

IN THE MATTER of Grievances dated June 19 and July 3, 2020
AND IN THE MATTER of an Arbitration under the *Labour Relations Act*,
1995 as amended.

BETWEEN:

LIUNA, LOCAL 183

(“the Union”)

-and-

CLARK CONSTRUCTION MANAGEMENT INC

(“the Employer”)

ORDER

Background

1. The continuation of the arbitration hearings of these two grievances is scheduled for May 18, 2021. There have already been five days of testimony. The Union evidence has been completed and the majority of the Employer evidence has been completed.
2. The arbitration has proceeded with the benefit of “Will-Say Statements” which have constituted the evidence in chief of the witnesses. Cross-examination and re-examination of witnesses have been conducted *viva voce*.

3. The “Will-Say Statements”, including, in some cases, Amended, and Supplemental “Will-Say Statements”, were all filed prior to the first day of testimony on January 11, 2021.
4. The next scheduled Employer witness is Mike Clark, who is the president of Clark Construction Management Inc.
5. On May 10, 2021, Union counsel sought an Order striking out two paragraphs of Mike Clark’s “Will-Say Statement” on the grounds that the paragraphs are “purely opinion evidence” and “devoid of factual content and any material facts”. The “Will-Say Statement” of Mike Clark was filed by the Employer in August 2020.
6. The impugned paragraphs are as follows:
 4. *Mr. Downey’s race was not a factor in his layoff.*
 5. *Mr. Downey was not subject to racial discrimination in the workplace.*
7. Employer counsel opposed the motion to strike on the basis that the paragraphs do not contain improper opinion evidence. Employer counsel further asserted that the motion should be rejected as untimely, being made nine months after the “Will-Say Statement” was filed.

Determination

8. The statements of Mr. Clarke clearly represent the position of the Employer, which is vigorously contesting the grievances in these proceedings. In many respects they are in the nature of a pleading made by the president of the company denying the allegations that are at the heart of the Union grievances. However, they constitute his opinions only, and are factually unsupported.
9. As the arbitrator of these two grievances it is my role to determine at the end of the case whether the allegations of the Union have been proven. I will make that determination on the basis of the facts presented in evidence.

10. Counsel for the Employer has invited me to allow the paragraphs to stand on the basis that they are not opinion evidence but “are better understood as evidence based on belief.”

11. I am unable to accept that submission. I take it almost as a “given” that the impugned paragraphs constitute the belief of Mr. Clark. They are nonetheless factually unsupported opinion evidence. It is not a question of me giving such statements appropriate weight at the end of the case. I cannot give them any weight because there are no facts alleged, upon which I can rely.

12. On the above grounds, I am not prepared to accept evidence contained in paragraphs 4 and 5 of the “Will-Say Statement” of Mr. Clark.

13. The motion to strike the two paragraphs in Mr. Clark’s “Will-Say Statement” was certainly brought very late in the proceedings. However, the cross-examination of Mr. Clark has not yet started and there will be no delay in the proceedings as a result. Further, the impugned paragraphs of his testimony are not any the less unsupported opinion evidence, regardless of the timing of the objection.

DATED at Toronto this 16th day of May, 2021.



Michael G. Horan, Arbitrator