IN THE MATTER OF AN ARBITRATION

BETWEEN:

TORONTO COMMUNITY HOUSING CORPORATION

("Employer")

- and –

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 79,

("Union")

(Grievance of J. Zhang – Preliminary Issue re Jurisdiction)

ARBITRATOR: Jasbir Parmar

On Behalf of the Employer:

Kathryn J. Bird, Counsel, Hicks Morley Hamilton Stewart Storie LLP
Jennifer Bond, Toronto Community Housing

On Behalf of the Union:

Douglas J. Wray, Counsel, Caley Wray
Janet McIvor, CUPE National Representative
Avaline Miller, Toronto Community Housing Unit Officer
Judith Zhang, Grievor

On Behalf of Sam Petralito:

Danny Kastner, Counsel, Kastner Law
Sam Petralito, Supervisor, Toronto Community Housing

This matter was heard on June 3, 2015, in Toronto, ON.

I. INTRODUCTION

1. There are two grievances before me, alleging workplace harassment of the Grievor by her supervisor, Sam Petralito, over a period from 2008-2013. One of the remedies sought by the Union on behalf of the Grievor is that the Employer discipline or terminate Mr. Petralito's employment.

2. The Employer has made a preliminary motion, seeking an order that I do not have the jurisdiction to grant those specific remedies.

3. Mr. Petralito was given notice of the hearing. He appeared with counsel. There is no dispute that given the nature of the remedial order sought, which may directly affect Mr. Petralito's rights, he has the right to fully participate in these proceedings.

4. The Employer and Mr. Petralito asked that I address this issue on a preliminary basis because it will allow Mr. Petralito to make an informed decision about whether to participate in the hearing, and, relatedly, will impact the scope of the evidence and submissions canvassed during the hearing.

II. SUMMARY OF PARTIES' SUBMISSIONS

5. The Employer notes that its relationship with Mr. Petralito, who is not part of this or any other bargaining unit, is governed by the common law, and as such is subject to oversight by the courts, not an arbitrator.

6. The Employer points to Article 2.05 of the collective agreement, which confirms the Employer has the exclusive right to discipline employees and to manage its operations. The Employer submits arbitrators have no authority to encroach on managerial authority to impose discipline where such authority is exclusively reserved by the employer. The Employer submits that there is nothing in the collective agreement that provides the Union with a right to review the Employer's conduct in respect of its relationship with supervisors, including the imposition of discipline.

7. The Employer relies on jurisprudence where these principles were followed to conclude arbitrators have no authority to discipline non-bargaining unit employees. Furthermore, the Employer submits, the analysis therein has not been altered by the Supreme Court of Canada decision in *Weber*. While *Weber* confirmed arbitrators have a broad jurisdiction to resolve disputes, the Employer submits that does not include authority over issues that were expressly excluded from the collective agreement.

8. The Employer submits there is a difference between a separation/exclusion order (i.e. an order that an employer must keep an individual away from a certain person or location) and an order requiring the termination of another employee. The latter, it is submitted, reaches into a different employment relationship and removes the right of the employer to deal with the other employee in terms of his or her employment contract.

9. The Employer submits that an analysis that concludes an arbitrator can order anything to ensure appropriate relief for a collective agreement breach (which is an analysis followed in certain arbitral awards) fails to examine where the authority to make orders with respect to relationships outside the collective agreement is founded. As a result, the Employer submits these decisions are wrong.

10. The Employer submits that given the possibility of such a remedial order, the non-bargaining unit employee has the right to participate. However, such an order would then be binding on that individual, impacting their right to seek redress through a separate wrongful dismissal proceeding. An employer could present the arbitration award and argue that a wrongful dismissal action in such a case is an abuse of process or a collateral attack, rendering the right to pursue such an action meaningless.

11. The Employer notes that a determination that a common law employee can properly be dismissed requires consideration of the employment contract governing that individual's employment, which includes both express and implied terms in the common law. By making an arbitration order that the individual should be dismissed, which would be binding on the individual if he exercised his right to participate in the arbitration hearing, an arbitrator would effectively be depriving the individual of the common law right to enforce the terms of his employment contract through the civil courts.

12. Alternatively, the Employer submits that in the event I find I do have the jurisdiction to order such a remedy, I should find on a preliminary basis, based on the allegations set out in the particulars, that such a remedy is not appropriate in the present case. The Employer submits the allegations, assuming that they are true, do not warrant ordering the discipline or termination of Mr. Petralito. The Employer notes that there are no allegations that post-date 2013, when the Employer investigated and responded to the allegations, which included altering the reporting relationship of the Grievor so she would no longer have to report to Mr. Petralito. The Employer submits that in this circumstance, there is no reasonable basis to conclude that the Employer is unable to provide the Grievor with a harassment-free workplace without the discipline or termination of Mr. Petralito. In the further alternative, but based on the same alleged facts, the Employer submits I should simply find that the request for such a remedy is moot.

13. The Employer relies on the following authorities: *C.U.P.E. – and – Office and Professional Employees' International Union, Local 491*, [1982] O.L.A.A. No. 41; *Zehrs/The Great Food Stores – and – U.F.C.W., Locals 1975/633* (2014), 118 C.L.A.S. 29; *Petro-Canada Lubricants Centre – and – C.E.P., Loc. 593 (Burpee)* (2000), 89 L.A.C. (4th) 378; *Canada Safeway Ltd. v. U.F.C.W., Loc. 401*, 2008 CarswellAlta 2175; *Toronto Transit Commission – and – A.T.U.* (2004), 132 L.A.C. (4th) 225; and *Berryland Foods – and – U.F.C.W., Loc. 430P* (1987), 29 L.A.C. (3d) 311.

14. Mr. Petralito adopts the submissions of the Employer, focusing on two particular areas of those submissions. First, Mr. Petralito's counsel notes that since there are no allegations of ongoing harassment after the grievances were filed and the matter investigated by the Employer, the request for such a remedy is moot.

15. Second, Mr. Petralito's counsel notes that he has the right to a complete and full consideration as to whether there is cause to terminate his employment. The authority to conduct this analysis falls exclusively to the civil courts, with arbitrators having no such authority absent the consent of the contracting parties. In the present case, Mr. Petralito does not consent to having this issue being

determined through arbitration. As such, an arbitrator has no authority to infringe on the court's exclusive jurisdiction.

16. Mr. Petralito's counsel highlights the practical problems of an arbitrator ordering such a remedy. It is noted that if Mr. Petralito participates in this proceeding, he will have effectively attorned to the arbitrator's jurisdiction. In that case, his ability to exercise his common law rights to enforce the terms of his employment contract will be impacted.

17. With respect to the line of arbitral awards that conclude arbitrators may order the termination of an employee if they conclude it is necessary to effect a remedy for a breach of a collective agreement right, Mr. Petralito's counsel submits that the boundaries of jurisdiction cannot be determined by consideration of what is necessary. Mr. Petralito's counsel notes that there are limits on arbitral authority, and provides as an example that arbitrators cannot order an employer to do something that is illegal even if they feel it is necessary.

18. Mr. Petralito submits that ordering the termination of his employment without full consideration of all the reasonable cause factors that permit termination of an individual employment contract would be ordering an employer to do something illegal.

19. The Union submits that fact that one adjudicator's decision may have an impact on another proceeding is not novel. That is why, the Union notes, Mr. Petralito has a right to participate in the arbitration because his rights and interests may be affected. However, the impact of such a decision on Mr. Petralito's rights outside the collective agreement is for the courts to decide.

20. The Union submits there may be a circumstance where an employer fails to deal with a supervisor or manager who consistently breaches the collective agreement by failing to provide a safe work environment. In that circumstance, the Union would have no remedy if an arbitrator did not order the employer to take the necessary steps, including discipline, in respect of that supervisor.

21. The Union rejects the Employer's argument that there is a difference between an order to transfer a supervisor and an order to discipline/terminate the supervisor. In both cases, the Union notes, the order may be interfering with or reaching into the Employer's contract with the supervisor. There is no reason to draw a distinction on an arbitrator's jurisdiction on this basis.

22. The Union relies on a line of arbitral awards that conclude arbitrators have the authority to order the termination of an employee where it is necessary to finally decide the grievance and give an effective remedy for a breach. The Union submits that this is the more recent arbitral approach, and the decisions the Employer relies upon are no longer good law.

23. With respect to Mr. Petralito attorning to my authority, the Union notes that Mr. Petralito has the right to participate in this arbitration but there is no requirement he do so. He is free to determine how he wishes to protect his rights.

24. With respect to the alternative argument of removing this request on a preliminary basis from the possible remedies that may be ordered at the end of the case, the Union notes that it isn't appropriate to remove remedies without a full and complete hearing on the merits. Further, the Union submits that the facts of this case are such that they constitute the "extreme" case where such a remedy may well be appropriate. The Union submits that just because time has passed to have this matter heard does not mean such a remedy is no longer appropriate or necessary.

25. The Union relies on the following authorities: *Ontario (Ministry of Correctional Services) v. O.P.S.E.U.* (1994), 42 L.A.C. (4th) 342; *Tenaquip Ltd. and - Teamsters Canada, Local 419* (2002) 112 L.A.C. (4th) 60; and *Ontario (Ministry of Community Safety & Correctional Services) – and – O.P.S.E.U.* (2004), 141 L.A.C. (4th) 132.

III. ANALYSIS

26. The preliminary issue is whether I have the authority, as an arbitrator appointed under the collective agreement, to order the Employer to discipline or terminate the employment of Mr. Petralito, an employee who is not covered by the collective agreement.

27. This issue has been addressed by other arbitrators, and illustrates two views.

28. The first is that set out in *C.U.P.E. - and - Professional Employees' International Union, supra*, by an arbitration board chaired by, as she then was, Arbitrator Swinton. In that case, the grievor alleged harassment by a co-worker who was a member of a different bargaining unit. Among the relief sought by the Union was the "removal" of the worker from the office where the grievor worked, and an apology from the co-worker. The union argued the arbitration board had the authority to make such an order because it had the authority to fashion an effective remedy where there was a breach of the collective agreement.

29. The board in that case concluded such a remedy was not available to them. The arbitration board noted that remedies were traditionally compensatory in nature, and an order that the employer discipline an employee had the flavor of a punitive action demanded by the grievor. In doing so, the board noted that not having that particular remedy available did not mean that the grievor was without a remedy, as the employer could still be ordered to provide a safe workplace. The result of such an order may in fact be that the employer disciplines the offending employee, but that decision would be left to management in the course of complying with the remedy of providing a safe workplace. Management rights gave the employer the authority to decide to discipline.

30. This view was echoed in *Berryland Foods, supra.* This was also a case with allegations of harassment by a supervisor. The remedy sought was that the supervisor be suspended and apologize. The arbitration board held that its authority to fashion an appropriate remedy did not include ordering discipline of a supervisor, stating as follows:

> We are not able to agree that the discretion vested in an arbitrator to fashion appropriate remedies includes a jurisdiction to order an employer to compel a supervisor to apologize to an employee or to impose some form of discipline on the supervisor. There is nothing in the

> collective bargaining relationship that implies a right in the employees or their union to review the conduct of supervisors and require the employer to impose discipline upon them. If there is no such contractual right vested in the union, it is difficult to accept that exercising such a discretion is appropriate for an arbitrator appointed under the collective agreement.

31. The other view is set out by Arbitrator Dissanayake in *Ontario (Ministry of Correctional Services) v. O.P.S.E.U., supra,* a decision of the Ontario Crown Employees Grievance Settlement Board. Again the grievance alleged harassment by a supervisor and the remedy sought was that the supervisor be transferred or discharged. Arbitrator Dissanayake addressed the issue of his remedial jurisdiction on a preliminary basis, and in doing so considered Arbitrator Swinton's decision. Arbitrator Dissanayake noted that the *Crown Employees Collective Bargaining Act* gave him authority to "decide the matter" and that included authority to effect a remedy if it found there was a wrong, relying on an Ontario Divisional Court decision where the Court noted that "the existence of a right implies the existence of a remedy". Arbitrator Dissanayake noted that, in cases of improper classification, this remedial authority had been held to include the board making orders which touched upon rights expressly reserved to the employer in the management rights clause because they were necessary to effect a remedy for a breach of other rights set out in the collective agreement.

32. Arbitrator Dissanayake viewed the issue as whether the employees' right to grieve and obtain a remedy from the Board must yield to the reservation of management functions. He concluded that the exclusive management right had to be read subject to some incursion on management's rights if it was necessarily incidental to the employee's right to grieve and the board's power to effect a final settlement of the grievances. He stated the following:

> ...In our view, whether a particular remedial order is absolutely necessary to finally and effectively remedy a grievance is directly linked to the question of whether the board has jurisdiction to grant that order. If the grievor can be redressed without such an order, the granting of such an order will not be "necessarily incidental" to the employees' right to grieve and the board's statutory duty to finally decide grievances, as contemplated by the courts. It would rather be an incursion by the board into the prohibited zone of management rights. Similarly, if such an order is not absolutely necessary to remedy the grievance, it takes the flavor of punitive action as opposed to remedial action. In other words, it is the necessity of a particular order to remedy a grievance, which makes it a remedial order within the board's powers rather than an unauthorized exercise of its management functions or punitive action.

33. In 1995, the Supreme Court of Canada, in *Weber v. Ontario Hydro*, [1985] 2 S.C.R. 929, confirmed a broad jurisdiction on arbitrators to resolve the essential nature of a dispute arising from a collective agreement. This decision does not appear to have altered the divide in the two views on the issue of jurisdiction to order the discipline/termination of non-bargaining unit employees.

34. The Swinton view was affirmed post-*Weber* in *Petro-Can*ada, *supra*, wherein Arbitrator Kirkwood considered the impact of *Weber* on the issue of her authority to order the discipline of a supervisor in the case of a grievance alleging harassment. She noted that one must still look to the essential nature of the dispute to determine if the matter and the ensuring remedies arise from the collective agreement to determine the arbitrator has jurisdiction. She stated that there was nothing in the collective agreement before her that gave the union or a grievor the right to examine the employer's relationship with a managerial employee, drawing a distinction between an incursion on management rights in the context of reviewing the exercise of management functions as they related to other provisions of the collective agreement and an order that the employer discipline an employee. She stated to make an order of discipline would be to "create a remedy for which there is no right".

35. On the other hand, Arbitrator Dissanayake's conclusion was followed post-*Weber* by Arbitrator Newman in *Tenaquip Ltd. – and – Teamsters Canada, supra,* and Arbitrator Herlich in *Ontario (Ministry of Community Safety & Correctional Services) – and – O.P.S.E.U., supra*. Both those decisions involved grievances alleging harassment by a supervisor and seeking either the termination of the supervisor's employment or his removal from the workplace. Both concluded that jurisdiction to make such an order existed if the circumstances warranted.

36. Having reviewed all this jurisprudence, I observe there actually is not much of a difference between the two lines of cases. The general principles are agreed. It is not appropriate to issue remedies that are simply punitive in nature, or which usurp exclusively held management rights. Yet, arbitrators must be able to give effective remedies and must be able to enforce compliance with the terms of collective agreement. Furthermore, the exercise of management rights can be reviewed in the

context of reviewing other provisions of the collective agreement, and arbitrators have the authority to intervene where management is exercising its rights in a manner that defeats specific collective agreement rights.

37. The only difference seems to be that the Swinton line of cases conclude there is no basis to review the exercise of management discretion in respect of its expressly reserved rights while finding that a remedy for harassment by a supervisor is available without such an order. The Dissanayake line of cases agree, where an alternative effective remedy is available. In fact, Arbitrator Dissanayake expressly states that where that is the case, an order requiring an employer to discipline an employee is an intrusion on management rights, is simply punitive, and is beyond the jurisdiction of an arbitrator.

38. However, the Dissanayake line of cases contemplates that there may be circumstances where an effective remedy is NOT possible without some incursion on the management right to discipline. If in fact there are circumstances where an effective remedy isn't possible without such an order, the conclusion that an arbitrator has the jurisdiction to issue such an order has a lot of attraction. Accepting the notion that arbitral authority stops on one side of a line when the only effective remedy is on the other side is completely inconsistent with the *Labour Relations Act*, and would render arbitration useless as a dispute resolution process.

39. It is important to remember that arbitral authority is not defined exhaustively. Rather, it is interpreted from an arbitrator's broad mandate under the *Labour Relations Act* to hear and determine any dispute whose essential nature arises from the collective agreement. An arbitrator's remedial jurisdiction is similarly based on the scope of the dispute. A specific remedy is only within an arbitrator's jurisdiction to grant when the arbitrator has authority over the party subject to the order, and the order is rationally connected to a breach of the collective agreement and the consequences of the breach.

40. While remedies for harassment grievances have been granted by arbitrators for many years, there is not a single decision where an order requiring an employer to discipline or terminate an employee

has ever been issued. This is not happenstance. There is a requirement for a rational connection between the remedy and the breach and its consequences. In no case has it been established that there was a rational connection between the safety of the workplace and the Employer's legal relationship with the offending employee, as opposed to the offending employee's involvement and conduct while in the workplace.

41. To find that there was, an arbitrator would have to conclude it was not sufficient to order the employer to take certain actions within the workplace itself (for example, an order that a certain individual should not be allowed to enter a certain location where bargaining units members were present or allowed to work with certain bargaining unit members). Rather, it would have to be determined that a safe workplace was dependent on actions that went beyond the workplace, extending to how the employer managed its relationship with parties outside the collective bargaining relationship and outside the collective agreement.

42. I cannot imagine on what facts that could possibly be established.

43. Nonetheless, it would be unwise to make definitive pronouncements about the parameters of broad remedial jurisdiction based upon the limits of my imagination. While I think it is highly unlikely there will be facts to justify such a remedy or such an intrusion on expressly reserved management rights, the arbitral jurisdiction to award a particular remedy must ultimately be determined with regard to the specific facts.

44. For this reason, I will consider the Employer's alternative argument about whether this particular remedy should be determined to be unavailable in the present case, based on the particulars of the allegations put forth by the Union. In my view, if such a determination can be confidently made on a preliminary basis and it would aid in achieving an efficient process, it is appropriate to do so. Other arbitrators have done so: see *Zehrs/The Great Food Stores, supra,* and *Ontario (Ministry of Community Safety & Correctional Services) – and – O.P.S.E.U., supra.*

45. However, before I turn to that, I wish to address the argument that ordering the Employer to terminate Mr. Petralito's employment is an intrusion on Mr. Petralito's common law rights, which fall within the exclusive jurisdiction of the courts. I accept the submissions of the Union on this point. My mandate is to determine whether there's been a breach of the collective agreement and ensure an appropriate remedy is provided for such a breach. In doing so, I have the authority to make orders against the Employer. The impact of the Employer's actions, pursuant to such orders, on rights outside the collective agreement, contractual or otherwise, is not for me to determine. Neither is it for me to determine the impact of Mr. Petralito's participation in this proceeding on his legal rights in another forum. It is his choice whether he wishes to participate; there is no requirement he do so.

46. I have also considered Mr. Petralito's submission that ordering an employer to terminate an employment contract without cause would be illegal, and I cannot order the Employer to engage in illegal conduct. I disagree that an order to discipline or terminate an employee, if I have the jurisdiction otherwise, would be illegal. The Employer has the right to terminate Mr. Petralito's employment, with or without cause. There may be consequences to how and when it is done (i.e. some pay in lieu of reasonable notice may be owing), but it is not illegal.

47. I have considered the particulars outlined by the Union, and presume them all to be true for the purposes of this preliminary award. I make no determination about the gravity of the conduct alleged or the impact on the Grievor, which I presume to be significant. My focus is only on whether the breach, if proven, cannot be remedied with anything less than the remedy of ordering the Employer to discipline or terminate Mr. Petralito's employment.

48. Given that there are no allegations that harassment has continued in the two year period following the filing of the grievances, I find the Union will not be able to establish that a harassment-free workplace cannot be achieved without the remedy of discipline or termination of Mr. Petralito.

IV. DISPOSITION

49. The Employer's preliminary motion is allowed. I find, on the basis of the allegations as set out in the particulars, that there is no justification to award a remedial order that the Employer discipline or terminate Mr. Petralito's employment.

50. The matter may proceed in respect of the merits and the other remedies sought.

Dated this 30th day of June, 2015.

JASBIR PARMAR