

IN THE MATTER OF AN ARBITRATION
PURSUANT TO THE COLLECTIVE AGREEMENT
AND THE *LABOUR RELATIONS CODE* OF BRITISH COLUMBIA
R.S.B.C. 1996, c. 244

BETWEEN:

STANFORD PLACE

(the “Employer”)

AND:

HOSPITAL EMPLOYEES’ UNION

(the “Union”)

(T. Irvin Grievance)

ARBITRATOR:

Christopher Sullivan

COUNSEL:

Scott McCann
for the Employer

David Tarasoff
for the Union

DATE AND PLACE OF HEARING:

July 4 and 5, 2013
Parksville, BC

ISSUED:

September 10, 2013

The parties agree I have jurisdiction to hear and determine the matter in dispute. The case involves a grievance filed by the Union on behalf of Licensed Practical Nurse Tina Irvine, alleging unjust discipline. Ms. Irvine, who was also the Secretary-Treasurer of the Local Union and part of its Executive Group, was suspended from employment for six shifts without pay commencing February 3, 2012 for comments she made in a public forum on January 19, 2012.

The letter of discipline dated February 3, 2012 outlines the substance of the Employer's reasons for discipline. That letter, signed by the Employer's Executive Director, Sue Abermann, stated:

Dear Tina;

This letter confirms our meeting on February 1, 2012 to discuss your participation in a seniors' care panel on January 19th.

Following this public event, it was discovered through an article in the local newspaper (January 26, 2012) that you participated as an invited presenter representing Stanford Place. You confirmed that you made no attempt to advise your employer and saw no reason to discuss your participation prior to this event. Upon further discussion, you stated "if I had told you, you would not have let me".

If, in fact, you saw nothing wrong with your plan to participate in this public event, you would not have hesitated to meet with me prior to January 19th. If, as you state, your sole intention was to advocate for high quality seniors' care, there would have been no reason to focus your presentation on your specific employer and recent compensation changes as a result of a binding arbitration decision.

As we discussed, responsibility for one's actions when choosing to step into a public forum representing persons other than yourself must be taken very seriously. It is the employer's position that you have:

- 1) Presented yourself to the public as a representative of Stanford Place without authorization;

- 2) Pursued an agenda to publicly humiliate your employer – not to promote seniors’ care – as there was no reference to enhanced staffing levels and service delivery models at your workplace (e.g. unit-based teams; tableside meal service) in your presentation;
- 3) Undermined current activities to unite all staff in efforts to move beyond the results of an unsuccessful bargaining process;
- 4) Disregarded the rights of our residents and their families to the provision of a calm and non-political home environment;
- 5) Discredited the hard work of your fellow employees which has contributed to the reputation of Stanford Place as an excellent residential care service provider; and,
- 6) Violated our trust and breached the loyalty and fidelity required from all employees.

Due to the seriousness of this situation, you must be aware that we contemplated the termination of your employment at Stanford Place. However, we have decided to give you a final chance to learn from this experience by reducing your disciplinary action to an unpaid suspension of 6 shifts (February 3 – 12) which should sufficiently demonstrate the seriousness of your actions. Any incidents of similar behaviour following your return on February 13 could result in immediate termination.

BACKGROUND

Stanford Place is a care facility for elderly and disabled persons located in Parksville, British Columbia. It began operations in 2008 and is funded by the public health authority (Vancouver Island Health Authority) as well as private residents.

The Union became certified for the staff at Stanford Place on May 19, 2010, after wage and benefit reductions were imposed in January of that year. Subsequent to Union certification the Union and Employer were unable to reach a collective agreement on

their own and the matter was referred to the British Columbia Labour Relations Board pursuant to section 55 of the *Labour Relations Code*. The Labour Board appointed Vincent Ready as mediator/arbitrator and he ultimately issued an interest arbitration award that established the parties' first collective agreement. The most notable and controversial aspects of the new collective agreement were wage reductions of 20% effective October 2011, as well as a requirement that employees pay 50% of benefit costs.

Information regarding this collective bargaining resolution and its implications received interest in the local community, which has a relatively high proportion of seniors.

Oceanside Coalition for Strong Communities (OCSC) member, Rick Sullivan, gave evidence at these proceedings. Mr. Sullivan explained OCSC is a not for profit community group active in the Nanaimo/Parksville area, and it decided to organize a public event regarding the topic of improving care for seniors to take place on January 19, 2012. The organization approached the Hospital Employees' Union to assist it in putting on the event, and requested the Union provide a panelist to discuss the topic from a local perspective. During the course of a subsequent Union meeting the grievor, who was at the time the Secretary-Treasurer of the Local, volunteered to participate in the forum, and she was nominated by the Union to speak as a panelist at the event. The event was entitled "How Can We Improve Seniors' Care In Our Community?"

The evidence indicates the primary advertising vehicle for the event comprised of posters that indicated the OCSC and the Hospital Employees' Union (HEU) were sponsoring it. The poster also mentioned that a documentary produced by the HEU and the Canadian Centre for Policy Alternatives called "The Remaining Light" would be shown at the event.

The seniors' forum occurred on January 19, 2012 at 7:00 pm at the Parksville Community and Conference Centre, and it was well attended. Mr. Sullivan introduced the three panelists and the half-hour documentary. The film was shown and then the three panelists spoke. In addition to the grievor, who was introduced as a Stanford Place employee, the panel consisted of former HEU Research and Policy Director, and Adjunct Professor of Health Sciences at Simon Fraser University, and Canadian Centre for Policy Alternatives Board of Director member, Marcy Cohen; and retired educator/seniors advocate, Kim Slater.

During the event, each of the panelists made a statement and the grievor, who spoke after Ms. Cohen and before Mr. Slater, read hers out verbatim from what she had previously written.

Unbeknownst to the grievor, local media were in attendance at the event and reported on it. The Thursday, January 26, 2012 edition of the Oceanside Star included a story on the forum entitled "Seniors Care Deteriorating, Panel Says" with some specific reference to comments made by the grievor, who began her speech by outlining how good things were at Stanford Place from the time it opened in June 2008 until the time employee wages and benefits were cut at that facility. The Oceanside Star story reported the grievor making the following statements:

...When the wages were cut two years ago, she (the grievor) said, many workers left because they couldn't afford to stay, others took second jobs to make ends meet.

They were always short-staffed, staff were always tired, and there was no time to do small things for the residents like stop and talk, hold a hand or get out a favourite sweater, she said. The commotion and high turnover has unsettled residents, she said. There are no relationships...there is a lack of continuity of care.

New staff don't know the patients, don't know how to use some equipment and don't recognize changes in a resident that may be symptoms of a serious problem, she said.

As a result of the local media report, the Employer's Executive Director, Ms. Abermann, became aware of what the grievor said as a panelist at the public forum, which was also posted on the Union's website. Ms. Abermann then met with the grievor to discuss what had been said, and she expressed concerns that the grievor, identified solely as a Stanford Place employee, provided an unbalanced account as to what was occurring at the workplace. Specifically, Ms. Abermann took issue with the grievor's comments to the effect that the facility was running short-staffed, and the grievor's use of the term "stranger" when referring to casual employees, as well as the grievor's general theme to the effect that the environment at the workplace and provision of services had deteriorated since the imposition of the most recent round of wage cutbacks.

The letter of suspension was issued shortly thereafter, giving rise to the grievance and these arbitration proceedings. The evidence indicates that both the Union and the Employer issued press releases in relation to the case and the media continued to cover it.

POSITIONS OF THE PARTIES

On behalf of the Employer, Mr. McCann argues the Employer's decision to suspend the grievor should be upheld. He asserts there is an implied duty of loyalty owed by employees to their employer and that the grievor's choice of words at the event in giving rise to the present grievance clearly violated that duty. Specifically, the grievor made misleading statements in her reference to decreased staffing levels, the use of "strangers" as employees, and the inability of staff to perform the same services previously provided to residents of the facility. Mr. McCann claims the statements made by the grievor constituted unfair public criticism of the Employer; they were neither accurate nor truthful; and were made intentionally to discredit and embarrass the

Employer. The grievor compromised the Employer's reputation and ability to conduct its business. She publicly bashed and embarrassed her co-workers.

Mr. McCann submits the grievor in the present case is akin to a "whistleblower", and in taking on such a role she had an obligation to first exhaust all internal avenues available before publicly criticizing the Employer to ensure inaccurate or misleading information was not released to the public, potentially damaging the reputation of the Employer.

Mr. McCann points out the grievor improperly failed to notify the audience at the event of her involvement with the Union and that the audience could reasonably have been misled into thinking the grievor was a representative of Stanford Place and was entitled to speak on its behalf, which was not the case. He adds that because the grievor was not identified by anyone, including the grievor herself, that she was speaking as a representative of the Union, she should not be afforded the protection given to Union activists who speak publicly. Even if she is afforded this protection recognized at law, her comments fell far outside the acceptable range of public criticism.

Counsel states that upholding this grievance will allow employees to undermine the Employer through continued public criticism of the working conditions without fear of reprisal, and potentially using public comments as a means of achieving disputed collective bargaining terms.

The Employer relies on the following authorities in support of its position: *Canadian Labour Arbitration* (Brown & Beatty, 4th ed.); *Ministry of Attorney-General, Corrections Branch and British Columbia Government Employees' Union* (1981), 3 L.A.C. (3d) 140 (Weiler); *Newfoundland and Labrador Nurses' Union v. Health Care Corp of St. John's*, [2001] Nfld. L.A.A. No. 1 (Kelsey); *Public Service Alliance of Canada v. Serco Facilities Management Inc.* (2000), 91 L.A.C. (4th) 289 (Oakley);

Corporation of the City of London and London Civic Employees Union, Local 107 (1978), 19 L.A.C. (2d) 147 (Kruger); *National Steel Car Ltd. and United Steelworkers of America, Local 7135* (2001), 101 L.A.C. (4th) 316 (Shime); *Alberta Union of Public Employees v. Alberta*, [2000] A.G.A.A. No 57 (McFetridge); and *Casselhome Home for the Aged and Canadian Union of Public Employees, Local 146* (2004), 128 L.A.C. (4th) 425 (Carrier).

On behalf of the Union, Mr. Tarasoff argues there is no just cause for the suspension of the grievor. He asserts the statements made by the grievor were within the range of acceptable commentary for a Union activist. She was not obligated to provide some form of “balanced” portrayal of the Stanford workplace, nor was she obligated in first raising her specific concerns with management before “going public”.

Mr. Tarasoff states it is not necessary that the grievor was not clearly identified as a Union activist to be entitled to protection from being disciplined for her statements made as a panelist at the seniors’ forum. The surrounding circumstances outwardly suggested the grievor had a representative affiliation with the Union, which she in fact held as the Local’s Secretary-Treasurer. It was clearly evident from her speech and the surrounding circumstances that the grievor was speaking generally as a health care employee, and was relating her real-life experiences and observations of her own workplace – where employees had received a 25% cut in wages in the past two years – to the forum’s topic of improving care for seniors.

Mr. Tarasoff points out that the event was predominantly publicized by posters that indicated the event was co-sponsored by the HEU, and the documentary being screened was co-produced by that Union. At the commencement of the forum, Mr. Sullivan introduced the HEU as a co-sponsor of the event as well as a participant. Any reasonable person in attendance would have concluded the grievor was affiliated with the

Union. She had been nominated to speak at the event by a steering committee consisting of Stanford Place employees and provincial level HEU staff.

Mr. Tarasoff argues the grievor's comments at the seniors' forum were not made with malice, and were in the eyes of the grievor an accurate portrayal of the current atmosphere at Stanford Place. Her statement that the atmosphere drastically changed for the worse after the interest arbitration award was not seriously contested, as the evidence indicated both employees and management were shocked with the new collective agreement, which led to an abnormal number of resignations beginning October 1, 2011, which was the effective day of the interest arbitration award cutbacks.

Mr. Tarasoff also claims that by disciplining the grievor, the Employer has violated Article 2 of the Collective Agreement, which provides as follows:

2.01 No Discrimination

(c) The Employer and the Union agree that there shall be no discrimination practiced with respect to any employee for reasons of membership or activity in the Union.

The Union relies on the following authorities in support of its position:

Overwaitea Food Group Limited Partnership v. United Food and Commercial Workers, Local 1518, [2006] B.C.C.A.A.A. No 106 (Larson); *British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation*, [2004] B.C.C.A.A.A. No. 82 (Munroe); *British Columbia Public School Employers' Association v. British Columbia Teachers' Federation*, 2005 B.C.C.A. 393; *British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn.*, 2013 B.C.C.A. 241, B.C.J. No. 1022; *Health Employers' Assn. of British Columbia v. Hospital Employees' Union*, [2004] B.C.C.A.A.A. No. 11 (Sanderson); *Shaw v. Deputy Head (Department of Human Resources and Skills Development)*, [2006] C.P.S.L.R.B. No. 126 (Bilson).

DECISION

In *William Scott and Co. Ltd and Canadian Food & Allied Workers Union, Local P-162*, [1977] 1 C.L.R.B.R. 1, the British Columbia Labour Relations Board established a three-question inquiry for arbitrators assessing discipline grievances. The first question is whether the grievor's conduct gave rise to just cause for the imposition of some form of discipline. The second question is whether the discipline imposed was excessive. Third, if the penalty is excessive what should be substituted as just and equitable?

Careful consideration of the evidence and the submissions of the parties leads to a conclusion that the first *William Scott* question must be answered in the negative. This case involves a Union representative – the Secretary-Treasurer of the Local – speaking at a Union co-sponsored event regarding improving seniors' care on some of the real-life implications of wage and benefit cutbacks from a health care worker's perspective. All advertisements for the event contained the Union name and logo, and at the event it was made clear to those in attendance that the Union was involved in the event as a co-sponsor and a participant. Although the grievor was not expressly introduced as a Union representative on the panel, the circumstances made it sufficiently clear to any reasonable person that she was speaking in her capacity as a representative of the employees who perform work at the facility.

In light of her Union representative status the grievor is entitled to a limited form of immunity from discipline. This is not the type of case where the grievor was necessarily obligated to first confront the Employer with her views and exhaust internal avenues for resolution of concerns. Nor is this a case that necessarily required the grievor expressing a balanced viewpoint that included reference to positive initiatives at the workplace. Rather, the grievor was entitled to express a partisan view so long as her statements were not malicious in the sense of being knowingly or recklessly false.

The facts surrounding the incident in question support a conclusion that the grievor's statements did not exceed the limits of propriety, and were within the range of fair comment. The substance of her speech captured her own experiences at the workplace and her observations of the impact of significant wage and benefit cutbacks on staff morale, turnover, and the provision of services. Suffice it to observe all the grievor's statements had reasonable foundation. For example, her comment that the facility was operating "short-staffed" was made with reference to the number of regular vacancies as at the time in question. While the unit-based staffing levels were being maintained, the resignations triggered by the wage cuts caused a significant increase in the use of casual employees, which in the eyes of the grievor negatively affected the provision of "the little, but important" things that are part of care beyond the basics, as residents may not be as comfortable with new, albeit qualified and competent, casual employees, and these employees often need time to become acquainted with their new workplace as well.

The evidence supports a conclusion that the grievor had some foundation upon which to suggest continuity of care was diminished at the time in question by the increased prevalence of many new casuals, as was the "personal touch" aspect of the care, due primarily to the unfamiliarity between residents and new casual workers. Suffice it to observe the grievor's use of the term "stranger" to describe a newly-hired casual employee was from the standpoint of a resident whose regular caregiver had resigned.

It bears reiterating that the grievor made her statements as an employee and Union activist who had, with her co-workers at Stanford Place, received a wage cut of about 25% in the two-year period leading up to the seniors' forum, and that as at the time in question the workplace was extremely polarized. She essentially expressed the view that the significant wage and benefit cutbacks seriously affected the workforce, which in turn

affected the residents, and it cannot be said that any of her comments were knowingly or recklessly false.

The general focus of the January 19, 2012 forum was on government policy and funding for seniors' care. Mr. Sullivan acknowledged in his evidence that he sought to "target" Stanford Place, but this cannot be particularly surprising given the profile of the labour dispute outcome in the local seniors' community and the relevance of the situation to the broader prevailing government policy issues. There is nothing in the grievor's speech to suggest she was "targeting" her Employer in any improper manner.

The first question in *Wm. Scott* is therefore answered in the negative. The grievor's statements were insufficient to constitute just cause for the imposition of any disciplinary penalty.

The grievance is therefore upheld. The letter of suspension dated February 3, 2012 shall be removed from the grievor's file, and she is entitled to pay for six shifts representing the wages lost from the unwarranted discipline. I shall remain seized with jurisdiction to resolve any dispute that may arise out of the implementation of this decision.

It is so awarded.

Dated at the City of Vancouver in the Province of British Columbia this 10th day of September, 2013.



Christopher Sullivan