. Another adjournment was granted, to allow the employer to respond in writing to the request.

Arguments

The grievor raised the following two arguments in support of his request:

...

18. *The grounds for that motion are as follows:*

(a) The Browne v. Dunn rule was not followed during cross-examination of [the employer's] witnesses. There was a general failure to identify to the witnesses the areas where their credibility would be challenged by contradictory evidence. Therefore those witnesses were deprived of an opportunity to reconsider their responses where it was pointed out that contradictory evidence would be called.

(b) Important points in the cross-examination of those witnesses were omitted to an extent that the grievor will be deprived of a fair and full hearing, in the event that these points are not addressed....

...

The employer responded to the grievor's request on September 30, 1998. Amongst other things, it submitted that:

- although the grievor cites the rule in *Browne v. Dunn* (1894), 6 R. 67 (H.L.) to argue that cross-examination of the employer's witnesses needs to be re-opened to ensure that they will have an opportunity to respond to contradictory evidence which will be introduced to challenge their credibility, the grievor did not identify or provide any such evidence;
- although the grievor invokes the rule in *Browne v. Dunn, supra*, his real concern is to give his new counsel an opportunity to re-cross-examine the employer's witnesses;
- all the issues raised by the grievor in support of his request were canvassed in the examinations-in-chief and cross-examinations of the employer's witnesses already conducted;
- the grievor's request to re-open the cross-examination of the employer's witnesses is not the result of inadvertence or of evidence that was not accessible at the time of the examinations-in-chief or cross examinations of these witnesses; and
- the granting of the grievor's request would result in inconvenience and additional expense for the employer and undue hardship for some of its witnesses.

On October 16, 1998, the grievor replied to the employer's response. He submitted that, in the context of this request, he need not identify specifically the evidence he intends to call to contradict the employer's witnesses. The grievor added that:

...

16. *It is important to note that the [grievor] will not object to the employer conducting a re-examination of its witnesses should further cross-examination be allowed, or to call additional witnesses other than those identified in its presentation of its evidence in chief.*

17. *Further, in the eventuality that the employer could establish that the cross-examination of the [grievor]'s witnesses was deficient, as a result of the evidence introduced through a further cross-examination of the employer's*

witnesses, the [grievor] will not object to the calling of those witnesses.

...

Reasons for Interim Decision

The grievor is asking me to allow him to re-open the cross-examination of the employer's witnesses because 1) the rule in *Browne v. Dunn, supra*, would prevent him from contradicting the testimony of these witnesses because, in cross-examining them, his representative omitted to inform them that she intended to contradict their testimony on specific points and 2) his representative's omission to cross-examine them on specific points was so important as to deprive him of a fair and full hearing.

The rule in *Browne v. Dunn, supra*, has been applied in many different ways. However, I do not believe that this rule is as absolute as the grievor alleges. At this stage of the hearing, I do not consider that the grievor is prohibited from adducing evidence to contradict the testimony of the employer's witnesses. I would nonetheless add that I am confident that the approach taken by Adjudicator Potter in *Avey* (Board file 166-18-27611) would also be appropriate in this case, that is, if the grievor were to adduce evidence aiming at contradicting the testimony of the employer's witnesses, the employer would be allowed to either re-examine its witnesses or present rebuttal evidence. In my view, proceeding in this fashion would protect both the integrity and fairness of this hearing.

Now, with regard to the allegation that the omission of the grievor's representative to cross-examine the employer's witnesses on specific points was so important as to deprive the grievor of a fair and full hearing, I wish to point out that the grievor, at that stage of the hearing, was represented by his bargaining agent. I cannot ignore the fact that the grievor's representative exercised the right to cross-examine the witnesses called by the employer and had, at that time, full latitude to canvass any issues she considered relevant to his case. The fact that the cross-examination did not provide the grievor with the evidence which he now considers he would have liked to obtain is not sufficient in my mind to justify allowing him to re-open the cross-examination of the employer's witnesses.

For all these reasons, I deny the grievor's request for leave to re-open the cross-examination of the employer's witnesses.

Jean Charles Cloutier
Board Member

OTTAWA, November 4, 1998.