2017 CarswellOnt 1056
Ontario Arbitration

University Health Network and CUPE, Local 5001 (Khan), Re

2017 CarswellOnt 1056

IN THE MATTER OF AN ARBITRATION PURSUANT TO THE LABOUR RELATIONS ACT, 1995

University Health Network Health Network (the "Employer" "Hospital") and Canadian Union of Public Employees, Local 5001 (the "Union")

Daniel P. Randazzo Member

Heard: September 21, 2016
Judgment: January 30, 2017
Docket: None given.

Counsel: Brian O'Byrne, for Employer
Cynthia Watson, for Union
Selwyn A. Pieters (written), for BADC

Subject: Public; Labour

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Labour and employment law

I Labour law
I.10 Discipline and termination
I.10.f Practice and procedure
I.10.f.viii Evidence
I.10.f.viii.D Witnesses

Labour and employment law

I Labour law
I.10 Discipline and termination
I.10.f Practice and procedure
I.10.f.xi Miscellaneous

Headnote

Labour and employment law --- Labour law — Discipline and termination — Practice and procedure — Evidence — Witnesses

Labour and employment law --- Labour law — Discipline and termination — Practice and procedure — Miscellaneous

Table of Authorities

Cases considered by *Daniel P. Randazzo Member*:

British Columbia Institute of Technology v. College of New Caledonia (1979), [1980] 3 W.L.A.C. 282, 24 L.A.C. (2d) 129, 1979 CarswellBC 1118 (B.C. Arb.) — referred to

Children's Hospital of Eastern Ontario and OPSEU, Re (2014), 2014 CarswellOnt 10176 (Ont. Arb.) — considered

Clarke Institute of Psychiatry v. O.N.A. (1995), 45 L.A.C. (4th) 284, 1995 CarswellOnt 1409 (Ont. Arb.) — considered

Dough Delight Ltd. v. B.C.T., Local 181 (1998), 72 L.A.C. (4th) 34, 1998 CarswellOnt 6103 (Ont. Arb.) — considered

Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General) (2012), 2012 SCC 45, 2012 CarswellBC 2818, 2012 CarswellBC 2819, 34 B.C.L.R. (5th) 1, [2012] 10 W.W.R. 423, 95 C.R. (6th) 1, 23 C.P.C. (7th) 217, 352 D.L.R. (4th) 587, 290 C.C.C. (3d) 1, 325 B.C.A.C. 1, 553 W.A.C. 1, (sub nom. *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society)* [2012] 2 S.C.R. 524, (sub nom. *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society)* 266 C.R.R. (2d) 1 (S.C.C.) — considered

Malaspina University College v. Malaspina College Faculty Assn. (1996), 53 L.A.C. (4th) 93, 1996 CarswellBC 3180 (B.C. Arb.) — considered

North Simcoe Hospital Alliance v. O.N.A. (2007), 165 L.A.C. (4th) 60, 2007 CarswellOnt 8858 (Ont. Arb.) — considered

Ottawa Public Library Board v. Ottawa-Carleton Public Employees' Union, Local 503 (2003), 2003 CarswellOnt 2250, 117 L.A.C. (4th) 435 (Ont. Arb.) — considered

Ottawa-Carleton District School Board v. E.T.F.O. (2012), 2012 CarswellOnt 1908, 216 L.A.C. (4th) 31 (Ont. Arb.) — referred to

Toronto (City) and CUPE, Local 79 (Kalra), Re (2015), 2015 CarswellOnt 6910, 255 L.A.C. (4th) 384 (Ont. Arb.) — followed

Toronto Civic Employees Union, Local 416 v. Toronto Community Housing Corp. (2008), 179 L.A.C. (4th) 208, 2008 CarswellOnt 9005 (Ont. Arb.) — referred to

Vale Canada Ltd. v. U.S.W., Local 6500 (2012), 2012 CarswellOnt 4944, [2012] L.V.I. 3998-2 (Ont. Arb.) — considered

Vaughan (City) and Vaughan Professional Fire Fighters Assn., IAFF, Local 1595, Re (February 19, 2013), Hayes Member (Ont. Arb.) — considered

Statutes considered:

Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A
Generally — referred to

s. 49(4) — considered

***Daniel P. Randazzo Member*:**

1 This matter comes before me by way of consensual appointment. The grievance concerns the discharge of Mr. J. Khan. By way of a very brief background, the Hospital is a large institution comprised of the Toronto General Hospital, Toronto Western Hospital, Princess Margaret Cancer Centre and the Toronto Rehabilitation Institute. It has a large diverse compliment of employees and services a large diverse population. The Grievor was originally terminated for time theft however in preparing for the arbitration with respect to the time theft allegation the Hospital discovered that the grievor, prior to his discharge, had allegedly posted a racist and violent post on his Facebook page. The Hospital contends that the egregious Facebook posting is a factor that should be considered in determining whether reinstatement is an appropriate remedy. The Union does not deny the posting but denies that it was intended as racist and suggests that there was condonation in the workplace with respect to similar if not worse comments than what was posted. Further, the Union contends that there was delay on the Hospital's part in bringing this issue forward and a failure to provide union representation. The above are not findings of fact but are a very general restatement of the parties' respective views.

2 The Black Action Defense Committee ("BADC") is a non-profit corporation whose primary objective is to eliminate racism in all its forms and to work towards a fair and just system of justice in the Province of Ontario and throughout Canada. In carryout out this function, the BADC is particularly committed to the elimination of racism within the Public and Broader Public Sectors, including Hospitals, School Boards, Colleges and Universities, Municipalities and Municipal and Provincial Agencies.

3 The BADC sites many examples of how they have and continue to play an instrumental role in the development and implementation of public policy in policing, race relations and police accountability. They cite, amongst many other examples, their work and contribution to the Report on the Police Complaints System in Ontario, April 25, 2005; Review Report on the Special Investigation Unit Reforms, 2003; and the Report on the Commission on Systemic Racism in the Ontario Justice System, 1995.

4 The BADC serves and represents the African Canadian Community and other racialized communities by providing community based advise, representation and recommendations in cases involving issues of systemic and institutional racism.

5 The hearing was originally scheduled for hearing on May 3, 13 and 16, 2016 and on September 19 and 21, 2016. Some

time was used by the parties in an attempt to resolve the grievance and related matters. However, despite their efforts and my assistance, a resolution of all outstanding issues was not achieved. On May 13, 2016, the hearing with respect to Mr. Khan's discharge grievance was commenced with the parties presenting their opening statements, following which the hearing was adjourned to deal with issues surrounding production and particulars. On September 19, 2016, the hearing reconvened at which time the BADC sought status to attend the hearing. As this request was made relatively late in the day, the hearing was adjourned and reconvened on September 21, 2016 to hear submissions on the request by the BADC to attend the hearing. At the September 19, 2016 hearing, the BADC initially advised that they wanted status as observers only. However, on September 20, 2016 the BADC, through its counsel, provided written submission on the BADC's request to attend the hearing which modified their original request. The BADC in its written submissions sought to have a representative attend the hearing as an observer and to have counsel present at the conclusion of the hearing to make submissions "on any consideration in respect of Mr. Khan's reinstatement and its impact on African Canadian employees, patients, and others who are in the UHN facility in which Mr. Khan previously worked". The BADC's request moved from one of observer to one of participant.

6 Both the Hospital and the Union opposed the BADC's request to attend and/or participate in the proceedings. I note at this juncture that the BADC's request came after the hearing had commenced (the parties had made their opening statements) but before any evidence had been called.

7 The BADC submits that they are entitled to attend as observers and entitled to participate on the basis that:

i. The alleged postings involved a threat of gun violence against Black People;

ii. The threat of gun violence raises a public safety dimension, issues of discrimination and the potential targeting of African Canadians in a public sector workplace and service provider. This public interest issue is within the mandate of the BADC

iii. The BADC is a guardian of the collective public interest of the Black Community.

iv. The BADC members, their family, friends and members of the Black Community seek services of the UHN facilities.

v. The alleged actions of the grievor implicate sections 1, 5, and 9 of the *Human Rights Code*.

vi. There is the risk that the grievor, or others, may carry out his alleged threats.

vii. The BADC has an interest in ensuring that employee misconduct in a public sector workplace that raise racial discrimination are adjudicated in a manner that recognizes racism's subtle, pervasive and unconscious nature and that decisions in the area are consistent with human rights principles.

8 Further, the BADC points out that the grievor is employed by a hospital which is a publically funded institution and the statements were posted on a social media platform and were accessible and viewed publically.

9 The BADC relied on two cases in support of their request: *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45 (S.C.C.) and *Toronto (City) and CUPE, Local 79 (Kalra), Re* [2015 CarswellOnt 6910 (Ont. Arb.)], 2015 CanLII 25143 (Knopf)

10 The Union opposes the BADC's request relying on several grounds which can be summarized as follows: my appointment to hear the grievance is a consensual appointment made by the parties to the collective agreement, the appointment is a private contractual matter between the parties, a third party observer will come into possession of information which may be confidential and there are no procedural controls on the use of the information by the third party. The inappropriate dissemination of information obtained through the hearing process could have a serious and significant detrimental effect on the grieovr's right to a fair hearing. The Union points to the fact that the initial request was to have observer status only but this request morphed into a request to make submissions on remedy. This the Union seems to suggest demonstrates that the BADC is not being forthright with respect to their request and, if granted, would delay an already

prolonged matter.

11 The Hospital also opposed the BADC's request.

12 The Union and Hospital relied upon the following case law in support of their position: *Dough Delight Ltd. v. B.C.T., Local 181* [1998 CarswellOnt 6103 (Ont. Arb.)] (unreported, March 31 1988, Newman); *Vale Canada Ltd. v. U.S.W., Local 6500* [2012 CarswellOnt 4944 (Ont. Arb.)] , 2012 CanLII 20848 (Johnston); *Vaughan (City) and Vaughan Professional Fire Fighters Assn., IAFF, Local 1595, Re* [(February 19, 2013), Hayes Member (Ont. Arb.)] 2013 CanLII 6928 (Hayes); *Toronto Civic Employees Union, Local 416 v. Toronto Community Housing Corp.* [2008 CarswellOnt 9005 (Ont. Arb.)] (unreported, November 2008, Joseph Carrier); *British Columbia Institute of Technology v. College of New Caledonia* (1979), 24 L.A.C. (2d) 129 (B.C. Arb.); *Ottawa-Carleton District School Board v. E.T.F.O.* (2012), 216 L.A.C. (4th) 31 (Ont. Arb.); *Malaspina University College v. Malaspina College Faculty Assn.* (1996), 53 L.A.C. (4th) 93 (B.C. Arb.); *Ottawa Public Library Board v. Ottawa-Carleton Public Employees' Union, Local 503* [2003 CarswellOnt 2250 (Ont. Arb.)] (unreported, April 4, 2003, Baxter); *Children's Hospital of Eastern Ontario and OPSEU, Re*, 2014 CarswellOnt 10176 (Ont. Arb.) (Parmar); *North Simcoe Hospital Alliance v. O.N.A.* (2007), 165 L.A.C. (4th) 60 (Ont. Arb.).

13 As a starting point, as an arbitrator consensually appointed by the parties to the Collective Agreement and pursuant to my authority under the *Labour Relations Act*, S.O. 1995, c.1, ("*LRA*"), I have the authority and obligation to control the hearing process to ensure that the parties, the Hospital and the Union as well as the Grievor are provided with a fair and, to the extent possible, an expeditious hearing.

CASE LAW

14 In *Dough Delight Limited*, *supra*, a case in which the grievor sought to have a personal advisor attend the hearing, Arbitrator Neumann found that the arbitration was a private dispute between the Union and the Employer. Moreover, Arbitrator Neumann found that in the matter before her there was no divergence of interest between the union and the grievor. The fact that her appointment was made pursuant to section 49(4) of the *Act* did not in any way change the private nature of the matter. Arbitrator Neumann relied heavily on *Clarke Institute of Psychiatry v. O.N.A.* (1995), 45 L.A.C. (4th) 284 (Ont. Arb.), a decision by Arbitrator Knopf in which she addresses the question of whether an arbitration proceeding is matter of primarily private or public interest in a matter which dealt with an important public issue concerning alleged violations of human rights by a public institution. Arbitrator Knopf notes at page 288 of the *Clarke Institute* decision:

> Boards of arbitration are constituted to resolve the disputes between the parties. In the context of an arbitration, the parties are the parties to a collective agreement, namely the union and the employer. The arbitration process is designed to offer an expeditious and expert forum in which to resolve disputes. Unlike the courts, the process is essentially private involving the interpretation, application, or administration of a collective agreement. However, that is not to say that there is no public interest in arbitration proceedings or that the union and the employer are the only ones with rights at a hearing. There are a number of individual rights which are regularly protected at a hearing including those of the grievors, witnesses, and/or other parties who may be affected by the outcome of such proceedings. Boards of arbitration are routinely called upon to balance the rights of all these interests. But at all times, the overriding principles must be that the labour relations between the parties to the collective agreement deserve respect and protection.
>
> In analyzing the two issues put to us by the parties, let us begin by indicating that we do not believe that it is appropriate to apply any presumptions as to what ought to be the proper practice. Instead, since this board of arbitration is being called upon to exercise its discretion, that demands that the board look at the facts and circumstances of this as and the issues raised in order to determine the proper result.

15 In *Vale Canada, Ltd*, *supra*, Arbitrator Johnston, in denying the request of the Canadian Broadcast Corporation ("CBC") to attend the hearing, stated that the arbitration process is essentially a private process designed to work with and assist the parties to a collective agreement to resolve workplace disputes. Arbitrator Johnston was persuaded in significant part by the fact that both parties to the proceeding were in agreement to exclude the media from the hearing.

> I have carefully reviewed all of the cases before me that have considered the issue of media or public access to an arbitration hearing. There are no cases where in the face of the agreement of the parties that it could be potentially harmful to their relationship to allow the media to attend and when the parties were united in their desire to have the media or public excluded, that an arbitrator discounted the views of the parties and went ahead and ordered access.

16 Further, Arbitrator Johnston found that the attendance of the media or public could affect the grievor's right to fair hearing, an adverse effect on witnesses and could also have an impact on settlement discussions.

17 In the *City of Vaughan*, *supra*, the employer sought an order to have the proceedings closed to the public, an order excluding witnesses and an order confirming that the evidence used or heard during the arbitration will be used only for the purposes of the arbitration. The Association opposed the first order (excluding the public from the hearing) and consented to the second and third order (excluding witness and confirming restriction on the use of evidence to the arbitration hearing). Arbitrator Hayes conducted a thorough review of the case law in granting the City of Vaughan's request to exclude the public.

18 At paragraph 17 of his decision, Arbitrator Hayes refers to the *North Simcoe Hospital Alliance v. O.N.A.* (2007), 165 L.A.C. (4th) 60 (Ont. Arb.)), which lists a number factors an arbitrator might take into consideration when determining whether the public should have access to an arbitration hearing. Arbitrator Hayes, referring to *North Simcoe* states,

> 17. Furthermore, as suggested by the Association counsel, *North Simcoe* provides a useful framework for analyzing this issue. That case involved an allegation of patient abuse where the Ontario Nurses Association took the position that there was a pressing interest by nurses and other professionals in knowing what nursing practices should be considered appropriate.
>
> 18 The arbitrator said the following at p. 64:
>
> > The issue to be decided at this point is simply whether the public can have access to his hearing. Both parties and the cited authorities agree that the determination of this question is entirely within the discretion of the arbitrator. The matter must be determined on a case-by-case basis, depending on the circumstances and context of the dispute. Factors that arbitrators might take into consideration can include:
> >
> > • the nature of the dispute
> >
> > • the context of the dispute
> >
> > • the implications upon an order excluding witnesses
> >
> > • the impact on the proceedings if observers and/or media are present
> >
> > • the nature of the employer's enterprise whether it is a public or provide institution
> >
> > • the sensitivities raised by the issues
> >
> > • confidentiality of witness and private information
> >
> > • whether there is any legitimate public interest in the issues
> >
> > • the extent to which the matter is already a matter of public knowledge or the subject matter of media coverage
> >
> > • the labour relations implications of such an order

19 Arbitrator Hayes, after reviewing the case law and considering the factors raised in the *North Simcoe* case, held that the hearing should be closed to the public despite the City being a public employer. Arbitrator Hayes noted that neither party was taking the position that the alleged misconduct did not warrant discipline.

> There is no freestanding issue of principal up for debate. The key questions are whether this grievor engaged in misconduct, and if he did, what should be the penalty: private concerns in my opinion. [Para. 24]

20 In *North Simcoe*, *supra*, Arbitrator Knopf allowed the public access to an arbitration hearing finding that the Employer was a "public institution and the public had a legitimate interest in knowing that it can expect appropriate and professional care therein." In Arbitrator Knopf's view, there was a sufficient public interest that warranted public access to the hearing. Further, Arbitrator Knopf found that the privacy issues with respect to the parties and witnesses had already been usurp by events leading to and at the hearing. For example, an unprecedented number of observers had already attended the first day of hearing and the circumstances of the case had been the subject of widespread discussion within the hospital prior to the order excluding witnesses taking effect.

21 In *Children's Hospital of Eastern Ontario*, *supra*, Arbitrator Parmar, relying on *North Simcoe*, *supra*, excluded witnesses and the public. The exclusion of the public was necessary to meaning and effect to the order excluding witnesses and to ensure that witnesses were not intimidated by members of the public while testifying.

22 In *Malaspina University College* the arbitrator held that the hearing should be closed to the public. The arbitrator expressed significant concerns observers may have on witnesses' testimony, including credibility issues and the ability of the parties to obtain a fair hearing. In coming to this conclusion, the arbitrator described his concerns as follows:

> 15. The association argues arbitrators have authority to compel observers to comply with rulings in regard to the discussion of evidence outside the hearing in the same manner as a witness. I am not satisfied, however, that an arbitrator has judicial powers of contempt or any practical means of enforcing rulings against persons who are not parties to the proceedings. If a witness admits to discussing his evidence with others contrary to an order by the arbitrator, the parties' remedy lies in the weight attached to his or her evidence. It is quite another matter to effectively control the discussion or publication of evidence by observers. In this regard, I agree with the arbitration board's comments in *Re Clarke Institute*, *supra* (p.289)
>
> > It is true that when the media attends a hearing, the board of arbitration has no control over what the media does nor does not report and how it is reported. It is also true that there is no effective control over the accuracy of the media coverage.

23 In *The Ottawa Public Library*, Arbitrator Baxter held that in the face of a witness exclusion order the media should not be entitled to attend the hearing. Arbitrator Baxter found that without the authority to order a publication ban or to enforce that ban, natural justice and fairness to the parties could be adversely affected should a non-party publish information which could, either consciously or unconsciously, taint the testimony of a witness. This is of importance where the credibility of witnesses will be an issue at the hearing.

24 The BADC relies upon *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, *supra*, in support of their position that should be given status to participate in the hearing. I note that although the BADC had initially only sought the opportunity to attend as an observer, their request was amended at the time of filing their written submissions to include the right of counsel to make submissions on remedy. In*Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, *supra*, the Supreme Court of Canada set out the criteria by which a public interest group may seek standing in a public law matter. In *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, *supra*, the Downtown Eastside Sex Workers Against Violence Society (the "Society") was given standing to bring a constitutional challenge to the prostitution provisions of the Criminal Code. In

granting the Society standing to bring the challenge, the Supreme Court of Canada reviewed three factors: 1. Does the case raise a serious justiciable issue; 2. Does the party bringing the case have a real stake in the proceedings or engaged in the issues that are raised, and 3. Is the proposed suit a reasonable and effective means to bring the case to court. Although a party with standing as of right is generally preferred, upon a review of the factors and circumstances of that matter, the Supreme Court of Canada granted the Society status to bring a public law matter.

25 The BADC also relies upon *Toronto (City) and CUPE, Local 79 (Kalra), Re*, *supra*, in support of their position. I note at this juncture that the BADC did not provide a copy of this decision at the hearing nor did they reference the decision during their written or oral submission. A copy of the decision was received after the parties had concluded their submissions. Given the timing of the late submissions, the Union objected and took the position that I should not consider this case. The Hospital took no position. Notwithstanding the timing, for the purposes of completeness, I have reviewed and considered this case.

26 In *Toronto (City) and CUPE, Local 79 (Kalra), Re*, *supra*, a grievor sought to have a personal adviser attend as an observer. The union did not object to the grievor's request however the City did. In allowing the personal adviser to attend, Arbitrator Knopf observed at paragraphs 12 and 13:

> 12. The parties to this case have gone to considerable trouble to provide this Arbitrator with case law that gives guidance into issues regarding whether the public or the press should be allowed in arbitration hearings or whether a Grievor can be represented by his/her own counsel or as a separate party. The public/private debate need not be addressed in this Preliminary Award for all the reasons that follow. All the cases cited above accept the same general but fundamental principles that are relevant to this proceeding. First, a labour arbitrator is vested with the discretion to determine whether it is appropriate to allow anyone other than the parties and their representatives to attend the hearing [*Toronto Star Ltd. and Toronto Newspaper Guild, supra]*. The exercise of that discretion requires consideration of several factors that must be determined on a case-by-case basis. [*Clarke Institute of Psychology; North Simcoe Hospital Alliance]*. Secondly, only the Union and the Employer are the parties to a collective agreement and have status at a discipline or discharge hearing *[every case cited by the parties]*. In the normal course, only the Union and the Employer have party status at a hearing. "Third party status" may only granted if there is a conflict between the Union and the Grievor and/or where individuals other than the Grievor have a significant interest that may be adversely and directly affected by the outcome of the arbitration. [*Ryder Integrated Logistics, supra]*. Third, there is a distinction between third party or Intervenor status and that of being accorded the opportunity to be present as an observer [*Ryder Integrated Logistics, supra]*. Fourth, because an arbitrator has the power and authority to control the proceeding, the arbitrator has the discretion to allow or exclude witnesses and observers from his/her hearing *[every case cited by the parties]*. Consequently, when and if someone interferes with the integrity of the arbitration or its dispute resolution process, the arbitrator can and should exclude that person from the hearing [*Quality Meats; Toronto Community Housing; Children's Hospital of Eastern Ontario]*. That applies to anyone who negatively affects the fairness and proper process of the hearing.
>
> 13. Turning to the case at hand, it is important to focus on the real issue to be determined. This is not a case where the Grievor is seeking third party status. This is not a case where there is any request for the public to have access to the hearing. This is not a case where the "public v. private" nature of labour arbitration needs to be debated or resolved. This is not a situation where the Grievor or her personal counsel are seeking the right to make submissions or even to take any active role in the hearing. Therefore, this is a situation where the Grievor is simply asking to have someone sit in the hearing as her personal observer. That chosen person happens to be a lawyer who practices in the field of employment law and who has undertaken to abide by a number of self-imposed terms as conditions of his attendance.

27 Save and except the Supreme Court of Canada's decision in *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, *supra*, the decisions relied upon by the Hospital, the Union and the BADC are based upon very similar if not the same principles in addressing the issue of whether to grant the public access to an arbitration hearing. *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, *supra*, addresses the issue of whether a public interest group has standing in a public law matter. This decision and its legal analysis has little if any relevance to the issue of whether the BADC should have standing or observer status in this arbitration hearing, which is a matter of private not public law.

28 The principles flowing from the case law are well set out by Arbitrator Knopf's *Toronto (City) and CUPE, Local 79 (Kalra), Re*, *supra*, decision at paragraph 12. I agree with Arbitrator Knopf that the four principles, as set out below, apply to the issue of access to an arbitration proceeding:

> 1. A labour arbitrator is vested with the discretion to determine whether it is appropriate to allow anyone other than the parties and their representatives to attend the hearing. The exercise of that discretion requires consideration of several factors that must be determined on a case-by-case basis.
>
> 2. Only the Union and the Employer are the parties to a collective agreement and have status at a discipline or discharge hearing. Third party status may only be granted if there is a conflict between the Union and the Grievor and/or where individuals other than the Grievor have a significant interest that may be adversely and directly affected by the outcome of the arbitration.
>
> 3. There is a distinction between third party or Intervenor status and that of being accorded the opportunity to be present as an observer.
>
> 4. An arbitrator has the power and authority to control the proceeding, the arbitrator has the discretion to allow or exclude witnesses and observers from his/her hearing.

DECISION

29 The BADC has made two requests. The first is to allow a representative of the group to attend and observe the hearing. The second is to allow counsel to attend (at the conclusion of the hearing) to address and make submissions with respect to remedy. The first request is the private-public debate that arbitrators have in a multitude of cases undertaken. The second request is for standing or third party status, which includes the right to attend and participate. Although the BADC has not asked for the right to call evidence, examine and cross-examine witnesses, they have, in their written submissions, asked for the right to make submissions on remedy. Although not presented as such during the BADC's remarks, both requests are separate and require significantly different analysis.

REQUEST FOR THIRD PARTY STATUS AND THE RIGHT TO MAKE SUBMISSIONS

30 There is no debate that only those who are parties to the collective agreement, the Union and the Hospital, have status at a discipline/discharge hearing. In an arbitration hearing, third party status may be granted where there is a conflict between the Union and the Grievor (that conflict is not present in the matter before me) or where there is an individual or individuals who have a significant interest that may be adversely and directly affected by the outcome of the arbitration. See for example *Toronto (City) and CUPE, Local 79 (Kalra), Re*, *supra* and those cases cited within as well as the case law put before me.

31 I have no doubt, given their mission and purpose, that the BADC is interested in the outcome of the matter before me. However, they have failed to establish a significant interest that may be *adversely and directly affected by the outcome of the arbitration*. Third party status in a discipline/discharge case is extremely rare. None of the case law put before me before me, including *Toronto (City) and CUPE, Local 79 (Kalra), Re*, *supra*, a case relied upon by the BADC, addresses the issue of third party status in a discharge case. Arbitrator Knopf in *Toronto (City) and CUPE, Local 79 (Kalra), Re*, *supra*, limits her analysis to circumstances where the grievor is seeking a personal advisor to attend as an observer and *North Simcoe*, *supra*, which allows the public access as observers, does not address the issue of third party status. Third party intervenor requests are commonly found in non-disciplinary matters such as posting grievances or disputes concerning work assignments. In those instances, individuals and in disputes concerning work assignment other trade unions, are given notice of the hearing and notice that their rights may be affected. Should an individual attend and establish that they will be adversely and directly affected by the outcome, they are granted status to participate in the hearing, which would include the right to make submissions on remedy.

32 The BADC has not established that they have an interest that will be adversely or directly affected by the outcome of this arbitration hearing and consequently their request for status and the opportunity to make submissions is denied.

OBSERVER STATUS

33 The request for observer status requires an exercise of my discretion to allow someone other than the Union and Hospital to attend the hearing. This is, as can be seen by the case law cited and referenced herein, a weighing of public interests and the private rights of the participants to the hearing. In determining how to exercise my discretion, I agree with my colleagues that consideration must be given to a number of factors.

34 A non-exhaustive list of factors which can be considered is found in *North Simcoe*, *supra*. In *North Simcoe*, *supra* for example Arbitrator Knopf comes to the conclusion that the public, in particular the workplace and employees, had a depth of knowledge of the circumstances which would form the subject matter of the hearing and consequently privacy was no longer an issue. Furthermore, Arbitrator Knopf found that the employer was a public institution and the allegations focused on patient care. This was in Arbitrator Knopf's view a sufficient public interest to warrant access to the hearing. In contrast to this, in *Malaspina University College v. Malaspina College Faculty Assn.*, *supra* arbitrators found that to give effect to a witness exclusion order, it was necessary and appropriate to restrict access to the hearing and excluded members of the public. The private rights of the parties to a fair hearing outweighed the public interest in having access to the hearing.

35 Arbitrator Hayes in *City of Vaughan* excluded the media notwithstanding that the employer was a public sector employer. The issues to be determined in the *City of Vaughan* was whether the grievor engage in the alleged misconduct of sexual harassment, and if so, what was the appropriate penalty. Arbitrator Hayes found these issues to be private matters. The private rights to a fair hearing outweighed the public interest.

36 In the case before me, the BADC points out that the Hospital is a public institution, BADC members, family and friends and members of the Black community seek services at the Hospital. Further, the racist statements were posted on a public platform (Facebook) and therefor potentially viewed by unknown numbers. The BADC also asserts that it "has an interest in ensuring that employee misconduct in a public sector workplace that raise racial discrimination are adjudicated in a manner that recognizes racism's subtle, pervasive and unconscious nature and that decisions in the area are consistent with human rights principles".

37 The matter before me is a discharge grievance that involves the allegation that the grievor posted a racist comment which included violence or the threat violence against those in the Black community. The Union has not taken the position that the grievor did not make the post nor is the Union condoning the grievor's actions. I will be called upon to determine if the Grievor's actions, in the context of various workplace circumstances, warrant discharge. These, as in *City of Vaughan*, *supra*, are private issues.

38 The Hospital is an institution within the broader public sector and I accept that the public would have an interest in how the operation of the Hospital. However, the employment relationship between the Hospital and the Grievor, as well as several witnesses who will testify before me, is a private matter. I am also mindful that through the arbitration process participants and those who attend may become aware of private and confidential employment information as well as private and confidential operational and patient information. The protection of private and/or confidential information is an important factor to be considered.

39 Although I am of the strong view that the BADC's public interests of working to towards a fair and just system of justice and the elimination of racism in the public and broader public institutions are significant interests within our society, I must weigh those interests against the parties' right to and my obligation to provide a fair hearing. I agree with the cautionary sentiments found in *Malaspina University College v. Malaspina College Faculty Assn.*, *supra*. As the arbitrator appointed to hear and determine whether or not the Grievor should be reinstated, I have an overriding obligation to the parties to provide a fair hearing.

40 Although the Union has acknowledged that the Grievor is responsible for the post, they have advanced the position that the Hospital has condoned discriminatory statements made by other employees. The Hospital has vehemently denied this. As it was evident that I would be called upon to assess the credibility of the witnesses, I have imposed an order excluding witnesses from the hearing room.

41 To meet my obligation to provide a fair hearing, my order to exclude witnesses must be an effective and enforceable order and to give effect to this order I am of the view that witnesses and the public, which includes observers from the BADC, must be excluded from the hearing room. I cannot effectively control what observers may publish or say outside the hearing room and I cannot control what effect, consciously or unconsciously, this could have on the witnesses who are to appear before me.

42 I note that the in *North Simcoe*, *supra* Arbitrator Knopf allowed the public to observe the hearing. However, she did so noting that the public had already attended at the hearing and the circumstances forming the subject matter of the hearing would appear to have already been part of the public knowledge. Privacy and the effect observers may have on witnesses' testimony were no longer a significant concern. In other cases where the effect observers may have on witnesses' testimony and a witness exclusion order, as in the matter before me, the public, as well as witnesses, have been excluded.

43 Having considered a number factors, including the nature and context of the dispute, the implications on an order excluding witnesses, the nature of the employer's enterprise, the public interest in the dispute, the preservation of private and confidential information and the necessity of providing a fair hearing, I am of the view that the public, which includes witnesses and the BADC, should be excluded from the hearing.

44 The BADC's request to attend the hearing as observers is denied.

45 This matter will proceed as scheduled.

End of Document

