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Parliamentary Employment and Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

LUC SÉGUIN

Grievor

and

HOUSE OF COMMONS

Employer

Before: Guy Giguère, Board Member

For the Grievor: Antal Bakaity, Counsel

For the Employer: Charles V. Hofley, Counsel

Heard at Ottawa, Ontario,
February 3 and 4 and May 15, 2000.
(Written submissions filed June 5, July 3 and 17, 2000.)

[1] On December 31, 1998, Luc Séguin, a maintenance worker at the House of Commons, was dismissed from his employment. In its letter of December 31, 1998, the employer explained that Mr. Séguin's dismissal was the result of his aggressive behaviour during incidents that occurred at a staff Christmas party on December 18, 1998.

[2] On January 12, 1999, Mr. Séguin grieved the termination of his employment. The employer rejected his grievance and it was then referred to adjudication. The hearing of this grievance was held on February 3 and 4, 2000 and continued on May 15, 2000. Several witnesses testified on behalf of the employer to explain generally the events that occurred on December 18, 1998.

[3] Mr. Stéphane Pilon was the last of the employer's witnesses. Mr. Bakaity cross-examined him on events that took place in the reception room and outside (how he got to the elevator; when he passed by the security guard; whether he feared losing his job; and so on).

[4] When the hearing resumed, Mr. Hofley confirmed that he would not be calling any other witnesses. Mr. Bakaity then called his first witness, Yves Labrèche. As Mr. Labrèche was testifying about an event that he witnessed outside the reception room involving the grievor, Mr. Pilon and another individual, Mr. Hofley raised an objection to this line of questioning based on the rule established in *Browne* v. *Dunn* (1894), 6 R. 67 (H.L.). Mr. Hofley explained that Mr. Pilon had testified on this event and that Mr. Bakaity had not specifically cross-examined him in this regard. Mr. Bakaity replied that he had put several questions to Mr. Pilon during his cross-examination but had not at the time foreseen that he would ask Mr. Labrèche to testify on behalf of the grievor.

[5] I explained to both counsel that there was some jurisprudence to the effect that, if the rule in *Browne* v. *Dunn* was not observed, there were different ways to address it. I asked counsel what their position would be should Mr. Pilon be recalled to address what Mr. Hofley felt was a breach of the rule in *Browne* v. *Dunn*.

[6] Mr. Hofley replied that it would be inappropriate to recall Mr. Pilon, as it would permit Mr. Bakaity to split his case. Mr. Bakaity submitted that Mr. Hofley could recall Mr. Pilon in rebuttal, in which case he would not cross-examine him. Mr. Hofley replied that he preferred to submit written submissions since the rule in *Browne* v. *Dunn*

could apply to the whole cross-examination of the employer's witnesses by Mr. Bakaity. He also requested that I render a written decision. Mr. Bakaity indicated that he as well preferred to submit written submissions with a written decision to follow.

[7] I therefore asked both counsel to prepare written submissions, following receipt of which I would render a written decision.

[8] Mr. Hofley forwarded his submissions, as requested, on June 5, with Mr. Bakaity replying on July 3 and Mr. Hofley submitting a rebuttal on July 17, 2000.

Arguments

[9] The following is a summary of the written submissions of the parties on the applicability of the rule in *Browne v. Dunn*.

For the Employer

[10] Mr. Hofley submits that the rule in *Browne* v. *Dunn* applies to labour arbitration, as established in numerous labour arbitration cases. The rule is helpful in establishing the truth and preventing unfairness to witnesses. It is a fundamental principle of fairness and not a mere legal technicality. The 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 contradictory evidence would be called.

[11] Fairness to the employer's witnesses requires that they each be cross-examined on all points of their evidence that is to be contradicted by the evidence of the grievor's witnesses. By not having put the contradictory evidence to the employer's witnesses in an express and particularized manner, they cannot now be impeached by the testimony of the grievor's witnesses.

[12] Mr. Hofley does not see the merits of Mr. Bakaity's argument at the hearing that he was not aware that he would be calling Mr. Labrèche as a witness on behalf of the grievor. Mr. Bakaity could have contacted Mr. Labrèche at any time prior to or during the hearing of this matter.

[13] Mr. Hofley notes that, as an exception to the rule in *Browne* v. *Dunn*, there will not be an obligation to cross-examine if it is obvious that a witness' testimony on a particular point is being challenged or if the intention to dispute the matter is obvious from the nature of the case. He submits that this exception could not apply to the present case since it was not obvious to the employer's witness, Mr. Pilon, that Mr. Labrèche's evidence would contradict his evidence.

[14] Addressing the breaches of the rule in *Browne* v. *Dunn* by admitting the disputed evidence, recalling the witness in question and providing him with an opportunity to speak to the contradictory evidence on which he was not cross-examined pose significant problems.

[15] Mr. Hofley states that there is a prejudice that cannot be entirely erased by recalling witnesses to restore credibility or testimony through re-examination. Recalling witnesses to address breaches of the rule in *Browne* v. *Dunn* also results in witnesses being forced to undergo the inconvenience and emotional distress that result from a return to the stand. This is particularly problematic in the instant case, involving as it does complainants who were victims of violence and threats that continue to affect their lives. Moreover, this approach would allow Mr. Bakaity to have two opportunities to cross-examine the employer's witnesses, indeed permitting him to split his case, and would unduly lengthen the proceedings.

[16] For all the above reasons, Mr. Hofley submits that the employer's objections are valid and that the grievor's counsel should be precluded from introducing such evidence or relying on it in a later argument. In support of his argument, Mr. Hofley relies on the following decisions: *John Clark et al.* v. *Representatives Association of Ontario, Local 414 of the Retail, Wholesale and Department Store Union, AFL-CIO-CLC and Retail, Wholesale and Department Store Union, AFL-CIO-CLC,* [1991] OLRB REP. May 598; *Re Laidlaw Waste Systems Ltd. (St. Catharines) and Canadian Union of Public Employees, Local 1045* (1993), 37 L.A.C. (4th) 146; *Re The Donwood Institute and Ontario Public Services Employees Union, Local 541* (1996), 56 L.A.C. (4th) 1; *Re Sunbeam Residential Development Centre and London & District Service Workers Union, Local 220* (1996), 54 L.A.C. (4th) 54; and *Re Goodyear Tire and Rubber Co. and United Rubber Workers, Local 232* (1976), 11 L.A.C. (2d) 161.

For the Grievor

[17] Mr. Bakaity submits that there is no hard and fast application in Canada of the rule in *Browne* v. *Dunn*. The Supreme Court of Canada in *Palmer* v. *The Queen,* [1980] 1 S.C.R. 759, indicated that it would be inappropriate to render such testimony inadmissible, but it should merely go to the weight that the evidence is given by the trier of fact.

[18] Mr. Bakaity states that the interest of allowing full argument in defense outweighs the interest of fairness in having witnesses being given a chance to respond to matters on which they might be impeached. The effect of denying this evidence admissibility would be to ultimately silence the grievor on this matter, but Mr. Séguin needs to be heard on this issue. The adjudication is about the search for truth and Mr. Pilon is not the subject of the termination. Mr. Pilon's interests can be safeguarded by allowing him to return to the stand to explain himself.

[19] As noted by Mr. Hofley, there are exceptions to the rule in *Browne* v. *Dunn*. Mr. Pilon was put on notice that evidence might be called to contradict him. Even though his examination was brief, he was questioned on the important points: about how he arrived outside; about not doing anything to prevent the incident, even though he passed by security; and so on. When cross-examining, counsel does not have an obligation to put to witnesses every question so that they may correct all their responses.

[20] Mr. Bakaity argues that there is no need to place the witness on notice if the nature of the case makes it obvious to the parties that a particular issue is being questioned. This is the case for all witnesses to the incident of December 18, 1998. Mr. Pilon should have expected that his story would be contradicted by the testimony of other witnesses. It is obvious that the events in question will be disputed, as they have been throughout the entire grievance process. Counsel for the employer and Mr. Pilon knew that contradictory versions of the events existed; they are contained in the investigatory report of this case and they were also part of the grievor's consistent position at the early stages of this process.

[21] Mr. Bakaity states that, under paragraph 15(*c*) of the *Parliamentary Employment and Staff Relations Act* (*PESRA*), any evidence may be heard in any manner, at the discretion of the adjudicator hearing the grievance, even if the evidence would not

otherwise be admissible in a court of law. Therefore, the adjudicator has the authority to admit the disputed evidence and permit Mr. Pilon to return to the stand.

[22] As indicated at the hearing, in order to allay the fears of counsel for the employer that Mr. Bakaity is being granted an opportunity to split the case, Mr. Bakaity undertakes not to cross-examine Mr. Pilon.

[23] In conclusion, counsel for the grievor reiterates that the objections of counsel for the employer should be overruled and that all evidence on these points be allowed. In the alternative, if necessary, Mr. Pilon may be allowed to be called in rebuttal (i.e. with no cross-examination by counsel for the grievor).

[24] In support of his argument, Mr. Bakaity relies on the following decisions: *Canadian Imperial Bank of Commerce* v. *Barley Mow Inn Inc.* (1994), 1 B.C.L.R. (3d) 232, 30 C.B.R. (3d) 241 (B.C. S.C.); *Canadian Union of Postal Workers and Canada Post Corp.,* [1997] C.L.A.D. No. 208 (Q.L.); *Re Dough Delight Ltd. and Bakery, Confectionery and Tobacco Workers International Union, Local 181* (1998), 74 L.A.C. (4th) 144; *Gendron* v. *Kelowna Flightcraft Ltd.,* [1999] C.L.A.D. No. 519 (Q.L.); and *Re Maple Leaf Poultry and United Food & Commercial Workers International Union, Local 175* (1998), 70 L.A.C. (4th) 249.

Rebuttal

[25] Mr. Hofley disagrees with the argument that the employer was fully aware that there were contradictory versions of the incidents that occurred on December 18, 1998. The employer's only knowledge in regard to the potential evidence of Mr. Labrèche was that Mr. Labrèche's testimony might not be consistent with the statements made and signed by him during the investigation of this matter. The employer submits that any knowledge it had that Mr. Séguin's version of the events had to be different from that of Mr. Pilon does not negate counsel for the grievor's obligation in regard to cross-examination of the employer's witnesses. Even if the employer was aware that its witnesses' versions of the events might be questioned, this did not relieve Mr. Bakaity of his obligation to question those witnesses on the specific aspects of their testimony that he would be challenging.

[26] Mr. Hofley also disagrees with another submission of Mr. Bakaity's that Mr. Pilon was put on notice by way of implication. Mr. Hofley submits that the present case is not a situation where the employer's witnesses were squarely on notice for particular and specific issues, such as the different versions of the events that took place on December 18, 1998.

[27] Mr. Hofley argues specifically that any evidence that differs from the written statements of Mr. Labrèche would have been a surprise to the employer's witnesses. Mr. Bakaity is attempting to lead evidence of a different version of events of which the witnesses for the employer could not have had knowledge.

[28] Mr. Hofley states that recalling the employer's witnesses would not be acceptable since several of the employer's witnesses experienced tremendous anxiety and had significant concerns in regard to their safety.

[29] In conclusion, Mr. Hofley submits that the employer's objections are valid and counsel for the grievor should be precluded from introducing such evidence.

Reasons for Decision

[30] Both counsel submitted jurisprudence showing how the rule in *Browne* v. *Dunn* has evolved and is applied by labour arbitration tribunals. Generally speaking, Mr. Hofley pleads for a strict application of the rule in *Browne* v. *Dunn*, with few exceptions not applying in the instant case. He also contends that recalling his witness to address breaches of the rule in *Browne* v. *Dunn* would not be acceptable.

[31] On the other hand, Mr. Bakaity submits that there is no hard and fast application in Canada of the rule in *Browne* v. *Dunn* and that exceptions to the rule are applicable in this case. He also claims, in the alternative, that breaches of the rule in *Browne* v. *Dunn* could be addressed by Mr. Pilon being recalled, with no cross-examination.

[32] Decisions submitted by Mr. Hofley suggest that discretion in the application of the rule in *Browne* v. *Dunn* is limited, while the one submitted by Mr. Bakaity permits more flexibility in its application.

[33] A brief review of the jurisprudence of higher courts is helpful in establishing what is the applicable law in the instant case.

[34] *Browne* v. *Dunn (supra)* is a decision of the House of Lords that has been quoted extensively. To summarize the rule found in this decision, Lord Chancellor Herschell said that, when a party intends to suggest that a witness is not telling the truth on a particular point, that party is obliged to ask some questions in cross-examination so the witness knows that the testimony in relation to this given point could be challenged and therefore has an opportunity to provide an explanation.

[35] But even in the decision of the House of Lords, exceptions to the rule were outlined. Lord Chancellor Herschell found that, in some cases, where notice has been given and the point is so manifest, it is not necessary to put questions to the witness. Lord Morris concurred with Lord Chancellor Herschell and added that there could be situations where a story told by a witness was so incredible that the most effective cross-examination would be to ask the witness to leave the box. Lord Morris concluded that there was no absolute rule with regard to cross-examining a witness as a necessary preliminary to impeaching the witness' credibility.

[36] Lord Morris' conclusion was specifically embraced by the Supreme Court of Canada in *Palmer* v. *The Queen* (*supra*) where Justice McIntyre, delivering the reasons for the Court, agreed with the Court of Appeal of British Columbia (per McFarlane, J.A., 1 W.C.B. 914) that the effect to be given to the absence or necessity of cross-examination depends upon the circumstances of each case:

. . .

> *… There can be no general or absolute rule. It is a matter of weight to be decided by the tribunal of fact….*

. . .

[37] The *Palmer* v. *The Queen* decision of the Supreme Court of Canada is a precedent setting decision. Following this decision, Canadian courts have taken the position that no absolute or general rule exists with respect to the significance of cross-examining or not cross-examining a witness and view it generally as a matter of weight to be decided by the trier of facts.[1]

[1] *R.* v. *Verney* (1993), 67 O.A.C. 279, 87 C.C.C. (3d) 363; *R.* v. *MacKinnon* (1992), 72 C.C.C. (3d) 113, 12 B.C.A.C. 302; *Hurd* v. *Hewitt* (1994), 20 O.R. (3d) 639, 75 O.A.C. 205, 120 D.L.R. (4th) 105; *R.* v. *McNeill,* [2000] O.J. No. 1357 (Q.L.) (Ont. CA.); *Budnark* v. *Sun Life Assurance Co. of Canada,* [1996] 7 W.W.R. 670, 21 B.C.L.R. (3d) 35, 72 B.C.A.C. 290.

[38] Recent decisions of the Ontario Court of Appeal and the British Columbia Court of Appeal have laid out in more detail the principle found in the Supreme Court of Canada decision in *Palmer* v. *The Queen (supra).* In *R.* v. *Verney* (*supra*), the Ontario Court of Appeal said that counsel is not obliged to go through every detail that the defence does not accept:

. . .

> *… It is not, however, an absolute rule and counsel must not feel obliged to slog through a witness's evidence-in-chief putting him on notice of every detail that the defence does not accept. Defence counsel must be free to use his own judgment about how to cross-examine a hostile witness. Having the witness repeat in cross-examination, everything he said in chief, is rarely the tactic of choice….*

. . .

[39] In *Hurd* v. *Hewitt* (*supra*), Justice Carthy, for the Ontario Court of Appeal, stated, at page 650:

. . .

> *… The argument that a party puts after failing to ask obvious questions of a witness may be so severely impaired as to be characterized as incredible. Yet, the evidence of a witness may be so obviously flawed that a party's best interest lies in leaving that evidence to stand naked. In either event, the tribunal must assess the evidence and adjudicate upon the rights of the parties as those rights appear from that evidence, and not the evidence minus that which appears unfair to third parties.*

. . .

[40] While Mr. Bakaity's cross-examination of Mr. Pilon was not extensive, he did ask him several questions, therefore putting him on notice that his version of the events might be somewhat challenged by the grievor's evidence. He was asked about specific events that occurred on December 18, 1998 involving several witnesses and the grievor.

[41] In view of the questions that were asked by Mr. Bakaity during cross-examination and jurisprudence that says that counsel is not obliged to ask questions on every detail, I find that Mr. Pilon was sufficiently on notice about his

version of the events that took place on December 18, 1998. It is therefore not necessary to examine other arguments raised by both counsel.

[42] Accordingly, Mr. Hofley's objection to the questioning of Mr. Labrèche on the basis of the rule in *Browne* v. *Dunn* is overruled Mr. Bakaity can proceed with his examination-in-chief of Mr. Labrèche. However, in pursuit of fairness, Mr. Hofley will be allowed to recall his witness in rebuttal, as indicated in *R* v. *McNeill (supra).* If Mr. Pilon is available, Mr. Hofley then can take up this opportunity or decline it.

Guy Giguère,
Board Member

OTTAWA, August 28, 2000