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Administrative Law Case Study

The Inconsistent Witness

It was 3 p.m. on Friday November 12, 2010 and Philippa Enchin, acting for the union at an arbitration hearing of a grievance regarding scheduling, was in the middle of her direct examination of the client representative, local president, Jesse McCoy. When Philippa asked Jesse to identify a letter that the employer faxed to the union, which she planned to introduce as an exhibit, he flatly denied ever having seen it. After Philippa concluded her examination, the arbitrator called for a break, giving her fifteen minutes to decide what to do about Jesse's testimony, which she knew was almost certainly erroneous.

The Lawyer

Philippa Enchin was called to the bar in 2007 and practised with Manton & Associates, a small firm in Hamilton, Ontario, for three years. Focusing her practice on labour and employment law, she frequently appeared at arbitration hearings on behalf of her clients.

The Client Representative

Jesse McCoy was 55 and had worked his way to the top of the local union executive. He was elected as local union president in 2008. Early in 2010, he represented the union in the previous almost identical grievance that was settled on May 25, 2010. Jesse was extremely busy at the time, as he was involved in negotiating over ten separate collective agreements.

Philippa met Jesse for the first time when she arrived in Belleville that morning to go over the evidence. In the file was a printout of a faxed letter, which was sent by the employer's counsel to confirm the settlement of the previous grievance and to forward a copy of a proposed scheduling policy. The printout clearly displayed Jesse's fax number, indicating that it had been successfully transmitted. When Philippa asked Jesse to identify the letter, she expected him to testify that although he had received the fax, the union never agreed to the policy. She didn't expect him to deny ever having seen it. Philippa called her office in an attempt to get advice from one of the partners, but none of them were available to talk with her.

The Faxed Letter

During settlement negotiations in the previous grievance, Richard Lam, the employer's counsel, drafted a policy to govern all future grievances on the scheduling issue. On June 1, 2010, Richard mailed and faxed the following letter to Jesse regarding the settlement of the grievance and the policy governing scheduling:

Further to our meetings, discussions and correspondence on this matter, I have enclosed our cheque in the amount of \$910.00 in full and final settlement of the above-noted grievance. It is confirmed that this payment and the withdrawal of your grievance are without prejudice and shall not be a precedent for future cases.

I have also enclosed a copy of the policy that will apply in the future regarding scheduling which you have endorsed on behalf of the Union.

On direct examination, Jesse testified that the first time he saw the letter of June 1 was on the first day of the hearing. Richard maintained that the first time he became aware that the union was challenging the policy was on the first day of the hearing.

Conclusion

Philippa knew that anything Jesse said to her about the letter in their pre-hearing discussion was protected by privilege, but she was also aware of her professional obligation to avoid misleading the tribunal. The letter was damaging, but not devastating to her case. She needed to find a way to win the case for her client without breaching either of her conflicting duties.