

IN THE MATTER OF AN ARBITRATION

BETWEEN:

Kawartha-Haliburton Children's Aid Society

-and-

**Ontario Public Service Employees Union
Local 334**

Grievance of Krista Knerr

Lorne Slotnick, Arbitrator

Representing the Employer – Frances Gallop

Representing the Union – Andrew Mindszenty

Hearing – by conference call, June 21, 2019.

A W A R D

This grievance arises from the termination of employment of Krista Knerr. After the first hearing day and before the second scheduled date, the union withdrew the grievance. An issue has arisen regarding whether the withdrawal should be considered “without prejudice,” or whether the grievance should be dismissed “with prejudice.”

The matter was heard by conference call, with documents provided beforehand and further submissions made afterward.

Background

The grievance was filed in November 2018, alleging a breach of the collective agreement, the *Human Rights Code* and the *Occupational Health and Safety Act*. The first day of hearing was scheduled for March 4, 2019. On that date, an attempt at resolution was unsuccessful. The employer then made an opening statement, I ordered the employer to produce some documents, and further hearing dates were set for October 2019.

On May 9, 2019, union counsel wrote by email to employer counsel that, “without prejudice to any other matter and without precedent, the Union is withdrawing the above-noted and attached grievance of November 13, 2019 on behalf of Krista Knerr.” Employer counsel advised that there was no problem with the withdrawal being “without prejudice or precedent” with regard to any other employee, but that she wanted the withdrawal to be “with prejudice” to the grievor in

any other proceeding involving her and the employer. Union counsel did not agree, but responded that the grievor had been made aware of the employer's position.

About two weeks later, on May 22, 2019, a lawyer representing the grievor filed an application with the Human Rights Tribunal of Ontario raising some or all of the same issues raised by the grievance. It was served on the employer on June 18. At the conference call held with counsel on June 21, union counsel advised that he and the union were unaware of this application until employer counsel sent documents the previous day in preparation for the call.

The union asserts that once it unilaterally withdrew the grievance, it was resolved without any requirement for the employer's agreement. It says I have no jurisdiction to declare the withdrawal "with prejudice" to a proceeding before another tribunal. It asks me to end the proceeding because of the withdrawal without ruling on whether it was with or without prejudice. The union submitted the following cases: *Re City of Toronto and CUPE Local 79* 2014 CarswellOnt 6360 (Stout); *Re Ontario (Community and Social Services) and OPSEU* 2012 CarswellOnt 6645 (GSB, Carrier); and *Re Seneca College and OPSEU*, July 24, 2009, unreported (M. Picher).

The employer says the undisputed facts point to an abuse of process by the grievor, warranting a dismissal of the grievance with prejudice or as an abuse of process, or that the grievance be deemed to be withdrawn with prejudice. The employer referred to *Re Ottawa-Carleton District School Board and OSSTF*, Nov. 7, 2011, unreported (Knopf).

Decision

Any party is free to withdraw a grievance at any time. For a grievance to be withdrawn “without prejudice,” both parties’ agreement may be required. Here, the parties have agreed the grievance is withdrawn without prejudice to matters involving employees other than the grievor. It has long been accepted that, subject to exceptional circumstances, an arbitrator will not hear a grievance that has been withdrawn and later filed again. (See *Re City of Sudbury and CUPE Local 207* (1965) 15 L.A.C. 405 (Reville).) In that sense, the withdrawal of this grievance is “with prejudice” to this grievor’s ability to pursue the same grievance in the future.

It is understandable that the employer is upset that it has devoted time and resources to defending this grievance, only to have it withdrawn in favour of a human rights application. However, it is up to the Human Rights Tribunal to determine its disposition of her application to that tribunal. The employer is free to argue at the tribunal that there has been an abuse of process. Its request for a ruling on that point from me is dismissed.

However, the matter before me is dismissed with prejudice to the grievor’s right to grieve the termination of her employment under the collective agreement.

A handwritten signature in black ink, appearing to read "Lorne Slotnick", written over a horizontal line.

Lorne Slotnick, Arbitrator
June 28, 2019