IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT, 1995*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

HÔTEL-DIEU GRACE HOSPITAL
- the Employer

-and-

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 2458
- the Union

AND IN THE MATTER of the grievance of Sylvia Bonello

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Leonard P. Kavanaugh	- Counsel
Mary Benson Albers	- Interim Vice President, Corporate Services
Rick Hyra	- Manager, Human Resources
Anne Dedumets	- Director, Occupational Health and Safety
Rick Mamak	- Occupational Health Nurse
Sherry McGeen	- Interim Director, Human Resources

On behalf of the Union:

Ken Brown	- Director of Health Care
Darlene Marcuz	- Vice Chairperson, Local 2458 (Service Unit)
Sylvia Bonello	- Grievor

Hearing held July 15 and October 14, 2004, in Windsor, Ontario.

AWARD

I. INTRODUCTION

The grievor was discharged on the basis of video surveillance evidence. This is an interim award regarding the admissibility of that video evidence.

II. THE BACKGROUND

The parties made opening statements and several medical documents were admitted in evidence on consent.

Sylvia Bonello, the grievor, was a part time worker at Hôtel-Dieu Grace Hospital, the Employer. In October/November 2003 the grievor was absent from work for medical reasons. Her first medical note indicated that she could perform light duties. The Employer offered her light duties. I understand the grievor tried light duties for a short time and again left work. She soon presented several additional medical notes setting out varying lengths of time before she would be fit to return to work. The notes suggested a deteriorating medical situation.

The Employer was suspicious of the reasons for the grievor's absence, placed her under surveillance and obtained video recordings of the grievor. The videos showed the grievor working in a family owned restaurant. The grievor was discharged in late November 2003 on the basis of the video recordings.

On the first hearing day the Union requested an order prohibiting the Employer from using the video evidence. As the Employer indicated it had not received notice of this Union request, the Employer sought and was granted time to prepare for submissions on this issue. On the second hearing day the parties argued the admissibility of the surveillance video and

I ruled orally that I would admit the video evidence. This award confirms that oral ruling. I note that the parties agreed that if I found this video evidence was subject to the reasonableness test urged upon me by the Union they would be given an opportunity to lead evidence and make submissions on the question of whether this video evidence met that test.

III. PROVISION OF THE *LABOUR RELATIONS ACT, 1995*

The following provision of the *Labour Relations Act, 1995* was referred to in the submissions:

Section 48

. . .

(12) . . . and an arbitrator or an arbitration board, as the case may be, has power,

(f) to accept the oral or written evidence as the arbitrator or the arbitration board, as the case may be, in its discretion considers proper, whether admissible in a court of law or not;

. . .

IV. UNION POSITION

The Union submitted that the Employer could only use this video evidence if:

1. It was reasonable for the Employer to request surveillance;
2. The surveillance was conducted in a reasonable manner; and,
3. There were no other alternatives open to the Employer to obtain this evidence.

The Union submitted that the arbitration cases indicated that video of an employee was an intrusion that should not be taken lightly, that an Employer needed to have reasonable grounds to decide to engage in surveillance of an employee and, if the Employer did not have reasonable grounds, the video evidence should be rejected. The Union reviewed several awards and adopted the arguments contained in them.

As for reasonable grounds, the Union said the cases made clear that mere suspicion was inadequate. The Union said there were no reasonable grounds to use surveillance in this case. To allow the Employer to use video evidence without first subjecting that evidence to the above reasonableness test would shift the balance of power in favour of the Employer. In summary, the Union said it made sound labour relations sense to use the test of reasonableness in assessing video surveillance evidence.

The Union relied upon the following authorities: *Re Toronto Transit Commission and Amalgamated Transit Union, Local 113* (1997), 61 L.A.C. (4th) 218 (Saltman); *Re New Flyer Industries Ltd. and Canadian Auto Workers, Local 3003* (2003), 115 L.A.C. (4th) 57 (Chapman); *Re Labatt Ontario Breweries (Toronto Brewery) and Brewery, General & Professional Workers Union, Local 304* (1994), 42 L.A.C. (4th) 151 (Brandt); and *Ross v. Rosedale Transport Ltd.* [2003] C.L.A.D. No. 237 (Brunner).

V. EMPLOYER POSITION

The Employer said there was no legal reason to require the Employer to have reasonable grounds to engage in surveillance and there was no proper basis to refuse to admit the video evidence from that surveillance.

The Employer referred to Section 48 (12) (f) of the *Labour Relations Act, 1995* dealing with admissibility of evidence and said that an examination of that provision indicated that the video was admissible. The Employer submitted that the arbitration cases upon which it relied indicated that the cases cited by the Union have not been followed in recent years. The Employer reviewed both the Union's and its own cases in detail and urged me to follow the approach found in its cases.

The Employer said it was prepared to call the person who took the video as a witness and

asserted that there was no question as to the authenticity of the video. The video evidence was central to its case, as it had been the basis for the grievor's discharge.

In summary, the Employer said that, absent a collective agreement or statutory provision, an Employer can engage in surveillance of an employee and use the video from that surveillance in arbitration. There was no basis for subjecting the issue of admissibility of this video evidence to a special test.

The Employer relied upon the following authorities: *Ball v. Vincent* [1993] O.J. No. 3289 (Q.L.) (Abbey J.); *Re Kimberly-Clark Inc. and I.W.A.-Canada, Local 1-92-4* (1996), 66 L.A.C. (4th) 266 (Bendel); *Re Toronto Transit Commission and Amalgamated Transit Union, Local 113* (1999), 79 L.A.C. (4th) 85 (Solomatenko); and *Re Canadian Timken Ltd. and United Steelworkers of America, Local 4906* (2001), 98 L.A.C. (4th) 129 (Welling).

VI. CONCLUSIONS

General approach to admission of evidence

Information is admissible as evidence in an arbitration if it is relevant to a material issue. Not every issue upon which the parties disagree needs to be resolved in order to dispose of the grievance - those issues which need not be resolved are said to be immaterial issues. A "material" issue, then, is one which needs to be resolved in order to dispose of the grievance. Evidence which will help to resolve a material issue - that is evidence which makes one or other view of the "truth" more probable - is said to be "relevant". Nearly all relevant evidence is admitted.

In arbitrations, much evidence comes in the form of oral testimony. But there is also evidence in the form of documents, letters, notes and videotapes, to name but a few. This

type of evidence is often referred to as “real” evidence. Real evidence which is relevant to a material issue in dispute is normally admissible provided that it can be proven - e.g. if a witness testifies that he or she wrote the letter, took the video, etc.

In this case, the state of the grievor’s health, that is the extent of her illness or injury, is a material issue. Whether the grievor could have performed light duties is another material issue.

As for the relevance of this video evidence, the Employer said the evidence was central to its case, that it relied heavily on the video in terminating the grievor’s employment. This video of the grievor appears relevant to, among other things, the grievor’s physical limitations and whether the grievor could have done light duties for the Employer. Applying the simple test of “Is this evidence relevant to a material issue in dispute?”, I find it is.

The approach outlined above - is the evidence relevant to a material issue - is the basic approach used not simply by arbitrators but by other adjudicative bodies in Canada.

Interpretation of the admissibility provision of the Labour Relations Act

In an arbitration conducted, as this is, pursuant to the *Labour Relations Act, 1995,* consideration should be given to section 48 (12) (f) (*supra*) of that *Act* which briefly addresses the admissibility of evidence by an arbitrator. That section authorizes an arbitrator to admit evidence even though that evidence would not be admitted in a court. The section also suggests that an arbitrator ought to hear more evidence than would be admitted in court, that an arbitrator should cast a wider net in the fact finding task than would a court.

The Divisional Court interpreted this section in *Greater Niagara Transit Commission v. A.T.U. Loc. 1582* (1987), 43 D.L.R. (4th) 71, cited in *Re Kimberly-Clark, supra.* The Court

examined the section in detail and concluded that it would be "prudent and proper" for an arbitrator to admit any evidence which would be admitted in a court. The Court also noted that an arbitrator has the statutory authority in section 48 (12) (f) *(supra)* to admit other evidence which would be rejected by a court. In other words, the Court said that an arbitrator's approach should be as follows:

1. If a court would reject the video evidence, an arbitrator could still admit it; but,
2. If a court would admit the video, it would be prudent and proper for an arbitrator to also admit it.

When a Court provides an interpretation of the *Labour Relations Act,* labour arbitrators are expected to follow it. I turn to the question of whether a court would admit video evidence such as this.

In the Ontario Court of Justice decision in *Ball v. Vincent, (supra)* Abbey J. reviewed the approach to video evidence. That matter involved a personal injury claim arising from a motor vehicle accident and one issue in dispute was the extent of the injury. Videotapes of the plaintiff had been taken by the defendant and the intended purpose of that video evidence was to help evaluate the plaintiff's injury claim, making that video evidence relevant to a material issue. In *Ball v. Vincent* the video was admitted. The Court stated that the proper approach to the admissibility of video was as follows:

1. Accuracy in representing the facts;
2. Fairness and absence of intention to mislead; and,
3. Verification.

I note four points:

1. The purpose of the video in *Ball v. Vincent* was similar to the purpose for which the Employer seeks to use the video here.
2. The video in *Ball v. Vincent* was admitted without any reference to whether the

defendant's decision to engage in surveillance was reasonable.

3. There was no concern expressed in the case before me about any of the three *Ball v. Vincent* issues relating to the admissibility of video evidence. The Employer said the person who took the video was available to testify and asserted there was no editing or deception involved in the video.
4. The Union made no suggestion that *Ball v. Vincent* was unusual, or that other courts took a different approach.

Since an Ontario court would admit this type of video evidence, applying the Divisional Court reasoning in *Greater Niagara Transit, supra,* it would be prudent and proper for me as an arbitrator to admit the video evidence in this case.

The above is the general approach to the admission of evidence. However, there are certain exceptions to the admissibility of relevant evidence.

For example, the legal system has long thought it was vitally important that clients be able to communicate openly with their lawyers without the lawyer then having to testify about those conversations; as a result the law has treated dealings between a lawyer and client as privileged, or protected from disclosure, under what is referred to as solicitor client privilege. Relevant evidence of those communications is not admitted.

Similarly "hearsay"evidence, that is statements made away from the arbitration which are offered to prove the truth of a material issue, are not normally admitted because of the importance placed on cross examination. For example, in the context of this case, suppose that witness A was called to testify that person B said she saw the grievor lifting a case of beer, without person B being called to testify. The purpose of the testimony was to prove the grievor could and did lift the case of beer and was therefore more fit than she claimed. That evidence would not normally be admitted as those "facts" should be proved by person B who

could be asked how far away she was from the grievor, whether it was day or night, whether she was wearing her glasses, whether the case was full or empty, etc, all with a view to establishing whether it truly was the grievor and what precisely was lifted.

In the grievance before me the Union has asked that I make another exception regarding the admissibility of this relevant video evidence.

Should there be an additional reasonableness test for surveillance video?

Notwithstanding that this evidence is relevant to a material issue, and would be admissible applying the statute, the Union said that there was a line of arbitration cases which took a different approach. The Union submitted that those cases held that video evidence should only be admitted in an arbitration if that evidence also passed the reasonableness test. Although there are conflicting decisions of Ontario arbitrators on this point, the Union is correct that in the decisions upon which it relied the arbitrators subjected the introduction of video surveillance to the reasonableness test. There are minor differences in those tests but the key points are:

1. The employer had to have acted reasonably in deciding to place the employee under surveillance; and,
2. The Employer had to have conducted the actual surveillance in a reasonable manner.

I note that the reasonableness test appears to have been used in Ontario only for video evidence. Before the days of video, and currently as well, this Employer could have hired a detective to conduct similar surreptitious surveillance away from the work place, make notes on what was observed and take still photographs, and then testify in an arbitration from his or her memory aided by the notes and still photographs. I am aware of no suggestion that such evidence has been subjected to the reasonableness test in an arbitration under the *Labour Relations Act.*

From the awards before me it is clear that this reasonableness test for the admissibility of video evidence was first used in British Columbia in *Re Doman Forest Products Ltd. and I.W.A., Loc. 1-357* (1990), 13 L.A.C. (4th) 275 (Vickers), a case discussed in several of the awards relied upon by the parties. At that time British Columbia had a statute providing for a right of privacy and Arbitrator Vickers took the view that, among other things, surveillance conflicted with the employee's statutory right of privacy. In reconciling the employer's right to prove its case through relevant evidence with the employee's statutory privacy right to be free from surveillance, the arbitrator adopted the reasonableness test. If the surveillance was unreasonable under the privacy legislation, the resulting video evidence was not admitted.

A similar test was used in Manitoba, where there was also a statutory right to privacy, in *Re New Flyer Industries Ltd. (supra)*. Arbitrator Chapman cited with approval an earlier decision of Arbitrator Peltz between the same parties (the Mogg case) and, at page 63 of his award, Arbitrator Chapman quoted from Arbitrator Peltz' earlier award where the existence of a statutory right to privacy is relied upon. Although Arbitrator Chapman does not specify the source of the statutory right, at page 146 of his award in *Re Canadian Timken Ltd. (supra)*, Arbitrator Welling indicates that the right to privacy in Manitoba was found in the *Privacy Act*, R.S.M. 1987, c. P125.

A similar test was used in *Ross v. Rosedale Transport Ltd. (supra)*, a dispute under federal jurisdiction, to balance an employee's privacy rights found in the federal *Personal Information Protection and Electronic Documents Act* with the employer's right to prove its case through relevant evidence.

In each of those jurisdictions there is a statutory right of privacy and I have no issue with the reasonableness test being applied to balance an employee's right of privacy with an employer's right to prove its case through relevant evidence.

But I do have difficulty with the use of a reasonableness test where there is no right of privacy. A reasonableness test has been used in Ontario - see, for example, two cases cited by the Union, *Re Toronto Transit Commission* (Saltman) *(supra)* and *Re Labatt Ontario Breweries (supra)* - where there is no statutory right to privacy. In subjecting videotape evidence to a reasonableness test Arbitrators Saltman and Brandt applied a different approach from that normally used in assessing the admissibility of evidence.

In examining the reasonableness test of Arbitrators Saltman and Brandt in the above cases, a test also applied by some other Ontario arbitrators, it is important to note that the use of the reasonableness test for the admission of videotape evidence has been criticized and firmly rejected in a number of later cases - see, for example, *Re Kimberly-Clark Inc.* (Bendel) *(supra)*; *Re Toronto Transit Commission* (Solomatenko) *(supra)*; and *Re Canadian Timken Ltd.* (Welling) *(supra)* cited by the Employer. (I note that while Arbitrator Bendel's award was released in 1996, prior to Arbitrator Saltman's 1997 award, it was not published in *Labour Arbitration Cases* until 1998 and was not mentioned in Arbitrator Saltman's award.)

The initial and primary basis for the use of the reasonableness test for the admissibility of video evidence has been a concern about privacy. The use of the reasonableness test as a means of balancing privacy expectations or concerns (there being no right to privacy) with the right to lead relevant evidence has been fully and ably reviewed in the three awards by Arbitrators Bendel, Solomatenko and Welling *(supra)* and I do not intend to repeat that analysis. Although the analysis in those three cases varies in some details, each rejects the reliance on privacy as a basis for using the reasonableness test for the admissibility of video evidence.

As there is no right of privacy in Ontario, this reasonableness test, originally designed to balance rights, has to be carefully examined. Since it is not needed to balance competing rights, and has been persuasively rejected by other arbitrators, why might I adopt it?

Some of the cases (including cases not relied upon by the Union but referred to in the various awards) suggest alternative rationales for using the reasonableness test and subjecting video evidence, particularly video evidence resulting from surveillance, to heightened scrutiny. But those alternative bases (reliance on values in the *Canadian Charter of Rights and Freedoms*, analogy with cases on searching employees, and safeguarding the integrity and credibility of the arbitration process) are also examined by Arbitrators Bendel, Solomatenko and Welling in *Re Kimberly-Clark Inc. (supra)*; *Re Toronto Transit Commission (supra)*; and *Re Canadian Timken Ltd. (supra)*, respectively, and persuasively rejected.

I can find no basis in the arbitration awards relied upon by the parties to persuade me to adopt a reasonableness test for the admissibility of this video evidence. In particular, I reject the primary ground advanced for this test - privacy - as a basis for using the reasonableness test. I also reject the other reasons which have been advanced - reliance on values in the *Canadian Charter of Rights and Freedoms*, analogy with cases on searching employees, and safeguarding the integrity and credibility of the arbitration process. Nothing in those awards persuades me that a special test is needed to determine the admissibility of video evidence.

The Union offered further policy reasons for adopting the reasonableness test. The Union submitted that to allow the Employer to use video evidence without subjecting that evidence to the reasonableness test would shift the balance in favour of the Employer. The Union also submitted that it made sound labour relations sense to use the test of reasonableness in assessing surveillance evidence. The Union did not provide specifics, but I understood that the submissions flowed from:

1. The idea that employees have an expectation of privacy, even if not a right; and,
2. The distaste which some people have regarding an employer conducting surreptitious surveillance.

The Union urged me to shift the balance, and to uphold sound labour relations values, by subjecting the video evidence to the reasonableness test.

I do not think that my subjective perception about a need to shift the balance of power between the parties, or the balance between the Employer and the grievor, is a sound basis for a decision to reject relevant evidence, or to subject this evidence to the additional reasonableness test.

Moreover, the fact that some people find this practice of surreptitious video surveillance offensive does not, in my view, carry any weight in determining the admissibility of the video evidence. Improvements in technology have enhanced the ability of a "sleuth" to record what an employee has done away from the work place but, as I noted earlier, it has long been possible to engage in surveillance and testify about what was observed. I do not see that the recent use of video has created a shift in the balance of power which should be corrected, even assuming that correcting a shift in the balance of power was a sound basis for determining admissibility. In my view, because the evidence is clearer, more detailed, and thus perhaps more persuasive, the possibility of video evidence has, at most, simply prompted employers to more frequently exercise a power which employers have long possessed.

While I have concluded that shifting the balance of power is not a proper basis for determining the admissibility of this video evidence, I would note that if the Union wishes to shift the balance of power it is able to do so in the bargaining process. The parties' collective agreement is their current agreement in terms of the allocation of power between the two of them. It is clearly possible for a collective agreement to address this issue and to indicate an approach to the admissibility of video evidence which an arbitrator would be required to apply. But there was no suggestion of anything in the parties' existing collective agreement which would assist in resolving the issue before me on the admissibility of this video evidence.

On the Union's general point regarding sound labour relations, I accept that a value such as

good labour relations may be used to reject evidence. Thus, for example, arbitrators generally refuse evidence of grievance discussions on the basis that full and open discussion of grievances during the grievance procedure is vitally important to good labour relations and allowing those discussions to be used later in an arbitration hearing would seriously undermine the effectiveness of the grievance procedure. Given the expanded approach to privilege in recent years, such evidence may be protected as privileged. However arbitrators rejected this evidence when it was not seen as privileged, relying on more general values such as sound labour relations.

Although the grievor may have a personal interest in excluding the evidence, I cannot find any general labour relations value that will be affected by its admission. In particular, I do not think that either an expectation of privacy or a distaste by some persons for surreptitious videotaping are labour relations values which justify subjecting this video evidence to the reasonableness test.

I can find no persuasive rationale for adopting the reasonableness test for determining the admissibility of this videotape evidence.

Summary

I conclude that the usual tests for the admissibility of evidence should be used for examining the admissibility of video evidence. The primary test is relevance and this evidence is clearly relevant to a material issue in dispute. The statutory provision discussed above provides general guidance. I confirm that the Employer can lead this evidence.

I would note that some other issues may appear later which might ultimately cause me to reject this evidence, matters such as those referred to in *Ball v. Vincent (supra)* (e.g., if the video has been edited, does not reflect the facts, or cannot be proven). I was of the

impression that the Union has not yet seen the video evidence and nothing I have said here is intended to prevent the Union from raising such concerns once it has seen the actual evidence.

Union production request

Finally, I note that the Union also sought an order for the Employer to produce evidence of the videotaping of other employees. The Union requested this material to assist it in its submission that the Employer's decision to engage in videotaping of the grievor was unreasonable. Since I decided not to subject the Employer's video evidence to the reasonableness test, I also declined to order the Employer to produce this material.

Dated in London, Ontario, this 2nd day of November, 2004.

Howard Snow, Arbitrator