IN THE MATTER OF AN ARBITRATION
UNDER THE COLLECTIVE AGREEMENT
AND THE ONTARIO *LABOUR RELATIONS ACT*

BETWEEN:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

("the Employer")

AND

ONTARIO PUBLIC SERVICE STAFF UNION

("the Union")

GRIEVANCE OF SHAWN KOZA

<u>INTERIM AWARD RE COMPENSATION</u>

Arbitrator: **Barry Stephens**

Union Counsel: **Roberto Henriquez, McMahon Molyneaux Henriquez**

Employer Counsel: **Danny Kastner, Kastner Lam LLP**

Heard by Video Conference on May 23, 2023

AWARD

[1] I issued an award in this matter on December 7, 2021, and remitted the issue of damages to the parties while retaining jurisdiction. The parties were unable to resolve the compensation issues. The employer seeks disclosure of certain materials, but the union opposes the employer's requests. This decision deal with those disclosure issues.

Union Submissions

[2] The employer has requested disclosure of the following materials:

1. Production of monthly statements of Mr. Koza's accounts for the three-year period before his September 9, 2019 termination.

2. Full particulars of his income (other than OPSEU/SEFPO income) from September 2016 to present.

3. Full particulars of ongoing income sources, existing or anticipated within the next 24 months.

The union submits that the materials requested under points 1 and 2 are not arguably relevant because they relate to the period prior to the grievor's termination. With respect to point 3 the union asserts that the grievor has no income to report at the present time and no income is anticipated in the next 24 months.

[3] The union asserted that the quantum of the remedy sought by the grievor is not a relevant consideration. The grievor, in this case, has been able to "weather the storm" of unjust termination on his own due to his reliance on pre-existing investments. The employer may able to establish through cross-examination the relevance of some of the requested matter, but it would not be proper to allow the other side to engage in a fishing

expedition through all the grievor's banking statements and other documentation without a proper foundation having been established. The scope of the employer's production request is based entirely on speculation and that is not sufficient to warrant further disclosure.

[4] The union relied on the following authorities: *Red Deer College*, [1976] 2 S.C.R. 324; *Venice Fitness*, [2013] ONSC 6574 (Ont. Div. Ct.); *IBM Canada*, [2023] ONSC 490 (Ont. S. C.); *Christie and Walther Communications*, [2020] O.J. No. 4307 (Ont. S. C.); *West Park Hospital*, [1993] O.L.A.A. No. 12 (Knopf); *TTC*, [2016] O.L.A.A. No 455 (Stout); *Bruce Power*, [2021] CanLII 114134 (Surdykowski); *Earth Boring Company*, [2018] CanLII 59385 (Rogers.)

Employer Submissions

[5] The employer did not dispute the general test from the jurisprudence relied upon by the union but disagreed on how the jurisprudence applied to the facts of this case. The employer made submissions on ten factors relevant to the disclosure request.

1. **Breadth of Disclosure**. The union alleged that the disclosure request was unduly broad. The remedy requested by the union is for 10 years of income to age 60 in the range of $1 Million. In this context, the employer's request for disclosure was reasonable.

2. **Effort to Prepare Disclosure.** The amount of effort required to prepare the disclosure was not disproportionate in view of the remedy being sought by the union.

3. **Issues of Mitigation are Key.** Issues of mitigation are central to the dispute between the parties with respect to the quantum of damages. The parties are now more than four years out from the date of termination. During that time the grievor has been without employment income and has only applied for two jobs in that time span. The union confirmed that there was no prospect the grievor would start a new job in the future. The grievor has been without work and essentially not making any attempts to find work for a period of four years. The employer was not aware of any disability that had prevented the grievor from mitigating his damages, and there is no evidence of the grievor pursuing disability coverage from any source. These are all extraordinary factors that underscore the importance of the mitigation issue.

4. **"Fishing Expedition".** The employer asserted that the concern about engaging in a fishing expedition as expressed in the jurisprudence was relevant to cases where the period of time since termination is relatively short, where the employee has made regular efforts to find work or has some reasonable explanation for failing to do so (such as a disability), and where the employer uses demands for disclosure as a method to badger the employee and to try to find a case. These

were not the factors of this case, where the grievor has essentially abandoned any effort at a job search, has somehow continued to support himself, and has indicated he lives off prior investments. The employer has a right to explore the grievor's sources of income, whatever they might be and put them in context for consideration of mitigation and compensation. However, the union positions had the effect of preventing the employer from getting a clear picture of the grievor's financial circumstances.

5. **Lack of Information re Sources of Income.** The employer is aware from bank records of the post-termination transfer of significant funds into the grievor's account but no evidence as to the source of such income and how it relates to the grievor's pre-termination income. The employer should not be required to accept at face value the grievor's assertion that these transfers constituted the draw down on pre-existing investments. The employer asserted the right to test the grievor's assertions by examining relevant financial records.

6. **Time Frame is Reasonable**. The employer sought three years of disclosure which was not arbitrary or inconvenient or intended to badger the grievor. The employer asserted that three years was a standard measurement used to determine income averages from businesses, especially where the income is variable.

7. **Grievor has the Information.** The cases make it clear that the employer has the onus to demonstrate a failure to mitigate. Given the fact that the grievor controls the relevant evidence with respect to mitigation, as a matter of fairness the employer should be able to review the documentation available to the grievor in order to test the grievor's version of events. In other words, the employer has the onus but not the information, so it is crucial that production should be sufficient for the employer to assess its legal position properly.

8. **No Prejudice to Grievor**. The grievor is not prejudiced by the request for disclosure to provide basic financial information in order to verify and particularize his income sources.

9. **Privacy**. The employer asserted it was seeking basic financial information for which there were no obvious privacy concerns. It was not unusual for employees to be required to provide much more sensitive information in arbitration hearings, such as mental health records, and disclosure of basic financial information cannot be seen as unduly impacting the grievor's privacy.

[6] The employer submitted it could not be expected to fairly litigate the central issue of mitigation without the proposed disclosure and sought an order to that effect.

Conclusions and Order

[7] In my view the material requested by the employer is arguably relevant and meets the tests outlined in the jurisprudence. The union has asserted that the grievor has not been able to work since termination and that he has supported himself with pre-existing investments. The union is not entitled to make such an assertion and expect it to be accepted as fact without the opportunity for the employer to meaningfully review supporting documentation.

[8] This case is unusual in that the grievor is alleged to have supported himself since his termination on investments. That means the remedial and mitigation issues in dispute are not restricted to job searches and other employment income. Given that the grievor asserts he relied on investment income in order to support himself, the employer is entitled to see the details of those investments and understand how those investments fit within the context of the grievor's financial profile. This means that the employer has a right to see what investments the grievor made, how they were managed and how they impacted his income. The documentation establishing the facts should be relatively straight-forward both to produce and to analyze. The material sought by the employer directly addresses the assertion of the union's description of the role the investment income has played in the grievor's finances since termination and are properly aimed at verifying how such income should be seen in the context of the grievor's duty to mitigate. Given the position taken by the union, the information request is at least arguably relevant to the decisions I will have to make.

[9] The grievor has a legal obligation, outlined in the jurisprudence relied on by the union, to prove his losses. In a typical case, this onus would be met by a grievor establishing loss of income because of a *bona fide* inability to find alternate employment to cover all losses. The onus to demonstrate this is normally addressed with detailed job search records and financial information verifying income, such as pay stubs or income tax assessments. The employer routinely has a right to pre-hearing production of such records since they are relevant to, or form a nexus with, the issue of the quantum of the claimed loss. If the grievor had asserted that he had applied for 100 jobs after his termination, the employer would be entitled to disclosure of the details. There is no reason why disclosure related to investment liquidation or income should not be subject to similar scrutiny and rules of production. The union has put the investment income into play and the employer has a right to inquire into the details and verify the assertions made about such income.

[10] The employer's disclosure request in this case does not amount to an unreasonable demand for "positive action" on the part of an "innocent" or "blameless" employee", as described by the Supreme Court in *Red Deer College*. The union here has made factual assertions on the grievor's behalf about the grievor's investment income that are relevant to the issues of the amount of compensation in dispute. The employer should be provided with disclosure in order to assess how such income may be relevant to the quantum of damages. The request for disclosure is not an "open-ended fishing

expedition" as described in *Christie and Walther*, but is directly responsive to the union's assertion of the grievor's financial circumstances.

[11] The disputed production, again, is as follows:

> 1. Production of monthly statements of Mr. Koza's accounts for the three-year period before his September 9, 2019 termination.
>
> 2. Full particulars of his income (other than OPSEU/SEFPO income) from September 2016 to present.
>
> 3. Full particulars of ongoing income sources, existing or anticipated within the next 24 months.

[12] In *West Park*, Arbitrator Knopf provided a succinct and four (or five) part test for a disclosure request, which is useful to apply to the facts of this case. First, is the material arguably relevant? The requested information can be generally described as documentation to place the grievor's investment and other income into context of his financial history, which is directly relevant to how such income should be viewed and accounted for in regard to ongoing loss. The second factor is, has the employer sufficiently particularized the production request? The three points of disclosure requested are clear and limited to readily available and easily produced documents - account statements and statements of particulars relevant to identified time periods. In my view, the request is sufficiently particularized. The third factor is, has the employer satisfied this Board that its request is not a loose "fishing expedition" intended to build a case rather than to shed light on existing facts that are in dispute or have been asserted? I am satisfied that the employer's disclosure request stems from the union's assertion of

the grievor's financial circumstances and is intended to verify how those circumstances should be viewed in the quantifying the grievor's damages. The fourth factor is, does the employer's disclosure request form a clear nexus between the material requested and the issues in dispute? This factor overlaps somewhat with the other factors, but there is a direct connection between the material requested and the issues in dispute. There is a final consideration referred to by Arbitrator Knopf, which is whether the requested material causes any "undue prejudice", such as the disclosure of privileged information. The union did not assert any privilege, nor is the nature of the request such that it should be unduly onerous. In addition, the material requested does not constitute an invasion of the grievor's privacy given the issues in dispute. Thus, assessed against all of the factors set out in *West Park*, the employer's disclosure request is sound and should be granted.

[13] This is an interim order and, as with any case, the need for further disclosure may become necessary depending on how the evidence unfolds. The employer's request for disclosure is ordered in accordance with the three points as set out above in paragraph 11. The hearings in this matter will be continued on dates already scheduled with the parties.

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Barry Stephens, Arbitrator
October 6, 2023