

IN THE MATTER OF an Arbitration

BETWEEN:

THE TORONTO TRANSIT COMMISSION
(the Commission or the employer)

- and -

AMALGAMATED TRANSIT UNION, LOCAL 113
(the union)

AND IN THE MATTER OF a union policy grievance regarding vaccination against COVID-19 and regarding an interim application by the union to limit the scope of the evidence by striking out portions of the will-say statement of Dr. Vinita Dubey.

Before: Daniel Harris, Sole Arbitrator

Heard at: Toronto, Ontario December 20, 2022.

Decision Date: January 27, 2023.

Appearances:

For the employer: Dolores Barbini, Counsel, and others.

For the Union: Simon Blackstone, Counsel, and others.

DECISION

Background

1. This matter is a policy grievance filed by the Amalgamated Transit Union, Local 113, hereinafter the union, against the promulgation by the Toronto Transit Commission, hereinafter the Employer or the Commission, of a policy that required employees to be vaccinated against the COVID-19 virus. Failure to be vaccinated resulted in the termination of the employment of many members of the Local 113 bargaining unit.
2. The parties have agreed to modifications to their normal arbitration hearing procedures, including the exchange of will-say statements that will stand for the direct evidence of their witnesses, with cross-examination thereon by the party opposite.
3. This decision deals with a preliminary application by the Union, which objects to the admissibility of three paragraphs in the will-say statement of Dr. Vinita Dubey. Dr. Dubey is, and was at the material time, the Associate Medical Officer of Health, Communicable Disease Control, for the City of Toronto.

4. The three paragraphs objected to are paragraphs 73, 74 and 75, which read as follows:

73. In the context of the Delta variant, vaccines were the single most important measure to protect employees and residents of Toronto from infection, hospitalization, ICU admission and death due to COVID-19, as part of a comprehensive public health strategy.

74. In the context of the Omicron variant, vaccines remain the single most important measure to protect employees and residents of Toronto from the serious consequences of COVID-19 and, as outlined above, may also help limit transmission of the virus both in the workplace and in the community, thereby protecting vulnerable persons such as those who cannot be vaccinated and those with weakened immune systems.

75. Requiring employees to be fully vaccinated means that employers are also well prepared to protect their employees from future variants and/or waves of COVID-19. In the event a fully vaccinated employee has not received a booster dose, they still receive considerable protection from serious illness, hospitalization and death through full vaccination. In addition, being fully vaccinated means when they are eligible for a booster dose and receive it, they will enjoy further protection from that dose within 7 days.

5. The union's objection to these paragraphs is that they are conclusionary in nature.

That is, Dr. Dubey was not involved in the creation or implementation of the Commission's COVID-19 Vaccination Policy, yet she draws conclusions in these paragraphs that may only be put into evidence by a party, as the opinions of an expert, after the submission of a written report of the expert, which is provided to the party opposite in advance of the hearing. The union submitted that paragraphs 21 through 25 of her will-say are examples of permissible fact evidence that she may provide without the preparation of an expert report. Those paragraphs read as follows:

21. Over the course of the pandemic, the MOH and TPH have provided detailed and updated evidence-based guidance and recommendations in response to evidence on COVID-19 and prevailing epidemiological trends. Workplaces have been identified as a site of COVID-19 transmission through case and contact management investigations and outbreaks. Accordingly, and despite that TPH's mandate is to provide public health advice rather than occupational health and safety guidance to employers, on August 20, 2021, the MOH strongly recommended that employers implement workplace vaccination policies to protect their employees and the public from COVID-19. The MOH recommended that employers' vaccination policies should require at minimum:

- (a) Workers to provide proof of their vaccination series approved by Health Canada or the World Health Organization;
- (b) Unvaccinated employees to provide written proof of a medical reason from a physician or nurse practitioner that includes whether the reason is permanent or time-limited; and
- (c) Unvaccinated workers to complete a vaccination education course on the risks of being unvaccinated in the workplace.

22. The MOH made this recommendation in part recognizing that, if employers created workplace policies regarding vaccination, the likely effect would be an increase in vaccination rates, which was thought in turn to be in the best interests of public health.

23. The TPH website makes clear that the City of Toronto's vaccination policy, which made vaccination mandatory for staff, is an example for other workplaces to adopt.

24. TPH's view is that implementing a COVID-19 vaccination policy is an important step that employers can take to provide a safe workplace, recognizing that employers will want to conduct their own assessments as to what precautions are necessary in order to discharge their legislative obligations with respect to protecting the health and safety of their workers.

25. To support employers in implementing workplace vaccination policies, TPH publishes detailed information and resources on the City of Toronto website which are updated when required throughout the pandemic.

Source: <https://www.toronto.ca/home/covid-19/covid-19-reopening-recoveryrebuild/covid-19-reopening-guidelines-for-businesses-organizations/covid-19-guidanceemployers-workplaces-businesses/covid-19-vaccine-information-foremployers/?accordion=establishing-a-vaccination-policy-for-your-workplace>

6. The union submitted that these paragraphs relate to the work performed by Toronto Public Health in its efforts to make recommendations to employers of the course to follow in dealing with the COVID-19 pandemic.
7. The union relies upon the Ontario Court of Appeal's decision in *Westerhof v. Gee Estate*, 2015 ONCA 206, . It said that the Court provided binding authority in that case with respect to the admissibility of expert opinion evidence and speaks to what type of expert evidence requires a report. It said that expertise based on conclusions by someone who did not directly participate in or observe the facts-in-issue in the instant litigation require compliance with *Rule 53.03*, but the opinions expressed on the basis of being a participant in the factual narrative before me do not require a *Rule 53.03* report. It said that the employer here is taking the broadest possible view of the facts-in-issue in order to sweep Dr. Dubey's at-large opinions in the three disputed paragraphs into the factual narrative here. The union submitted that the facts-in-issue here are the creation and implementation of the TTC policy requiring employees to be vaccinated against COVID-19. The union points to the correspondence from TTC counsel, dated December 19, 2022, as dispositive that Dr. Dubey had no participation in the creation or implementation of the Commission's COVID-19 vaccination policy.

We agree that Dr. Dubey is being put forward as a fact witness. We further agree with the Union that she can give opinion evidence for the truth of its contents where she participated in the events at issue, namely her role as the Associate Medical Officer of Health for the City of Toronto during the pandemic. **The TTC does not intend to call**

evidence about Dr. Dubey's involvement in the development of the TTC's Policy because she was not so involved.

We further note that Dr. Dubey is in fact a medical expert – she is a medical doctor with a public health specialization and her work experience has focussed on vaccine preventable diseases. Since the onset of the pandemic, she has focused on health promotion, disease prevention, and public health strategies to address vaccine hesitancy in the community, led teams at the local public health level, as well as teams dedicated to increasing vaccine confidence in the workplace. **She clearly has expertise in vaccine preventable diseases. Moreover, she also directly participated in the events at issue, namely the Toronto Public Health's handling of and involvement with the pandemic in the City of Toronto.**

(emphasis added)

8. The union submitted that where participant experts as “fact-witnesses” go beyond testifying regarding their opinions derived from their observations of the underlying facts of the events in issue, they must first file an expert report pursuant to *Rule 53.03*. The union submitted that Dr. Dubey may give evidence of what she did and said to the City of Toronto and inferentially to the TTC, but not about her subsequent opinions as set out in the disputed paragraphs of her will-say statement.

9. The union also submitted that a fact-witness consulted by the TTC could give evidence of the advice it gave to the TTC, but no such advice was sought of Dr. Dubey by the TTC and the assertions made in the disputed paragraphs are after the fact opinions of Dr. Dubey that require compliance with the Court of Appeal's dictates in *Westerhof*. That is, those opinions at large are expert opinions that require the provision of an expert's report.

10. The TTC submitted that Dr. Dubey is both a fact witness and a participant witness to the extent that her will-say statement contains her opinion. The TTC referred to the union's correspondence of December 14, 2022 in which it set out that "Dr. Dubey could only give opinion evidence for the truth of its contents where that opinion is based on her own participation in the events in issue. The TTC submitted that the disputed paragraphs are her opinions based on her observation of and participation in dealing with the pandemic at large. Further, it said that she formed her opinion, as required by *Westerhof*, as part of the ordinary exercise of her skill, knowledge, training and experience, while observing and participating in the City of Toronto's involvement with battling the pandemic. It said that her opinions expressed in the disputed paragraphs are squarely based on, and rooted in, her job and experience acquired as the Associate Medical Officer of Health for the City of Toronto, while she was directly involved in and participated in Toronto Public Health's management of the pandemic at large for the City of Toronto.

11. The TTC submitted that it clearly relied on the opinion of Toronto Public Health, hereafter TPH, in developing the TTC's Mandatory Vaccination Policy. In this regard, in its submissions here, it relied upon the evidence of two of its witnesses, Betty Hasserjian and Meghan Rogers. Those two will-says are very similar and both

have attached as an appendix the press release referred to. Ms. Hasserjian's will-say reads as follows at paragraph 21:

On August 20, 2021, the Toronto Medical Officer of Health issued a press release strongly recommending that all Toronto employers institute COVID-19 vaccination policies requiring, at a minimum, that workers provide proof of vaccination or, failing that, provide written proof of a medical exemption from a physician or nurse practitioner and complete a course on the risks of being unvaccinated in the workplace. . . .

12. The TTC submitted that the evidence clearly establishes that it relied on these recommendations of TPH in drafting and implementing its policy. It noted that the union agreed that evidence of such reliance was admissible but that TPH's rationale for making the recommendation was not. The TTC submitted that it is unreasonable to exclude TPH's reasoning behind its public recommendations. It said that if the public recommendation that the TTC relied upon is relevant and admissible, then surely the reasons for TPH having made the public recommendation should also be relevant and admissible. It said that the disputed paragraphs are effectively the rationale for the public recommendations of TPH.

13. The TTC also submitted that the reasonableness of its mandatory vaccination policy rule is integral to its legal validity. It said that the context for the rule is the COVID pandemic in the City of Toronto and TPH's recommendations to employers of how to respond to the pandemic, which was made at the same time that the TTC decided to implement its policy. It said that the recommendation of TPH is relevant

to the validity of the rule and so too is TPH's reasoning. It also submitted that to rule that TPH's reasoning is inadmissible would go to the very heart of this case and would create the unreasonable outcome that evidence clearly linked to the recommendation be excluded.

14. The TTC also submitted that Dr. Dubey's acquired expertise, which resulted in TPH's recommendation, was contemporaneous with the promulgation of the Policy by the TTC. Further, her general expertise also existed at that time. It was submitted that Dr. Dubey is a medical expert with a focus on public health. It said that she clearly has expertise in mass vaccination and directly participated in experiences with the COVID-19 pandemic as it developed and in TPH's participation in the pandemic in the City of Toronto. The TTC submitted that she can and should provide an opinion, and it is absurd to say that her opinion is not admissible.

15. The TTC also submitted that, other than establishing that an expert is qualified to give opinion evidence, a party is not required to comply with the *Rules of Civil Procedure* because they do not apply to labour arbitrations. Further, even if there is an obligation for the expert to produce a report prior to testifying, the spirit of that requirement has been met here by the provision of her *curriculum vitae*. The TTC also submits that, more importantly, *Westerhof* does not require the production of an expert report by Dr. Dubey.

16. In this latter regard, the TTC submits that these proceedings are not a “trial”; the TTC has not “engaged” Dr. Dubey as an expert to give opinion evidence, and Dr. Dubey is a participant witness, meaning that she “formed the opinion to be given as part of the ordinary exercise of [her] skill, knowledge, training and experience while observing or participating in such events”.

17. That is, the TTC relies upon the two-part test laid down by the Ontario Court of Appeal which it said are exemplified by paragraphs 59, 61, 62 and 70 of the Court’s reasons in *Westerhof* for the proposition that, in any event, Rule 53.03, which requires an expert report, need not be complied with because Dr. Dubey is a participant witness. Further, I am told that Arbitrator Rogers accepted Dr. Dubey’s similar will-say statement, without objection, and without providing an expert report, in his decision relating to the union policy grievance against the City of Toronto’s Mandatory Vaccination Policy.

18. Finally, the TTC submitted that if I should find that Dr. Dubey’s evidence is inadmissible, I should allow it to be called under section 48(12)(f) of the Ontario *Labour Relations Act, 1975*.

19. In reply, the union submitted that paragraph 22 of Dr. Dubey's will-say entirely encompasses her rationale for promoting employer vaccination policies. For convenience that paragraph is again set out as follows:

22. The MOH made this recommendation in part recognizing that, if employers created workplace policies regarding vaccination, the likely effect would be an increase in vaccination rates, which was thought in turn to be in the best interests of public health.

20. The union submitted that the opinion proffered in the disputed paragraphs is an entirely different rationale and is divorced from the facts-in-issue in the instant matter, which is the reasonableness of the specific TTC policy requiring mandatory vaccination.

21. The union also addressed, in reply, the TTC's assertion that, 'If Dr. Dubey cannot give an expert opinion, who can? It submitted that the issue is not with respect to Dr. Dubey having or not having expertise, but rather it is how any such expert opinion may be proffered. It said that in fairness and justice it ought to be given through the vehicle of an expert report in advance of her testimony. The union relied upon *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham* (2000), 51 O.R. (3d) 97, [2000] O.J. No. 4428, 138 O.A.C. 201, 43 C.P.C. (5th) 65, 101 A.C.W.S. (3d) 634 (C.A.) as referred to by the Court of Appeal in *Westerhof, infra*, at paragraphs 67 through 70.

22. Finally, as to the TTC's oral submission that there was no objection to the admission of Dr. Dubey's will-say in the arbitration of the City of Toronto's Mandatory Vaccination Policy grievances, the union submitted that this submission was devoid of any factual context, and thereby of no assistance here.

Analysis and Reasons

23. The Employer focussed many of its submissions on Dr. Dubey's expertise. However, there is no apparent disagreement from the union that Dr. Dubey has appreciable expertise with respect to the progress of the COVID-19 virus in the City of Toronto and what the TPH promoted as the most desirable response.

24. As I understand the union's case, as put to me thus far in these proceedings, it is that the TTC had initially devised a policy rule which required frequent testing of its front-line employees. Nonetheless, the TTC ultimately adopted a mandatory vaccination requirement that resulted in mass terminations. Much of the union's efforts in these proceedings have been focussed on this change in the TTC policy.

25. In the TTC correspondence set out above, and in its submissions on this evidentiary question, it argues that if Dr. Dubey may not opine on the wisdom of that transition, "Who could?" I have not heard it argued that she is not "expert" enough. To the contrary, the union concedes the expertise she acquired in battling

the COVID-19 pandemic and it also concedes that her advice to the City of Toronto is relevant, and admissible. It objects to the admissibility of her opinion regarding the paramountcy of mandatory vaccination. The union submits that Dr. Dubey was not asked her opinion on that by the TTC, at the requisite time, and to be asked it now, in these proceedings, may only be done by first providing an expert report as required by *Rule 53.03* as outlined by the in *Westerhof*.

26. The Employer submitted here that *Rule 53.03* of the *Ontario Rules of Civil Procedure* is not applicable to labour arbitration proceedings. However, *Toronto Transit Commission v. Amalgamated Transit Union, Local 113*, 2022 CanLii 12795, sets out at paragraph 25 that “the general rule followed, and to be expected, is that parties to labour relations proceedings in Ontario will follow the procedure laid down in *Rule 53.03*.” Accordingly, the TTC should be no stranger to the understanding that the rule applies to labour relations proceedings between it and the union, such as these proceedings.

27. In *Westerhof*, the Ontario Court of Appeal set out the categories of matters to which *Rule 53.03* applies. At paragraphs 27 through 30 of the *TTC v ATU* decision, I described those categories as follows:

27) The Court of Appeal [in *Westerhof*] reads *Rule 53.03* as applying to experts “engaged by or on behalf of a party to provide opinion evidence”. Compliance

with *Rule 53.03* is required of such experts. (paragraph 35). The Court goes on in paragraphs 60 through 63 to differentiate two further classes of expert opinion evidence allowed at trial that do not require compliance with *Rule 53.03*, being “participant experts” and “non-party experts”. “Participant experts” are described in paragraphs 59, 60 and 61 as follows:

59 As I have said, I do not agree with the Divisional Court's conclusion that the type of evidence - whether fact or opinion - is the key factor in determining to whom rule 53.03 applies.

60 Instead, I conclude that a witness with special skill, knowledge, training, or experience who has not been engaged by or on behalf of a party to the litigation may give opinion evidence for the truth of its contents without complying with rule 53.03 where:

- * the opinion to be given is based on the witness's observation of or participation in the events at issue; and
- * the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events.

61 Such witnesses have sometimes been referred to as “fact witnesses” because their evidence is derived from their observations of or involvement in the underlying facts. Yet, describing such witnesses as “fact witness” risks confusion because the term “fact witness” does not make clear whether the witness's evidence must relate solely to their observations of the underlying facts or whether they may give opinion evidence admissible for its truth. I have therefore referred to such witnesses as “participant experts”.

28) The third category, “non-party experts” are described in paragraphs 62 and 63 as being experts who have formed relevant opinions relating to the subject matter of the litigation, essentially independently of the litigation:

62 Similarly, I conclude that rule 53.03 does not apply to the opinion evidence of a non-party expert where the nonparty expert has formed a relevant opinion based on personal observations or examinations relating to the subject matter of the litigation for a purpose other than the litigation.

29) The Court also sets out in paragraph 63 that if these “participant experts” or “non-party experts” exceed the limits that apply to them, they must comply with *Rule 53.03*:

63 If participant experts or non-party experts also proffer opinion evidence extending beyond the limits I have described, they must comply with rule 53.03 with respect to the portion of their opinions extending beyond those limits.

30) Finally, the trier of fact retains its “gatekeeper function” with respect to these latter two categories of expert, “participant experts” and “non-party experts” by adjusting the requirement to comply with *Rule 53.03*, as needs be, as set out in paragraph 64:

64 As with all evidence, and especially all opinion evidence, the court retains its gatekeeper function in relation to opinion evidence from participant experts and non-party experts. In exercising that function, a court could, if the evidence did not meet the test for admissibility, exclude all or part of the opinion evidence of a participant expert or non-party expert or rule that all or part of such evidence is not admissible for the truth of its contents. The court could also require that the participant expert or non-party expert comply with rule 53.03 if the participant or nonparty expert's opinion went beyond the scope of an opinion formed in the course of treatment or observation for purposes other than the litigation.

28. I turn now to the applicability of these three categories in order to determine where the disputed paragraphs of Dr. Dubey's will-say fall.

29. First, Dr. Dubey has not been engaged by the TTC to provide expert opinion evidence. Accordingly, the first category from *Westerhof* is not applicable.

30. Second, Dr. Dubey was not involved in the drafting or implementation of the TTC's Mandatory Vaccination Policy. That is, she did not observe or participate in the

creation or implementation of the policy. This category is exemplified in *Westerhof* by the participation of an attending physician who may give evidence about the facts of their involvement treating a patient, and may give opinion evidence with respect to a prognosis. Accordingly, the second category from *Westerhof* is not applicable.

31. Third, Dr. Dubey is not a party to this litigation, but she has formed relevant opinions, as set out in the disputed paragraphs, based on her personal observations and expertise relating to the subject of vaccination against COVID-19, which relates to the subject matter of the litigation, being the TTC's mandatory vaccination policy. She did so for the City of Toronto in the capacity of the Associate Medical Officer of Health. Accordingly, she may give opinion evidence without preparing the report required by *Rule 53.03*, for the reasons of the Court of Appeal in its third category set out in *Westerhof*, set out above. That is, her opinion falls into the third category set out in *Westerhof*. She is a non-party expert who has formed a relevant opinion based on personal observations or examinations relating to the subject matter of the litigation for a purpose other than the litigation.

32. Dr. Dubey's disputed will-say statements might, arguably, also be permitted without a *Rule 53.03* report if the submission of the Employer, that argues for a broad categorization of "events in issue", were acceded to. That submission would

sweep into the TTC's consideration of its vaccination policy the entire scope of the City of Toronto's public health activities in order to bring it within category two. In my view such a broad scope would not be consistent with the Court of Appeal's description of the second category set out above.

The Decision

33. Accordingly, the disputed paragraphs in Dr. Dubey's will-say statement are relevant and admissible without the need to prepare an expert opinion report pursuant to *Rule 53.03*.

DATED at Toronto this 27th day of January, 2023



Daniel Harris, Sole Arbitrator