IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Nova Scotia Teachers Union v. Nova Scotia Community College, 2005 NSSC 98

Date: 20050504
Docket: S.H. No. 233084
Registry: Halifax

IN THE MATTER OF: The Arbitration Act, R.S.N.S. 1989, c. 19

- and -

IN THE MATTER OF: An Arbitration between: The Nova Scotia Teachers Union and the Nova Scotia Community College

- and -

IN THE MATTER OF: An Application by the Nova Scotia Teachers Union for an Order to set aside the award of Bruce P. Archibald, Q.C. dated August 9, 2004

Between:

Nova Scotia Teachers Union

Applicant

v.

Nova Scotia Community College

Respondent

Judge: The Honourable Justice Frank Edwards

Heard: April 21, 2005, in Halifax, Nova Scotia

Counsel: Kevin Latimer, Q.C., for the [applicant]
Peter McLellan, Q.C., for the [respondent]

By the Court:

[1] ***Introduction:*** This case involves an analysis of an Arbitrator's decision in order to ascertain whether he correctly applied the onus of proof. The factual background is a "she says/he says" allegation of inappropriate sexual touching. In the result, I determined that the Arbitrator had inadvertently shifted the burden of proof by employing an either/or approach in selecting the Complainant's version of the event over that of the Grievor.

[2] ***Facts:*** The decision under review involves a teacher (the "Grievor") accused of sexual assault against a female student (the "Complainant") at the Strait Area Campus of the Nova Scotia Community College (the "Employer").

[3] On the day in question, the Complainant arrived late for a First Aid course taught by the Grievor. The Complainant and Grievor met at the Grievor's nearby office later that morning to arrange to make up the lost time. A brief meeting took place in the doorway of the Grievor's office, with the door open. The Complainant alleges that, during this meeting, the Grievor committed a sexual assault against her by grabbing her breast. The Grievor denies the allegation.

[4] The Employer accepted the Complainant's allegation. The Grievor was suspended without pay for thirty days and required to take sensitivity training. The Grievor challenged this discipline, which ultimately led to an arbitration.

[5] The Arbitrator heard evidence from the Complainant and the Grievor, as well as other staff, faculty, and students of the Strait Area Campus. The matter was heard on August 27, 28, and 29 and December 15, 16, and 17, 2003. The Arbitrator rendered a decision on August 9, 2004. On October 14, 2003, the Applicant filed an Originating Notice (Application Inter Partes) requesting that the Arbitrator's decision be quashed.

[6] ***Analysis:*** In Paragraphs 1 to 9 of his decision, the Arbitrator deals with some preliminary matters and sets out the issues. In paragraphs 10 and 11 the Arbitrator sets out burden of proof. He acknowledges that the burden is on the employer to establish its case by "clear, cogent and convincing" evidence.

[7] At paragraph 12, the Arbitrator notes that the evaluation of key witnesses' credibility will be decisive. "(The Complainant and the Grievor) tell starkly

different, indeed dramatically inconsistent stores. One of them cannot be telling the truth ..."

[8] Then he sets out the following passage from ***Faryna v. Chorney***, [1952] 2 D.L.R. 354 (B.C.C.A.) where O'Halleran, J.A. speaking for a majority of the court stated:

> "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 skilful 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.
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> 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."

[9] The Learned Arbitrator then goes on to cite the following passage from ***R. v. B.(R.W.)*** (1993), 40 W.A.C. 1 (B.C.C.A.):

> "28 It does not logically follow that because there is no apparent reason for a witness to lie, the witness must be telling the truth. Whether a witness has a motive to lie is one factor which may be considered in assessing the credibility of a witness, but it is not the only factor to be considered. Where, as here, the case for the Crown is wholly dependant upon the testimony of the complainant, it is essential that the credibility and reliability of the complainant's evidence be tested in the light of all of the other evidence presented.
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> 29 In this case there were a number of inconsistencies in the complainant's own evidence and a number of inconsistencies between the complainant's evidence and the testimony of other witnesses. While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness' evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise but at the least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness' evidence is reliable. This is particularly so when there is no supporting evidence on the central issue, which was the case here."

[10] The cited passages are well accepted statements of the law with respect to evaluating the credibility of witnesses. They do not speak directly to the issue of the ***discharge*** of the onus of proof. The Arbitrator's job is not

simply to decide whom he believes and whom he does not believe. He must go further and decide whether the onus of proof has been discharged by the party which bears it. In this case, the Employer bears the burden of proof. A careful examination of the Arbitrator's decision demonstrates that, despite his best intentions, the Arbitrator did not correctly apply the onus of proof .

[11] After citing the above passages from ***Chorney*** and ***B.(R.W.), supra,*** the Arbitrator goes on to summarize the background facts (Award paragraphs 13 - 15). He continues in paragraph 16 to outline his proposed methodology where he says in part:

> "This evidence will first be assessed in detail in order to determine whose story is in accordance with 'the preponderance of probabilities' and whether there are 'inconsistencies' in the evidence which may lead to the conclusion that the Employer has failed to demonstrate 'just cause' to impose discipline."

[12] In paragraph 17, the Arbitrator sets out his statement of substantive issue. He states in part:

> "Accepting its burden to demonstrate just cause on a balance of probabilities, the Employer concretizes the issue by essentially stating it as: 'Does the evidence demonstrate that the alleged unwanted touching occurred?' Both parties agree that the real issue is the credibility of the Complainant's allegation versus the credibility of the Grievor's denial, each to be assessed in light of all the circumstances. Resolving this issue requires a

> detailed analysis of the evidence from the chief protagonists as well as from others who observed matters leading up to and away from the time the event is alleged to have occurred."

[13] In paragraphs 18 to 22, the Arbitrator deals with the Complainant's version of events. At paragraph 23 he makes the following assessment of her evidence.

> "The Complainant's demeanour on the witness stand carried considerable conviction. She was simply by times, truculent at others, and at still others was overcome with tears such that the proceedings had to be adjourned briefly. She was combative in cross-examination, explaining inconsistencies in her story, primarily as the result of stress and accidental inaccuracy of description. She was not, however, a highly articulate witness.. It was not evident that she was lying or really would be capable of lying in a convincing manner. On the other hand, she came across as wilful, perhaps self-indulgent and stubbornly independent in her attitudes. She was clearly capable of putting up spirited resistance against being pushed around. It is perhaps not irrelevant to add that the Complainant is an attractive young woman by most conventional standards."

[14] In paragraphs 24 to 27, the Arbitrator examines the Grievor's version of the events. He assesses the Grievor's evidence in paragraph 28:

> "The Grievor's demeanour on the witness stand was quiet, calm and unassuming. While admitting to the fact that the allegation of the Complainant and its consequences had taken an emotional toll, he seemed to face the proceedings and his role as a witness in them with what might appear to some as phlegmatic stoicism. Just as with the Complainant, there was

> nothing about the Grievor's demeanour which made it readily appear that the witness was lying."

[15] To this point, in the Arbitrator's view, there is little to choose between the Complainant and the Grievor on the basis of their demeanour on the witness stand. The arbitrator goes on to summarize the evidence of the witnesses other than the Complainant and the Grievor (paras 29 - 37). In short, the Arbitrator found that some of these witnesses supported Complainant's credibility while others did not detract from it. None of the witnesses (beyond supporting the Complainant's credibility) had a negative impact on the credibility of the Grievor. In fact, three of the witnesses called by the Employer (Lewis, MacKinnon, MacLellan) to some extent supported the Grievor's credibility. All three testified that the commission of the alleged act would have been "out of character" in relation to the Grievor.

[16] At paragraphs 38 to 46, the Arbitrator deals with the Union arguments. Essentially, he uses that part of the award to outline why he rejects the Union's various submissions regarding the Complainant's lack of credibility (paras 40 and 41). He also accepts Union arguments supporting the credibility of the Grievor (paras 42, 43 and 44).

[17] At paragraphs 47 to 49, the Arbitrator summarizes the Employer's arguments. Here he makes no analysis or findings with respect to the

Employer's submission on the credibility of the Complainant and the Grievor.

[18] Paragraphs 50 to 83 of the Award deal with procedural issues which are not relevant to this application. At paragraph 84, the Arbitrator returns to the substantive issue and states:

> "... my duty at this point (as described earlier) is to determine whether the evidence as a whole demonstrates in accordance with the relevant burden of proof that the Employer had just and sufficient cause to impose discipline upon the Grievor..."

[19] He then states the following in paragraph 85:

> "To be blunt and brief, ***I have concluded that the Complainant's version of events is to be believed over that of the Grievor***. While this is a difficult and unfortunate case, I find that there is clear, cogent and convincing evidence that the Grievor engaged in unwanted sexual touching of the Complainant ..." (Emphasis mine).

[20] The Arbitrator then goes on to give his reasons for finding the Complainant credible (paras 85 - 90).

[21] In paragraph 91, the Arbitrator turns his attention to the Grievor. Paragraph 91 reads:

> "As to the Grievor, my conclusion is that this is something of a personal tragedy for him and for his family, which in the tradition of classical tragedies, is of his own making. The event constitutes a blot on an otherwise unblemished professional career. In a certain way this event might be seen as every teacher's tragic nightmare. Whether he had harboured a

> longstanding infatuation for this spunky and relatively attractive young woman formerly in his class or whether he gave way to a temptation on the spur of the moment with a friendly and outgoing student, is not the point. Though this unwanted sexual touching may be minor on the scale of seriousness of sexual assaults, it was a serious breach of personal and professional ethical responsibility in relation to a young woman who, though an adult, was vulnerable to his authority as a teacher in the school. The Complainant was legitimately distressed and upset by the event."

[22] Paragraph 91 does not deal with an analysis of or findings on the evidence of the Grievor. It is merely a description of the tragic situation facing the Grievor and some speculative comment upon what may have motivated him.

[23] In paragraph 92, the Arbitrator says that the evidence of the Grievor's good character does not help him. The Arbitrator says only that "... the whole of the evidence here leads me to the conclusion that, unfortunately, I cannot draw this inference (that the Grievor did not engage in the alleged inappropriate sexual touching) in the Grievor's favor." Beyond this general statement, the Arbitrator does not explain what evidence prevented him from drawing the inference in question.

[24] Paragraph 93 is a statement of the law respecting a lack of corroboration of a complainant's evidence. The key evaluation with respect to the Grievor's credibility appears in paragraph 94 which reads:

> "The Grievor's evidence does contain minor inconsistencies which sap its credibility to some degree. The timing of certain events on January 17, 2003 and the timing of the conversation with Mr. Williamson do not necessarily add up. However, I can only conclude that the Grievor, when faced with the embarrassment and personal/professional consequences of admitting his foolish error, as opposed to toughing out a nasty process through denial, chose the latter option - perhaps as the best means of saving face in the circumstances."

[25] As Counsel for the Applicant has pointed out, the Arbitrator does not explain what "minor inconsistencies" were at play nor why they "sapped" the Grievor's credibility. Similarly the Arbitrator does not explain the timing of which events "do not necessarily add up". The Arbitrator simply continues to proceed to make his conclusory finding in paragraph 95 that the Employer had made its case "... through clear, cogent and convincing evidence...".

[26] The Grievor is thus left without articulated reasons for the rejection of his evidence. The Ontario Court of Appeal said in ***R. v. Strong***, [2001] O.J. No. 1362 (at para. 9):

> "The appellant's evidence was not inherently incredible. ... a total rejection of his evidence to the point where it did not even leave a reasonable doubt without any explanation is unsatisfactory. ... ***the absence of any explanation for rejecting totally the appellant's evidence strongly suggests that he was disbelieved because the complainants were believed. This approach ignores the burden of proof.***"

[27] Furthermore, where the burden of proof lies with the Employer, rejecting the Grievor's evidence without providing material reasons is also a misapplication of the burden of proof. This principle was explained by the Manitoba Court of Appeal in ***R. v. CJL***, supra:

> "50 In a decision released at about the same time, *R. v. Y.M.*, [2004] O.J. No. 2001, in roughly similar circumstances, the Ontario Court of Appeal came to a similar conclusion. The court made clear its view that it was not sufficient for a trial judge to reject without explanation one witness's story (in this case, the accused's) simply because the judge found, on analysis, the conflicting story of another witness (the Complainant) to be credible. Laskin J.A. expressed the concern that (at para. 29):
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> > '... [T]he absence of adequate reasons for rejecting the appellant's evidence makes meaningful appellate review problematic. This court cannot be satisfied that the trial judge properly applied either the burden of proof or the principles underlying W.(D.). Instead, his conclusory rejection of the appellant's evidence suggests that he wrongly shifted the burden of proof to the appellant and failed to consider whether the appellant's evidence, though not accepted, still raised a reasonable doubt about his guilt.'
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> 51 That latter point was explained by Laskin J.A. in the following way (at para. 30):
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> > 'The trial judge's statement 'that for me to have made these findings of fact, I reject outright Mr. Y.M.'s denials', suggests that he may have engaged in the following forbidden reasoning: I accept the evidence of the Complainant A.G.; the appellant's evidence differs from A.G.'s evidence on material matters; therefore I do

> not believe the appellant's evidence. This reasoning is forbidden because it appears to shift the burden of proof on to the appellant to explain away the Complainant's evidence. ...'"

[28] Although the cases cited are criminal cases with a different ***standard*** of proof (reasonable doubt), the reasoning applies to the ***onus*** of proof generally, including the civil onus. With the greatest of respect, the learned Arbitrator appears to have fallen into the trap of resolving the case by simply choosing the version he believes. This so-called "either/or" approach clearly ignores the onus of proof which in this case was squarely upon the Employer. In his submission, Respondent's Counsel quoted the following from ***J. Sopinka et al., The Law of Evidence in Canada, 2nd ed.*** (Toronto:: Butterworths Canada Ltd., 1999) at para. 5.57:

> "This troublesome issue sometimes arises in sexual assault cases where the complainant and the accused testify to competing versions of the facts. It is a misdirection to direct a jury to select one version of the evidence over the other or to direct them to determine which version of the evidence is true. It is wrong for a trial judge to put forward an either/or approach to the evidence because it excludes the possibility that the jury may be left with a reasonable doubt on the whole of the evidence. The trier of fact is not required to believe or disbelieve either of the two persons who gave the conflicting evidence. ***The drawback of an either/or approach is that it has the effect of shifting the burden to the accused of demonstrating his or her innocence, since the jury may incorrectly believe that an accused cannot be acquitted unless the defence evidence is believed.***" (Emphasis mine)

[29] The Supreme Court of Canada has set out the three step approach in ***R. v. W.(D.)*** (1991) 63 CCC (3d) 397. The test in ***W.(D.)*** is as follows:

> "First, if you believe the evidence of the accused, obviously you must acquit.
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> Secondly, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
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> Thirdly, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused."

[30] In ***Law Society of Upper Canada v. Neinstein***, 2005 ONSLAP 1 (hereinafter "Neinstein") an Appeal Panel of the Law Society of Upper Canada found that, in assessing evidence in a professional discipline case, the principles from ***R. v. W.(D.)***, ***supra***, applied. It provided the following example of the formulation of W.(D.) appropriate for the civil standard:

> "47 In circumstances such as these, the proper three step W.(D). analysis, could be formulated as follows:
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> > (a) if the Panel believes the evidence of the member, assuming it is exculpatory, the particular must be dismissed;
> >
> > (b) if the Panel disbelieves the testimony of the member, but the member's evidence leads the panel to conclude that they cannot find clear and convincing proof of the particular, based on cogent evidence, the particular must be dismissed. In so doing, the member's evidence must be considered in the context of the evidence as a whole;

> (c) Even if the Panel disbelieves the member's evidence in its entirety, the panel must ask themselves, on the basis of the evidence they do accept, and disregarding the member's evidence, whether the facts substantiating the particular were made out by clear and convincing proof, based on cogent evidence? If not, the particular must also be dismissed.

[31] That is the test which ought to have been applied by the Arbitrator in the present case. Once the Arbitrator had decided that he did not believe the Grievor, he should then have considered whether the Grievor's evidence prevented him from finding that there was clear, cogent and convincing evidence of the sexual touching. If it did not, then the Arbitrator was bound to consider, disregarding the Grievor's evidence, whether the facts substantiating the sexual touching were made out by clear, cogent and convincing evidence.

[32] In failing to do the foregoing analysis, the Arbitrator inadvertently shifted the burden of proof to the Grievor. He thereby erred in law. Questions of law must be determined against the standard of correctness. I am therefore ordering that the Arbitrator's award be set aside and the matter remitted for a hearing before a new Arbitrator.

[33] The Applicant shall have its costs in the amount of $2,500.00 payable forthwith.

Order accordingly.

J.