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Citation: 2004 PSSRB 88

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

GRANT GALE

Grievor

and

TREASURY BOARD
(Solicitor General Canada – Correctional Service)

Employer

Before: Joseph W. Potter, Vice-Chairperson

For the Grievor: Martel Popescul, Q.C., Counsel

For the Employer: Richard Fader, Counsel

Written submissions submitted on May 14 and 21 and June 30, 2004.

[1] On August 17, 2001, I issued a decision concerning the termination grievance filed by Grant Gale (*Gale v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2001 PSSRB 85). The termination was upheld.

[2] An application for judicial review was filed with the Federal Court, Trial Division by Mr. Gale and the application was dismissed (*Gale v. Canada (Treasury Board)*, 2002 FCT 1084).

[3] A further appeal was made to the Federal Court of Appeal and on January 12, 2004, a judgment was rendered (*Gale v. Canada (Treasury Board)*, 2004 FCA 13), stating, in part:

> *(1) the appeal be allowed and the decision of the Trial Division set aside.*
>
> *(2) the adjudicator's decision be set aside and the matter be referred back to the same adjudicator with directions to consider the information in the August 17, 2001 letter from counsel for the respondent and to provide the parties with an opportunity to make submissions as to its effect on the outcome of the adjudication; and*
>
> *(3) ...*

[4] On February 10, 2004, counsel for the grievor sent a letter to the Public Service Staff Relations Board (the Board), addressed to me, and enclosed a copy of the August 17 2001 letter in question. The letter states, in part:

> ...
>
> *As you are aware, at the conclusion of the hearing the parties agreed to provide the Adjudicator with the status of A. Mardell on May 19, 1999.*
>
> *This will confirm that A. Mardell was doing A&D in the main institution on May 19, 1999, and was not scheduled to work in the FSW on May 19, 1999.*
>
> ...

I note here that although the letter says "A. Mardell", I believe it should read "L. Mardell". All references in the Court of Appeal's decision state the person in question to be L. Mardell, and I will do the same.

[5] The February 10, 2004 letter also said, in part:

> *... I will wish to make representations to you concerning whether it is appropriate for you to render a decision given the very unique circumstances of this case ...*

[6] Following the receipt of written submissions on the issue of whether it would be appropriate for me to decide the matter, on March 24, 2004, I rendered a decision in that preliminary matter (*Gale v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 23), and noted that the same issue had been raised before the Federal Court of Appeal. At paragraph 18 of its Reasons for Judgment (*supra*), the Court stated, in part:

> *[18] We agree with the respondent that, in the circumstances of this case, the matter should be remitted to the same Adjudicator. ... There is no suggestion here of bias. Nor is there any reasonable apprehension of bias. ...*

[7] I rejected the submission of counsel for Mr. Gale, and directed the parties to file written submissions on the substantive matter, raised successfully before the Federal Court of Appeal. This decision relates thereto.

[8] On May 14, 2004, counsel for the grievor sent in his written submission on this issue and the complete text is on file with the Board.

[9] On May 21, 2004, counsel for the employer sent in his written submission on this issue, and the complete text is on file with the Board.

[10] On June 30, 2004, counsel for the grievor submitted his reply to the employer's submission, stating, in part, "... I have determined that no further response is required..."

[11] Mr. Gale's termination was based on an alleged act of sexual harassment committed against one of his peers (a female correctional officer). In my original decision, I identified the female correctional officer as Ms. "X", pursuant to a request from the employer. This decision continues that practice, and where I quote from one of the parties' written submissions, I have used Ms. "X" where the actual name of the female correctional officer appears in the written submission.

Submission of the Grievor

[12] On the morning of the date of the incident that led to Mr. Gale's discharge, counsel writes, at paragraph 25, "... a significant incident, involving the restraining of an inmate, occurred at 10:40 that morning."

[13] At paragraphs 32-35 of the written submission on behalf of the grievor, counsel wrote:

> *32. At the close of the evidence, it was the position of Mr. Gale that the evidence advanced at the hearing was clear that everyone in the unit (except Ms.* ["X"]*) was confirmed to have been in attendance at the inmate incident, and the fact that Ms.* ["X"] *was not at the incident was tantamount to confirmation that she was not in the FSWU at that time. It was at this juncture that the question was raised, "If what Mr. Gale says is true, that everyone on the FSWU would have responded, how come "L. Mardell" didn't respond, because the work schedule says that she was working that shift too? If she was working on the FSWU and didn't respond either, that casts significant doubt on what Mr. Gale has just said? (this is a paraphrase and not intended to be a direct quote).*
>
> *33. Therefore, whether L. Mardell was working or not takes on critical importance.*
>
> *34. The letter submitted shows that L. Mardell was not working. In fact the reason why Ms.* ["X"] *was called in was to take L. Mardell's shift.*
>
> *35. What Mr. Gale said was substantiated.*

[14] Further on in his written submission, counsel for the grievor writes, at paragraphs 40-42:

> *40. It is evident, therefore, that an adverse inference was drawn against Mr. Gale and his credibility was adversely effected by the omission of the evidence pertaining to L. Mardell.*
>
> *41. Now that you have the letter showing that L. Mardell was not in the FSWU, it is clear that Mr. Gale's statement that "everyone would come running" was with substance and the fact that Ms.* ["X"] *was not there bolsters his credibility and destroys her.*

> *42. Therefore, the introduction and consideration of this crucial evidence ought to, it is respectfully submitted, change the conclusion previously reached.*

[15] Counsel then enumerated in paragraphs 43-48 what he termed "other considerations" in his written submission. This was a reiteration of the other evidence introduced at the adjudication hearing, and fully considered in the original decision (*supra*).

[16] Another point raised by counsel for Mr. Gale, was that according to the version of events advanced by Ms. "X", she was sexually harassed between 11:10 a.m. and 11:25 a.m. on Tier 1 by Mr. Gale. Ms. "X" then said she left for lunch, returning at 12:00 noon, at which time Mr. Gale let her into the unit. Ms. "X" stated that Mr. Gale made a comment upon letting her back in about the sexual harassment that had supposedly occurred earlier.

[17] At paragraph 24 of counsel's written submission, he states:

> *24. All of the evidence is consistent that Mr. Gale let Ms.* ["X"] *into the FSWU only once on that day.*

[18] Then, at paragraph 27, counsel writes:

> *27. Conversely, according to Mr. Gale, no sexual harassment occurred at all. When he permitted Ms.* ["X"] *to re-enter the FSWU, it would have been between 10:40 a.m. and 11:00 a.m. At this time there could not have been any talk about the "previous sexual harassment" because, according to the employer's own evidence, it had not yet occurred.*

Submission of the Employer

[19] Counsel for the employer wrote in his submission:

> *It is respectfully submitted that the only issue before this tribunal is to consider the fact that L. Mardell was working in another part of the Saskatchewan Penitentiary on May 19, 1999, and that he was not working on the FSWU. As noted by the Federal Court of Appeal (para 19):*
>
> > *It was the Adjudicator who raised the issue that gave rise to the obtaining of the evidence in question and he is in the best position, upon considering it, to determine its effect on his determination. We would, therefore, remit the*

> *matter to the same adjudicator for redetermination. The Adjudicator should take into account the information in the August 17, 2001, letter of counsel for the respondent [employer] respecting L. Mardell and provide the parties with an opportunity to make submissions as to its effect on the outcome of the adjudication* [Emphasis added].

[20] Then, the employer states:

> *Paragraphs 43-49 of the grievor's submissions rearticulate points previously raised by the grievor. ...*

[21] With respect to the substantive issue, counsel writes:

> *It is important to highlight that the employer did not take the position at the original hearing that a negative inference should be drawn concerning the whereabouts of L. Mardell on May 19, 1999.*
>
> *The presence or absence of L. Mardell is a red herring, it is entirely irrelevant.* [Ms. "X"] *did not testify with respect to the presence or absence of L. Mardell. The presence or absence of L. Mardell, therefore, could have no impact on the credibility of her testimony. The only theoretical impact this issue could have on the grievor's credibility is if a negative inference is drawn between the grievor testifying that all available staff responded to the inmate incident on May 19th but failed to mention L. Mardell.*
>
> *It is common ground that L. Mardell was not on the FSWU on May 19, 1999. The employer did not ask this tribunal to draw a negative inference with respect to the presence or absence of L. Mardell. The confirmation that L. Mardell was not on the FSWU should have no impact on the analysis.*
>
> *The grievor is attempting to create a nexus between the presence of L. Mardell and the credibility of both* [Ms. "X"] *and himself. The web of logic linking the presence of L. Mardell to the credibility of these two witnesses is premised upon three assumptions:*
>
> - *First, the grievor is arguing that the victim,* [Ms. "X"] *testified that (paragraphs 23 & 29): "...she had been on the FSWU the entire morning of May 19, 1999. She said she came on shift at 8:00 a.m. and did not leave the FSWU until approximately 11:30 a.m. at which time she left the FSWU for her scheduled lunch break. According to her, during the time that she was on the FSWU (between 8:00 a.m. and 11:30 a.m.) she was sexually harassed by Mr. Gale".*

- *Second, (paragraphs 24, 27 & 29) that "[a]ll of the evidence is consistent that Mr. Gale let Ms.* ["X"] *in to the FSWU only once on that day."*

- *Third, the grievor is suggesting (paragraph 30) that* [Ms. "X"] *testified that she was on the FSWU at 10:40 a.m. when the incident with an offender occurred.*

None of these propositions has any connection to the presence or absence of L. Mardell on the FSWU.

Furthermore, all three of these propositions are entirely inaccurate! [Ms. "X"] *never testified that she did not leave the FSWU until approximately 11:30 a.m.. Grant Gale never testified that he only let* [Ms. "X"] *into the FSWU once on May 19, 1999.* [Ms. "X"] *never testified that she was on the FSWU at 10:40 a.m. when the incident with the inmate occurred.*

Neither in direct, cross-examination nor redirect was it put to [Ms. "X"] *whether she was on the FSWU the entire morning prior to 11:30 a.m. without leaving. Neither in direct, cross-examination nor redirect was it put to the grievor exactly how many times he let* [Ms. "X"] *onto the FSWU on the day in question. Neither in direct, cross-examination nor redirect did* [Ms. "X"] *testify that she was on the FSWU at 10:40 a.m. when the incident with the inmate occurred.*

The link between the presence of L. Mardell and the credibility of the two primary witnesses is simply non-existent. The issue of the presence of L. Mardell on May 19, 1999, is irrelevant. It was never suggested by the employer that the presence or absence of L. Mardell had any impact on the grievor's credibility. The fact that L. Mardell was not on the FSWU should have no impact on the assessment of the grievor's credibility. Nothing turns on the fact that L. Mardell was not in the FSWU on the day in question.

Decision

[22] I wish to comment on one of the apparent reasons why it was deemed necessary to revisit my original decision of August 17, 2001.

[23] At the initial adjudication hearing, as noted in paragraph 5 of the Federal Court of Appeal's decision (*supra*), I "... raised the issue of why another employee, L. Mardell, who was on the work list for that day, did not attend the prisoner incident."

[24] Paragraph 6 of the Court of Appeal's decision (*supra*) states:

> *[6] Because the issue appeared to be of concern to the Adjudicator, counsel for the appellant asked to reopen the case to call evidence on whether L. Mardell was working at the FSWU that day. The Adjudicator adjourned the proceedings to allow counsel to obtain the answer to the question. After two hours of checking, counsel for the respondent was still unable to confirm whether L. Mardell was working at the FSWU that day. Counsel returned and advised the Adjudicator that the point could not be confirmed. It was agreed that the Adjudicator would adjourn the proceedings and await confirmation as to whether L. Mardell was working that day. It was agreed that counsel for the respondent would obtain the information and forward it to counsel for the appellant who would submit it to the Adjudicator. There were no time limits placed on the process.* (Emphasis added)

[25] If it was suggested to the Federal Court of Appeal that there were no time limits placed on the process of advising me whether L. Mardell was working on the day in question or not, this simply is not true. It would be unfortunate, indeed, if that was one of the reasons why the Federal Court of Appeal issued the reconsideration order.

[26] In this particular case, at the conclusion of the hearing (July 12, 2001) the only issue outstanding was a response to my question of whether or not L. Mardell was working on the day in question. The parties told me that if the information was available, it could be obtained in a few weeks. Accordingly, as noted in paragraph 6 of the Federal Court, Trial Division's Reasons for Order (*supra*):

> *(...) It was agreed that counsel would submit the information by agreement to the Adjudicator within a few weeks. The process agreed upon was that counsel for the respondent would submit the information to counsel for the applicant. He would then send it on to the Adjudicator.*

[27] However, counsel for the employer conceded, at the adjudication hearing, that L. Mardell was not on the FSWU on the day in question. As noted in paragraph 15 of the Federal Court, Trial Division's decision (*supra*):

> *... counsel for the respondent conceded, at the conclusion of the hearing, that it had no problem agreeing that L. Mardell was not working on the FSWU but was in the A&D in the main institution as sworn to by the applicant.*

[28] After waiting more than a "few weeks", from the July 12 conclusion of the hearing, and without hearing anything from either party that the information was forthcoming, I issued a decision on the important issue of the grievor's termination on

August 17, 2001. By coincidence, this was the same date that counsel for the grievor received confirmation from the employer's counsel that L. Mardell was not working in the applicable work unit on the day in question.

[29] What was going to be submitted to me in writing, if it was indeed available, was confirmation that what Mr. Gale had testified to about L. Mardell was, indeed correct. The employer had already conceded this point at the conclusion of the hearing! The irony here is that the only possible impact a letter would have is if it disputed Mr. Gale's testimony. The employer had already conceded the point at the end of the hearing.

[30] Whether L. Mardell was working on the day in question, or not, played no part in my original decision to uphold the termination. Counsel for the grievor says it is a critical element in buttressing the grievor's credibility. Counsel for the employer says it is a red herring.

[31] Essentially, what I was asked to determine in the original hearing was whether or not an alleged incident of sexual harassment occurred. As I noted in paragraph 2 of my original decision (*supra*):

> *... The parties were* ad idem *with respect to the issue of penalty, namely the result should be either denial of the grievance (in the event the allegation is proven) or full reinstatement (in the event the allegation is not proven).*

[32] The case was literally a "he said, she said". Ms. "X" said the incident took place; Mr. Gale said it did not. Other than the two parties directly involved in the alleged incident, no one else witnessed the event.

[33] I assessed all of the evidence and concluded that I preferred the evidence of Ms. "X" over that of Mr. Gale with respect to the alleged incident. The termination was upheld.

[34] Now, counsel for the grievor suggests that since the employer has admitted that L. Mardell was not scheduled to work at the applicable work unit on May 19, 1999, then L. Mardell could not have responded to the inmate incident, which is exactly what Mr. Gale testified to. Counsel submitted, at paragraph 35 of his written submission "what Mr. Gale said was substantiated".

[35] In my original decision, I did not state that everything that Mr. Gale said was not believable. I analyzed the events surrounding the alleged incident, and the recollection of other employees who, although not witnessing the actual incident, did observe and speak to Ms. "X" shortly after the alleged incident.

[36] As I pointed out in my original decision, at paragraphs 132 and 133:

> *[132] Cases involving serious allegations without witnesses other than the persons directly involved are among the most difficult for adjudicators to deal with. Issues of credibility often arise and adjudicators often refer to the decision of Mr. Justice O'Halloran of the British Columbia Court of Appeal in* Faryna v. Chorney, *[1952] 2 D.L.R. 354 for guidance here.*
>
> *[133] Justice O'Halloran states at page 356 of his decision:*
>
> > *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.*

[37] The evidence of Ms. "X" was that she was sexually harassed in Tier 1 of the work unit, by Mr. Gale, sometime between her arrival there at 11:10 and 11:25 a.m. on May 19, 1999. Mr. Gale stated he was not on Tier 1 at that time. At paragraph 139 of my decision (*supra*), I wrote:

> *Mr. Gale states he was on Tier II typing his OSOR at 11:00 a.m. and it took about 45 minutes to complete. ...*

[38] The evidence at the adjudication hearing showed that Ms. "X" had been asked to go to Tier 1 to replace another female correction officer, Ms. Wilson-Demuth, who was involved in an interview with an inmate. It was not disputed that the employer's policy did not allow a male staff member to be alone on duty at the particular work unit.

[39] The logbook indicated Ms. Wilson-Demuth commenced her interview with the inmate at 11:10 a.m., and upon arriving at Tier 1, Ms. "X" looked into the interview room and saw the interview in progress. As I stated at paragraph 138 of my decision:

> *... This was not refuted in cross-examination. ...*

[40] Ms. "X" said the incident took place between 11:10 and 11:25 a.m. Mr. Gale said he was not there at that time. At paragraph 140 of my decision (*supra*), I wrote:

> *On these two versions, I prefer the evidence of Ms. "X". ...*

[41] Does the fact that L. Mardell did not work on the FSWU on May 19, 1999, affect my conclusion with respect to this finding? Absolutely not. My conclusion was based on direct evidence surrounding the alleged whereabouts of Ms. "X" and Mr. Gale. Whether or not L. Mardell worked or not is irrelevant, in my view, to this finding.

[42] Similarly, all of the evidence that I outlined in my decision which occurred after the alleged sexual harassment is not, in my view, affected one iota by whether or not L Mardell worked on the day in question.

[43] Counsel for the employer stated:

> *The presence or absence of L. Mardell is a red herring, it is entirely irrelevant.*

[44] I agree. In my view, nothing in this matter hangs on the balance of whether L. Mardell worked that day in question, or not.

[45] I will also comment on one other point raised at paragraph 24 of the written submission of counsel for the grievor. He states:

> *All of the evidence is consistent that Mr. Gale let Ms.* ["X"] *into the FSWU only once on that day.*

[46] Later on, at paragraph 29, counsel for the grievor writes, in part:

> *... the evidence of Mr. Gale ...* [was] *She left again at 11:30 and someone other than Mr. Gale permitted re-entry at 12:00 noon.*

[47] Counsel for the employer wrote that this proposition was entirely inaccurate. I completely agree.

[48] There is no dispute that Mr. Gale admitted Ms. "X" into the work unit for the first time sometime around 11:00 a.m. Now, the grievor's counsel is saying that was the only time Mr. Gale let Ms. "X" into the work unit. During extensive cross-examination of Ms. "X", counsel for the grievor never put to her that her version of the events that took place after she re-entered Tier 1 at about 12:00 noon following

her lunch break were at variance with what Mr. Gale would be testifying to. Such notice would be required under the principles enunciated in *Browne v. Dunn*, [1893] 6 R 67 (H.L.). At no time during the original proceedings was there a suggestion that Mr. Gale had let Ms. "X" into the work unit only once. After hearing, reviewing and examining all of the evidence, there was no question in my mind that Mr. Gale allowed Ms. "X" into the Tier 1 work unit twice on the day in question. At paragraph 88 of my original decision (*supra*) I wrote:

> *When asked if he recalled letting Ms. "X" back in the unit after lunch and asking her how she liked it, Mr. Gale replied he did not specifically recall that, but it could have happened.*

[49] At the adjudication hearing Ms. "X" testified that after lunch she returned to the FSWU and, as I wrote at paragraph 24, "... she rang a bell to get in and the grievor answered, opened the door and Ms. "X" testified he said to her: "so, how was it?" ..."

[50] At paragraph 148 of my decision (*supra*), I wrote:

> *Ms. "X", thinking the inquiry referred to her lunch, replied "not bad". This was not contested.*

[51] Ms. "X" responded to an inquiry from Mr. Gale after she returned from her lunch break. I remain of the view that Mr. Gale let Ms. "X" back into the work unit and spoke to her. It is simply inaccurate for counsel for the grievor to state, at paragraph 24 of his May 14, 2004 submission, that:

> *All of the evidence is consistent that Mr. Gale let Ms. "X" in to the FSWU only once on that day.*

[52] In summary then, the issue of whether L. Mardell was working in the FSWU on the day in question, or not, was not and is not in the least bit critical to my determination in the case.

[53] The fact of the matter is, the letter of August 17, 2001, from the employer's counsel to counsel for the grievor, simply confirmed that which the employer had conceded at the hearing. In my view, ultimately nothing whatsoever turned on whether L. Mardell was working in the FSWU or not. The other evidence cited in my original decision (*supra*) led me to conclude that, in all probability, Mr. Gale did sexually harass Ms. "X".

[54] Ultimately, there are only two people who know, with 100% certainty, whether the events Ms. "X" testified to actually occurred. As a trier of fact, after carefully weighing all of the evidence, including the letter of August 17, 2001, confirming that L. Mardell was not working in the FSWU on May 19, 1999, I remain convinced that Mr. Gale did, indeed, commit an act of sexual harassment as stated by Ms. "X". Accordingly, I see no reason whatsoever to reverse my decision, and Mr. Gale's termination stands.

Joseph W. Potter,
Vice-Chairperson

OTTAWA, July 16, 2004.