IN THE MATTER OF AN ARBITRATION

BETWEEN:

BELL CANADA

("the Employer")

AND:

UNIFOR

("the Union")

IN THE MATTER OF:

GRIEVANCE OF J. J. BANCROFT
(GR. 34-0-2017-0087, 0158)

SOLE ARBITRATOR:

Kevin M. Burkett

FOR THE EMPLOYER:

Maria Valente-Fernandes - Counsel

FOR THE UNION:

Micheil Russell - Counsel

PRELIMINARY AWARD

I have before me the grievances of Mr. J. J. Bancroft challenging both a ten day suspension (April 21st, 2017) and his termination from employment (June 19th, 2017). There is no dispute with respect to my authority to hear and determine these matters.

A preliminary issue has arisen with respect to the admissibility of certain admissions purportedly made by Mr. Bancroft during the course of the second step grievance meeting convened on June 6th, 2017 to deal with the ten day suspension. These admissions were relied upon by the Company to justify the subsequent termination. The context is as follows:

- Mr. Bancroft was issued a ten day suspension on April 21st, 2017 for a series of alleged lates occurring during January, February and March 2017 and /or failure to notify prior to the commencement of his shifts.
- The Union grieved the ten day suspension.
- A grievance meeting was convened on June 6th, 2017 to deal with Mr. Bancroft's lateness on the specific dates in January through March 2017 that had been identified.
- During the course of the June 6th, 2017 grievance meeting it is asserted by the Employer that Mr. Bancroft revealed that on May 29th and June 5th 2017, when he otherwise would have been late for the start of his scheduled shift, he called-in sick rather than report late for work.

- More specifically, it is asserted, that Mr. Bancroft stated that on May 29th he called in sick when in reality his girlfriend's car had broken down and he had committed to picking her up.
- Mr. Bancroft further stated, it is asserted, that rather than being late on June 5th, 2017 he also called in sick.
- Mr. Bancroft did not report for work on either May 29th or June 5th 2017 but collected sick pay.
- The Company, relying on these purported admissions terminated Mr. Bancroft on June 19th, 2017 on the basis that "during (the) grievance meeting on June 6th, 2017 you revealed that you intentionally misappropriated Company benefits …. by falsely calling in sick when you were not sick and lied to the Company about the reason for your absence in an effort to avoid further discipline or termination for lateness".

SUBMISSIONS

It is the position of the Union that the Company "misheard or misunderstood" what Mr. Bancroft said at the June 6th, 2017 grievance meeting. It asserts that Mr. Bancroft "expressly denies" that he falsely called in sick when he was not sick on either of the days in question. It is the further position of the Union that notwithstanding Mr.

Bancroft's denial, the content of any discussion during a grievance meeting is privileged and cannot be relied upon by the Employer to impose further discipline.

The Union maintains that, with certain narrowly defined exceptions, that are not applicable here, discussions that occur during the course of grievance meetings are privileged. It is argued that the purpose of the privilege is to foster an environment in which the circumstances surrounding a grievance may be freely and fully discussed with a view towards resolution. The jurisprudence, it is argued, extends the privilege beyond offers of settlement to cover all statements and/or admissions with the onus of establishing an exception to the privilege that surrounds grievance discussions falling to the party that seeks to breach the privilege. More specifically, it is argued that "alleged admissions" during a grievance meeting, as here, are inadmissible for the purpose of imposing further discipline upon the grievor. The following awards are cited in support of the foregoing:

> Board of Education for City of York and Canadian Union of Public Employees, Local 1749-B 9 LAC (4th) 282 [H.D. Brown December 30, 1989]
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> Regional Municipality of Ottawa-Carleton and Canadian Union of Public Employees Local 503 14 LAC (3d) 445 [P.C. Picher April 4, 1984]
>
> Upper Canada District School Board and Elementary Teachers' Federation of Ontario 160 LAC (4th) 433 [C.G. Simmons April 25, 2007]
>
> Maple Lodge Farms Ltd. and United Food and Commercial Workers Union 21 LAC (3d) 321 [Swan [December 5, 1985]
>
> International Association of Fire Fighters Local 626 and Borough of Scarborough LAC Vol 24 [O.B. Shime April 5, 1972
>
> MacMillan Bathurst Inc. and Canadian Paperworks Union Local 359 Re 1992 CarswellAlta 1167 29 CLAS 237 [Moreau November 23, 1992]

Having regard to the foregoing and this not being a case that constitutes an exception, I am asked to rule that whatever statements may have been made by Mr. Bancroft during the June 6, 2017 grievance meeting are inadmissible and, therefore, cannot be relied upon in support of the termination of his employment.

The Company takes a much narrower view of the privilege that attaches to grievance meeting discussion. The Company position is that the privilege is limited to the subject matter of the grievance. It is submitted that the admissions make by Mr. Bancroft at the June 6, 2017 grievance meeting were not related to the subject matter of the grievance (i.e. his lateness on the specific days identified). It is emphasized that the privilege does not extend to discussions about May 29 and June 5, 2015, which were not relied upon as late days, and specifically to the misappropriation of Company sick benefits. Mr. Bancroft's admissions had no relation to the settlement of the ten day suspension grievance for habitual lateness and, therefore, it is argued, are not privileged and can be relied upon in support of his subsequent termination. The Company relies upon Ottawa Carleton v. CUPE 593 (1984) 14 LAC (3d) 445 (P. Picher) in support of the foregoing.

It is asserted further that an exception to the privileges exists where the "dictates of a fair hearing outweigh the need to maintain the integrity of the grievance procedure". MacMillan Bathurst and CPU (1992) 29 CLAS 237 is cited.

The Company argues that it would be denied a fair hearing if it was not permitted to cross-examine Mr. Bancroft for purposes of credibility, on the admissions made during

the grievance meeting. In this regard the Company relies upon Pirelli Cables v USWA (2002) Carswell BC 2384 and Pirelli Cables v. USWA (2003) Carswell BC 2568.

DECISION

An accurate summary of the jurisprudence as it pertains to the privilege accorded discussions / statements made at a grievance meeting is found in Canadian Labour Arbitration (4^{th}) Brown and Beatty Canada Law Book at 3 – 75 as follows:

" … because the primary purpose of grievance procedure meetings has been as a means of facilitating the settlement of disputes, arbitrators have generally treated all discussions, whether they relate to settlement or something else, as privileged regardless of whether there is an express agreement that such discussions are "without prejudice".

The seminal award is re Scarborough (Borough) and I.A.F.F. Local 626 (1972) 24 LAC 78 (Shime); an award that is especially instructive here. In that case a firefighter had been ordered to shave his sideburns. The firefighter complied but grieved that his privacy had been improperly breached. A heated discussion occurred at the grievance meeting as a result of which the grievor was then temporarily demoted for insubordination. In refusing to allow evidence of grievance meeting statements to be tendered by the Employer, arbitrator Shime ruled that allowing comments made in the course of the grievance procedure would undermine the entire process. In doing so he

relied upon the presumption that such comments are not ordinarily admissible unless the parties have waived privilege. He reasoned:

> "If the grievance procedure becomes the source or springboard for further disciplinary measures arising out of the conversations and the conduct of the parties involved, it will not be used and that should not be permitted within any scheme of labour relations".

It is clear from all of the foregoing that there is a prima facie presumption that grievance procedure communications are inadmissible unless the party seeking admissibility can somehow rebut the presumption.

The Employer in this case seeks to rebut the presumption of privilege on the basis, firstly, that the admissions of Mr. Bancroft are admissible because they are unrelated to the specific subject matter of the grievance meeting and, therefore, have nothing to do with preserving the settlement process as it pertains to the grievance at hand. Even accepting this assertion, the arbitrator rejects this position on the basis that from a policy perspective, and consistent with the jurisprudence, extending the privilege to all grievance meeting discussions better accomplishes the policy objective of creating the optimum environment within which settlement may be achieved. From a policy perspective a bright line test is far superior in this regard to a case by case assessment of what is alleged to have been said. Indeed, as found in re: Board of School Trustees (N7NAIMO) unreported September 3, 1987 (Hope) "the grievance procedure is to be considered as a privileged occasion in which all communications are considered inadmissible". In any event the purported admissions that the Company

seeks to rely on (i.e. Unauthorized absence from work on dates that would otherwise have resulted in a late reporting for work) are sufficiently related to the specific subject matter of the grievance meeting (i.e. lateness on other specific days during the same time period) so as to warrant application of the privilege (see re Regional Municipality of Ottawa-Carleton, P. Picher (supra)

The Employer also seeks to rebut the presumption of privilege on the basis that, "the dictates of a fair hearing outweigh the need to maintain the integrity of the grievance procedure". Pirelli Cables and Systems Inc v. USWA (2002) and (2003) (supra) are relied on in support of the assertion that if not permitted to cross-examine Mr. Bancroft on the admissions made during the June 6, 2017 grievance meeting it would be denied a fair hearing.

The supplementary argument made by the Union in re: Pirelli Cables (supra) was that the "general rule" that any communications made during the grievance procedure are privilege and inadmissible is inconsistent with the duty of an arbitrator to provide a fair hearing. The British Columbia Labour Relations Board, although acknowledging that this argument had been made, did not deal with it in either its initial decision or upon reconsideration.

The Board did acknowledge that the privilege may be waived in the interest of a fair hearing in circumstances where it is alleged that the basis for discipline has been altered or where it is alleged that the grievance has been settled. However, to reiterate, the Board did not deal with the question of whether a refusal to allow a grievor to be cross-examined on admissions alleged to have been made during the grievance

procedure denies the party seeking to cross-examine a fair hearing. Accordingly, there is no authority for the proposition that the privilege should be waived on this basis. Further, the result of waiving the privilege on this basis would be to effectively eliminate it altogether notwithstanding the sound labour relations policy considerations that support its existence. Given the jurisprudence the parties understand that if there is no resolution to a grievance within the grievance procedure and there is no recognised exception to the privilege their long-term interest in sound and harmonious labour relations dictates that it be as if the grievance discussions never took place. It cannot be, therefore, that in a labour relations context, the refusal to allow a party at arbitration to cross-examine in regard to an admission that may have been made during the grievance procedure somehow denies the party seeking to cross-examine a fair hearing. Indeed, to allow such a cross-examination would inhibit the settlement process generally, would be unfair to the subject of the cross-examination who spoke within the confines of the grievance procedure and, to repeat, would effectively eliminate the privilege altogether.

Having regard to all of the foregoing the arbitrator hereby finds that discussions that took place during the grievance meeting of June 6, 2017, including the admissions that are purported to have been made, are privileged and, therefore, inadmissible at arbitration.

DATED IN TORONTO, ONTARIO ON THIS 28th DAY OF FEBRURAY, 2018

Kevin Burkett

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Kevin M. Burkett