**IN THE MATTER OF AN ARBITRATION**

BETWEEN

**Canadian Union of Public Employees Local 1487**

(the "Union")

**and**

**The Scarborough Hospital**

(the "Employer")

**Grievance of Randy Meyer**

**SOLE ARBITRATOR: James Hayes**

**APPEARANCES**

**For the Union:**

Stephen Krashinsky, Counsel
Joanne Wilson, CUPE National Representative
Gaetano Iacono, President CUPE Local 1487
Cathy Stinson, Recording Secretary
Zoran Pivalica, Chief Steward

**For the Company:**

Robert Weir, Counsel
Rhonda Lewis, Chief Human Resources Officer
Patricia Ignagni, Manager, Labour Relations
Tyler Crocker, Director, Environment & Facilities
Rose Dawkins, Human Resources, Business Partner

Hearings were held on August 31, November 16, December 1, 7, 2011; March 20, April 25, August 21, 23, September 5, 6, 21, November 19, December 3, 2012; January 8, 15, March 12, 2013.

## AWARD

*Process*

1. This arbitration addresses the discharge of Randy Meyer by The Scarborough Hospital.

2. Many Hospital witnesses were called and were subject to thorough cross-examination. Dozens of exhibits were entered including e-mails, correspondence, memoranda, personal notes, recordings of telephone conversations, medical information, government documents, photographs, and police records. The proceeding was extended by efforts to resolve the matter during the course of the hearing.

*General Observations*

3. The situation giving rise to the termination began with an unfortunate incident and went downhill after that. It was marked by deepening suspicions by the grievor about his employer and most definitely *vice versa*. While judgmental hindsight is a prerogative of arbitrators, I expect that the employer might accept that the matter could have been better handled. In the circumstances it is somewhat ironic that I have concluded that the Hospital's initial assessment of the originating incident was correct.

4. Meyer did nothing to advance his cause. He became increasingly fixated, in my view, falsely, about the significance of a verbal exchange with a fellow employee. Whatever may have been said in that exchange, his determination to play the matter out led to gathering employer doubt about his credibility. That doubt led directly to his termination several months later.

5. Overall, in my opinion, Meyer testified honestly about his perception of what happened. He was generally determined and unshaken about the purported accuracy of his very detailed rendition of events, meetings, and telephone calls. This is not to say however that I have preferred his recollections or perceptions or that I have found that he

bears no responsibility in this matter. On the contrary, I have not accepted, for example, his description and explanation of one incident to which the Hospital attributed significance in its final argument.

6. I also believe that the Hospital witnesses testified honestly to the best of their respective abilities. There was contemporaneous documentary support for some of their oral evidence and I have taken that into account. Whether or not the documents were complete or entirely accurate, and they were not, there has been no suggestion by counsel that they were contrived-- although the grievor clearly believes otherwise. The contemporaneous material generally confirmed the gist of the employer's *viva voce* evidence and was not prepared in contemplation of litigation.

7. Unlike the parties of each other, I am prepared to credit the fundamental integrity of both. I do not share the grievor's apparent view that his testimony should be preferred in all respects and that the differences which he has identified, both big and small, should tell against the Hospital. Where necessary to choose, I have generally preferred the evidence of the Hospital. I have seen no point however in attempting to record many of the testimonial differences which arose, let alone in purporting to resolve them. The decision which follows is not abbreviated. Nevertheless it sets out only what appeared to me to be the more important elements of this unfortunate situation.

8. In the result, after reading and re-reading the substantial product of many days of evidence, I have concluded that the key aspects of this case are not, in the end, all that difficult to discern. Regrettably, they have led me to an outcome which is unlikely to satisfy either party. I have determined that the Hospital did not have just cause to terminate Meyer. However, I have also decided to accept the Hospital's alternative submission that Meyer should be compensated in damages in lieu of reinstatement.

9. The final submissions of counsel set out below have been sharply summarized and paraphrased. As to be expected from expert counsel, they were most helpful.

*The Grievor*

10. Meyer commenced his employment with the Hospital on October 20, 2005 as a plumber. Shortly thereafter he became a union steward in which position he remained until he was elected President of Local 1487 in February, 2008. He was defeated in a re-election bid in February 2010 and has held no union office thereafter. At the time Meyer gave evidence in September 2012, he was 52 years old. He is married with children, one of whom is a dependent. The grievor had a clean disciplinary record and was employed at the Birchmount campus of the Hospital. There is also a General campus.

11. Meyer was discharged in 2011. The letter of termination dated May 10 read in material part:

> a. This letter represents formal notice that your employment with The Scarborough Hospital is terminated effective immediately, for just cause.
>
> b. The Scarborough Hospital is terminating your employment as a result of the irreparable and extremely frustrated employment relationship that you have created through your inappropriate conduct, unsubstantiated allegations and claims, and inconsistent account of events.

12. During the course of the protracted arbitration hearings, the grievor secured alternative permanent employment with another major public employer. It is agreed that this employment is generally equivalent, or better, to that which he enjoyed with the Hospital. The new position requires him to commute from his home in Scarborough to a downtown Toronto location. He is pleased with his new job. He does not like the commute. He is obviously not alone in that.

*Facts and evidence*

13. A verbal exchange involving the grievor and another employee, Constantin Marcu, occurred on Friday, January 14, 2011. The two men have quite different recollections as to what Marcu said. Meyer believes that he was threatened. Marcu

claims that he was either misunderstood or that the story was twisted on purpose. Part of the exchange was witnessed by another employee, Rocco Di Rienzo.

14. A report [known as a SAFE report] was made by the grievor to the Hospital from his home online on Sunday January 16. It read in its entirety:

> Was cleaning up at the end of the day in shop when was approached by co-worker Constantin Marcu. He proceeded to tell me to be careful because Joe was going to cut my tendons. Another worker Rocco Di Rienzo was also there and I said to him did you hear what he said that Joe was going to cut my tendons and I should be careful. Constantin then remarked, no not Joe they will hire someone to do it like they do in Somalia.

15. It is common ground that the Marcu/Meyer exchange took place as the two men were washing up at the end of their shift at approximately 3:20pm. In chief, Meyer explained that after the Marcu statement, part of which was heard by Di Rienzo, "we just went home". Di Rienzo testified in chief that he heard "no, not Joe, they're going to hire someone like they do in Somalia". When first asked what he thought about this, he replied: "I didn't think much about it. I was focussed on signing out and leaving for the day."

16. Meyer went on to say in chief that:

> *At first, I felt it was odd* that he made the statement when I was going home, *I didn't think much about it*. I mentioned it to my wife. *More and more I would think about it*…I started to get worried more and more. *After thinking about what was said, it seemed more and more like a direct threat*.

17. Meyer went on the Hospital website to look for health and safety policies about violence in the workplace. He said it took him quite a long time to find the information but gathered it over the weekend: "It said I must report acts of violence, so *I felt I had no choice, I had to report it*."

18. Meyer later developed possible theories as to why Marcu and others might have wished him harm. It was his conjecture that some of his fellow workers were displeased

about a challenge that he and Di Rienzo had brought to the decision of the union and the employer to award certain positions without posting to persons without a millwright qualification. One of these persons was Joe Manganaro from the General campus. Meyer and Di Rienzo had filed an OLRB duty of fair representation complaint in October 2010. He wondered if the "they" in the threat might have been one or more of these people who might hire someone to harm him.

19. Meyer also testified about an earlier crisis in the Maintenance Department involving a former manager, Claudio Moro. An investigation had been conducted arising from the employer's receipt of an anonymous letter. Meyer speculated that his eventual termination might have been motivated by an employer belief that he was the author of that letter. Meyer also mentioned what he said was a false allegation, that he had "cut a deal with Claudio" to move to the Birchmount campus while he was local union president, an allegation about which he said Marcu had confronted him.

20. For its part, the Hospital later posited as a possible theory for the grievor's behaviour the notion that he may have been motivated to falsify the Marcu threat as a way of eliminating someone who represented an obstacle to the position he desired. Meyer and Di Rienzo were seen as friends and the employer considered that to be a relevant factor in evaluating the truth of what was said by Di Rienzo to have occurred.

21. The online SAFE report was seen early on Monday January 17 by Tyler Crocker. Crocker at the time was Building Systems Manager for both campuses. The employer immediately initiated an investigation and Meyer, Marcu and Di Rienzo were interviewed. Written statements were not taken and signed. A report was not prepared. Notes of the interviews are fragmentary at best.

22. Marcu testified that he initiated the conversation and asked Meyer if he had read the Toronto Star that day which included a story about a police officer from Montreal who went on vacation in Mexico and had a conflict with a biker from the Montreal area. When Meyer asked "how is it possible that things went so ugly?", Marcu replied with

words to the effect of "That's probably what happens when you enter someone's life." He says this was just a brief conversation which related to the police officer and was not about Meyer personally. He denies saying anything about Joe or Somalia.

23. Meyer, Marcu, and Di Rienzo were interviewed by Shirley Ward on January 20. Ward was a Business Partner in the Human Resources group at the Hospital. Meyer confirmed what he had written in his SAFE report. Di Rienzo confirmed that he had heard the last comment as reported by Meyer. Ward told the grievor that there would be an investigation and that he would be updated.

24. It appears that Marcu had no advance warning of the interview. He told Ward that they were joking around and that they were referring to a newspaper article about Mexico: "that's what happens when you mess up someone's life". Marcu said he had never met Joe before [Joe Manganaro from the Hospital's General campus] and that he never went to the General campus. He told her that "all the bullying has to stop". Ward understood Marcu to mean "that he was an immigrant with a strong accent, that Randy always twists his words around". Marcu said the same thing in cross-examination.

25. Ward went online and retrieved a Toronto Star article dated January 14 which referred to the beating of a Montreal police officer in Cancun. There was speculation in the article that the assault had been perpetrated by an alleged member of the Quebec Hells Angels. She did not retain a copy of the article at the time but it was obtained and made an exhibit.

26. Ward met with Meyer again on January 20. She advised him that she had received conflicting information. She testified that she "was not sure who the threat came from". She said that Meyer told her at that time that he didn't feel threatened and was not afraid for his life, that he became upset, and that he complained that the Hospital wasn't taking him seriously. These statements attributed to Meyer are not reflected in her notes. The notes do reflect her telling the grievor that the Hospital had an obligation to provide a safe environment and asking him if there was anything he could suggest might

be done if he felt threatened. Meyer testified to the contrary. He said that he felt more threatened than before if the Hospital believed it necessary to offer security measures.

27. In cross-examination, Ward stated that she did not conclude that Meyer and Di Rienzo were lying but it was "inconclusive". Marcu "had no reason to threaten" the grievor. "I believed that Constantin's side of the story was more credible than Randy's." She went on to say that: "I believe it was a misunderstanding and they were referring to a newspaper article. I believe that with Constantin's statement, with his heavy accent, Meyer twisted his words away, it could have happened, his words got twisted around."

28. Meyer says that he spoke to two police officers who happened to be at the Hospital on January 18 and that he went to 42 Division and then to 41 Division with Di Rienzo. Subsequently police officers came to his home on January 28. Documentary evidence confirms beyond doubt that Meyer had contemporaneous involvement with the police although, until that proof became available, the Hospital came to doubt that he had.

29. Meyer also testified that he initiated a work refusal with his supervisor Ken Janes on January 28. The testimony of Janes and the grievor about what happened that day is irreconcilable. Di Rienzo, according to Meyer, was there for at least a portion of the relevant time. He was not asked questions by either counsel about the situation.

30. Meyer testified that he wished to do a work refusal on January 28 because he was scheduled to work alone for a few hours on the Service Department level of the building where he did not feel safe. He said that he contacted colleague David Pettigrew the night before and received advice about how to initiate such an action. Pettigrew told him that Janes would get his member of the occupational health and safety committee, Althea Ramsay, right away [after a work refusal was initiated].

31. On the day in question the grievor said that he advised Janes of his work refusal and then went and spoke to Ramsey in person telling her that "Ken would be calling her

shortly". Janes then reported that Ramsey was busy and could not leave her station, to which Meyer agreed. Over a *Brown v. Dunn* objection, Meyer testified that Janes told him that he had spoken to Crocker and set up a meeting with Shirley Procher, an Ontario Nurses' Association certified committee member. The two men then came together with Di Rienzo. Janes agreed that Meyer and Di Rienzo could work together on the Service Department level. Meyer said that he reported all of this that evening to Pettigrew who recommended that he file a Ministry of Labour ("MOL") complaint. The grievor said that he did not do so because Janes had accommodated him and he decided to wait for the outcome of the meeting with Procher. Meyer said that he kept Pettigrew informed as to what was happening until he was fired. Over a continuing *Brown v. Dunn* objection Meyer testified that, "not sure of the day, could have been that day", he learned that there was no meeting set with Procher. He said he told Janes: "You guys are going to make up a story and lie…I told them they would have to explain it to the Ministry of Labour".

32. In cross-examination, when confronted with Janes' denial, said: "He's either lying or he forgot." Also in cross-examination he mentioned that Ramsey had told him on January 28 that he couldn't do a work refusal but he had told her: "yes I think I can". When shown e-mails between himself and Procher where it appears that the idea of a "work stoppage" first came from Procher, Meyer postulated that Janes had told Ramsey and then Ramsey had told Procher which is how it got into her e-mail. He acknowledged that there was no mention of any work refusal in his various e-mails in the month of February and that he never mentioned the work refusal in the meetings or telephone calls held with the Director of Human Resources which are later described.

33. Janes on the other hand testified that the grievor approached him as he was not satisfied with the length of time that the Hospital was taking to respond to the alleged Marcu incident. Meyer wanted to speak to a certified member of the Occupational Health and Safety Committee. Janes says that either he or Meyer suggested Ramsey who they then learned was unavailable. The two men went to a bulletin board where committee information was posted and Janes suggested Procher as an alternative. Janes said it was left to Meyer to follow up with her. Janes is clear that at no time did the

grievor engage in an unsafe work refusal. Notes of an MOL inspector confirm that he said the same thing on April 29 during a Ministry investigation and he prepared a written statement to the same effect on May 16. Janes maintained this position in cross-examination.

34. Meyer did not complain to the MOL about any employer failure concerning his alleged work refusal until April 28.

35. Ramsey and Pettigrew were not called as witnesses.

36. On February 10, Di Rienzo filed a SAFE report about an exchange which took place between him and Marcu on January 21. In cross-examination he acknowledged that he had discussed the filing of the report with Meyer.

37. Marcu testified that the accusation [of the alleged threat] by Meyer had "truly bothered me". "Rocco was beside me.. I couldn't hold it anymore. I'm asking Rocco you're part of the witness for Randy, it's a lie, not true at all, you know that. He said 'I don't have to answer to you'. I said 'you'll answer to God'. I was not upset because he was a witness. I was upset because of the lie, part of relating the story against me."

38. Di Rienzo testified that Marcu approached him as he was signing out at his computer and said "so you're the witness for Randy" "I might have said 'what?', he then got up, walked toward me, leaned over me and said [quietly] 'you'd better pray to God'." Di Rienzo saw the comment and the manner in which it was made as threatening.

39. Discussions internal to the employer took place on January 28 about security measures which might be offered to Meyer while he was on Hospital property. When asked in chief whether, as of that date, the Hospital had reached any conclusion about whether Meyer had in fact been threatened, Ward said that: "the only conclusion was that it was inconclusive".

40. Ward also testified that any possible update to the SAFE report would not have been her responsibility but Meyer's manager [Tyler Crocker]. Crocker testified that it was his understanding that the investigation about the January 14 sink incident was over as of the inconclusive fact finding exercise conducted by Ward on January 20: "That was my understanding at that time."

41. Based on this information received from Ward, Crocker stated that he understood that the Hospital had concluded that Marcu had made the type of statements alleged by Meyer and Di Rienzo but that such statements were not directed to Meyer as a threat. There were conflicting statements but not pointing to a clear threat being made. Later in cross-examination, when asked about whether or not he concluded at that time that Meyer had told the truth, Crocker said: "My take was that Meyer heard or had a conversation with Marcu which was taken out of context. There was no history with Marcu which would lead us to believe he would threaten the well being of a fellow worker". *When asked if, as of January 20, he believed that Meyer genuinely believed that he had been threatened, his answer was: "Yes". When asked, why no disciplinary action was then taken at the time if Meyer had indeed made a false statement, Crocker said: "We gave Randy the benefit of the doubt that he believed this took place."*

42. A further meeting with Meyer took place on January 31 which included Crocker, Ward and a union representative. According to Ward, details of security arrangements were offered to the grievor and accepted by him. Meyer wanted Marcu fired and alleged that he [Marcu] had earlier "cut a deal" with a previous manager, Claudio Moro. Meyer was asked to obtain a police occurrence number and told them that he had filed a police report on Sunday. Ward said that: "I told him about the status of the investigation, what we had found out so far, and that it was inconclusive". When asked by the grievor for the Hospital's report [of the incident] "I said it was not the Hospital's practice to give a report." Ward's notes include: "Randy thinks that he would be fired".

43. Crocker's memory of the same January 31 meeting was that Meyer accepted the security arrangements and indicated that he did continue to feel threatened. He also

recalled Meyer saying something like "if I would have threatened someone, I would have been fired." He recalled Meyer saying that he hadn't been given a police occurrence number but that there would be one on a contact card at the station. Meyer denied that he ever asked that Marcu be fired. At either this meeting or the previous one on January 20, he said that he commented that "if I had done this I would have been fired on the spot".

44. Crocker and Meyer had a further discussion on February 1st. At that time Meyer declined the security measures which he had accepted on the day before. He called them "ridiculous". An e-mail sent by Crocker that day records that "he feels these measures are unnecessary as he does not feel a personal threat from the accused". In cross-examination Crocker recalled that on that occasion Meyer indicated that he didn't feel threatened by Marcu but by "they" and that he asked again why Marcu hadn't yet been fired.

45. In another e-mail also sent on February 1st Crocker wrote: "At this time I feel Randy has begun to confuse his own statement and may even be unsure of the original context. His story has changed numerous times which, in my opinion is discrediting his statement completely. Please retain this statement alongside the notes from the original investigation."

46. Meyer stated that he declined the safety measures as he had concluded that he didn't think that Marcu would be the person to do him harm and that he didn't know who "they" were. "They" would not come to his place of work to do him harm. He denied speaking about getting Marcu fired and several other things mentioned in the Crocker February 1st e-mail.

47. Crocker confirmed that he had formulated his opinion ("at this point, yes") that Meyer had made a false accusation but made no recommendation at that time that Meyer be disciplined for doing so or changing his statement. When asked if it was his view then that Meyer was lying intentionally, he said: "I believe he knew what was said was not accurate." He conceded that the possibility of discipline "was at the back of my mind

yes" but had not been discussed with the Director of Human Resources. "I speculate it [discussing the possibility of discipline] would have been the end of February, early March."

48. Colin Hill became Director of Human Resources at the Hospital on January 5, 2011 but had no direct involvement with the Meyer situation until February 14 when he met with the grievor. He left the employ of the Hospital in October 2011. When Hill asked the grievor why he had declined the Hospital's offer of security measures, Hill testified that Meyer told him that it hadn't been a real threat but "guy talk" and that therefore there was no need. In cross-examination Hill stated that he was "not sure whether the investigation ever concluded, it kept evolving". He conceded that: "I would assume that there would be a report or notes of the investigation". He did not recall whether or not Crocker had told him before February 14 that, in Crocker's mind, the grievor had been discredited but he had been told by both Ward and Crocker that Meyer had said he did not feel threatened.

49. Hill discussed the Marcu incident with Meyer on February 14. In cross-examination Hill did not adopt the suggestion that Meyer's complaint was untruthful: "No not made up. My sense was that on further reflection by Randy he didn't feel it was a real threat after all." He agreed with the suggestion that it had happened as related by Meyer but that it was not done in a threatening manner. He was asked the following questions in sequence:

| | |
|---|---|
| Question: | Was that your opinion throughout to the point of termination? |
| Answer: | My conclusion was that there was an exchange. Whatever that exchange was, it was non-threatening shop talk. |
| Question: | Was it your view that Randy was lying when he made the complaint on the 14th? |
| Answer: | No, not that he was lying. I was trying to determine the context. I thought it was guy, locker talk. |
| Question: | Do you agree that, when you wrote the termination letter on May 10, it was not your view that he had lied about the incident? |
| Answer: | Not that he had lied but the real threat was not there. I believed that there was some exchange with Rocco but no real threat… |

Question: Was it part of the grounds for termination, was it correct to say that, when this decision was made, you were not considering that Randy had lied about the incident?

Answer: I don't believe he was lying that there was some sort of conversation with Constantin. Where it factored into the decision is that when I met on February 14 it was not a factor of concern as he did not choose security measures. But it evolved to the point where he took stress and WSIB.

Question: You're telling us he wasn't fired for falsifying the threat. He was fired for subsequently misleading you about whether it was causing him distress?

Answer: That was one of the factors, yes.

50. Hill categorically denied that Meyer told him on February 14 that he was declining security measures because he didn't think the threat would be carried out at the Hospital. Hill said that if there had been any sense of threat outside or inside of the Hospital, he would have insisted on security measures. No further action was required because it was shoptalk. "That's why I remember it."

51. The following question and answer then followed in cross-examination:

Question: Randy reports a threat...why not discipline him for falsely reporting a threat?

Answer: My sense at the time, Randy reflected and recognized the context that there was not threat. Therefore we were somewhat compassionate and decided that no discipline was required at that time. We gave him the benefit of the doubt.

52. Hill then agreed that he had been told by Crocker sometime in February about Crocker's opinion that Meyer had been discredited completely but that, even then, he did not see the need to discipline the grievor.

53. For his part, Meyer testified that he told Hill that he believed he had been threatened "because I had filed a section 74 [duty of fair representation complaint]. I thought that was the reason at the time". He denied telling Hill that he did not perceive a threat and said he never used the expression "guy talk" or the like.

54. Another discussion took place between Crocker and Meyer on February 18. An e-mail sent by Crocker that day included the following:

> This morning Randy and I spoke with regards to *the outcome of the investigation that was completed* with respect to the "threats" that were made towards him. He has stated that he is entitled to the outcomes and recommendations from this investigation. I have advised him that *there was no incident that was evident which warranted a formal outcome* and recommendation process, he disagrees. I advised him that one of the outcomes of the investigation was an attempt that TSH had made to provide him with additional security measures which he declined. I advised him that declining these measures coupled with stating to me previously that he didn't feel threatened *left the case resolved in my opinion*.
>
> *I feel we need to meet with him to finally close this matter* and make him better understand our position.
>
> (emphasis added)

55. Notwithstanding the words used in the final sentence of this e-mail, Crocker insisted in his evidence that Meyer had been informed by him that "the matter was closed". "As an organization, I believed the matter was closed." For his part, Meyer only recalled a doorway conversation where Crocker "told me as far as I'm concerned the investigation is over. He said he would check with Rose [Dawkins] if there would be any reports I would receive".

56. On February 23rd Meyer went off on a stress leave. He filed a further SAFE report on that day which included the following:

> Reported months ago about employees spreading malicious rumours to HR and was never looked into or relayed back any outcome of looking into situation, month went by received threat by co-worker which was reported and investigated by HR days later only after talking to director …don't feel hospital believes what was said. It's been over a month and received no investigation report, Manager said all was finished but feel more in the dark. Have had nothing but conflicting statements from HR, my supervisor and manager. *I feel I've been subject to unfair treatment and misuse of hospital and unions power and position*. I've been misled by staff and lied to that a meeting with health and safety was to happen which was all untrue. In my view its obvious of whats going on and insidious. *I feel the hospital together with the union are intentionally preventing and blocking me from promotion and training opportunities*. Combined with threats I feel it very hard to cope having feelings of anger and frustration also frightened and demotivated….

(emphasis added)

57. An e-mail sent by Crocker records a telephone conversation with Meyer on that same day which included the following:

> a. When questioned what incident this is relating to Randy stated 'I'm off on stress—you know with everything going on over the past month about the Constantin thing'. I asked if he still felt threatened to which he stated 'nope, it's not about that.' He stated 'it's all about nothing being done and seeing Constantin still running around'. I asked what he perceives the outcome should be, and he truly believes the investigation materials, reports, and outcomes need to be provided to him in writing. *I advised him that the matter was closed in my eyes* as he stated previously that there was no threat and declined all security measures……
>
> b. I would like to follow this issue as close as possible. *I truly feel he is now being malicious given the wide spread inconsistencies in his statements. He contradicts his story continually.* This is now beginning to consume productive time of not only me and Human Resources but OHD [Occupational Health Department] as well.
>
> (emphasis added)

58. When asked in cross-examination about the "malicious" reference, Crocker stated that: "I felt he was being malicious in terms of Marcu". When then asked, "The Hospital had already decided to do nothing about Marcu?", he said: "Yes". Elsewhere in his cross-examination, Crocker stated that he had discussed the possibility of disciplinary action for Meyer with Ward at some point between February 18 and 25. He confirmed that he had formed the opinion in February that the Hospital needed to deal with this at the disciplinary level and that Ward had agreed. He said that they were thinking about "suspension perhaps but not discharge".

59. Meyer denied that much of what Crocker had recorded in his e-mail had been discussed.

60. For his part, Hill testified that he was surprised that Meyer had taken a stress leave when he had admitted on February 14 that there had been no threat. "It was difficult

to believe, yes." The following sequence of questions and answers then ensued in cross-examination:

> Question: Given that you didn't believe he had stress, that he told you there had been no threat, that you agree there was a contradictory story, that it was consuming productive time, why did you not discipline him at that point?
> Answer: We were still trying to get information about the stress leave then.
> Question: The stress leave was bogus?
> Answer: We wanted the process to run its course. To discipline someone while off on stress leave would not be appropriate.
> Question: Did you believe Randy was lying about his ability to work?
> Answer: I found it inconsistent. If it was a lie, we would not know until we had the facts. *There could have been something medically or psychologically*. But it was certainly inconsistent given his statement to me that there had been no real threat.
> Question: So the decision was not to discipline him but to let the occupational health process work out?
> Answer: Yes, and then we would decide whether or not discipline was appropriate or not.

61. On February 25th, Mr. Meyer was offered a "return to active employment" at the General [as opposed to his home Birchmount] campus effective immediately. Mr. Crocker spoke to him again on February 28 and sent a subsequent long e-mail to various people expressing deep frustration which included the following:

> Randy has begun to be quite emphatic that the investigation into his incident was not done properly and feels that the hospital doesn't believe him…This to me is totally unacceptable, we have a worker off at the time and unwilling to comply with a back to work program. He appears to feel as if he is leading this and we are simply here to act on his whim. At this point we are nearly at a stalemate, we need to meet with Randy to discuss next steps and a concise back to work plan.

62. There were other communications with the grievor in the days and weeks which followed. Crocker confirmed in his cross-examination that, as of March 1, March 15, March 18, March 28, April 11, and April 20, the Hospital was prepared to return Meyer to work.

63. There were communications between Meyer and the Hospital's physicians in March and April. On April 4 the Workplace Safety & Insurance Board ("WSIB")

advised the grievor that his claim for mental stress had been denied. On April 8, the grievor's physician advised the Hospital that the grievor "should be capable of returning to work on April 11, 2011" subject to "Hospital recommendations". As late as April 28, Dr. McGoveran of the Occupational Health Department was communicating with Meyer's physician and with Crocker by e-mail about this issue.

64. Hill also agreed in cross examination that, if the grievor had accepted the Hospital's offer and/or was cleared medically he could have returned to work as of February 25, March 1, March 18, March 30, April 11. A tape-recorded conversation on April 13 discloses that Meyer asked: "Yah OK well at least if I decide to come back to work I would hope that I would have the support of human resources.." to which Hill replied: "Well you would".

65. This tape recorded exchange on April 13 was followed up in cross-examination as follows:

> Question: The assumption is that he will be coming back to work if that's his choice?
> Answer: Yes.

66. When asked specifically if, as of April 14, the only issue preventing Meyer's return to work was medical clearance, Hill answered: "Yes". Hill also agreed that the Hospital was prepared to return Meyer to work as of April 20 but explained that there was still outstanding information required from the doctors.

67. For his part, Meyer described that he did not feel capable of working [before April 11], that he was frustrated, not sleeping, and pacing his house back and forth. "You don't know what it feels like." He denied the truth of virtually everything recorded in Crocker's e-mail dated February 28 which was said to have described their telephone conversation of that morning.

68. On April 4, the Hospital received a report from a private investigation firm which reported that "there is no occurrence report or other indication that this alleged incident [Marcu/Meyer January 14] was reported to Toronto Police." On April 14, Crocker sent an e-mail to Hill which stated that: "Who wants a laugh??!! The occurrence number checks out. It was filed 3 days ago!!!!!". As previously mentioned above, this information turned out to be incorrect. Crocker stated that: "We wanted to verify that Mr. Meyer really did feel personally threatened and also to verify if the occurrence was filed at the time of the original incident. Our intent was to see if Mr. Meyer felt personally threatened. The reason was to determine if he was telling the truth."

69. On April 11, Hill intervened directly and met privately with Meyer off site on the following day. In chief, Hill explained that he was concerned with the way the Meyer matter was evolving, that he wanted to avoid a protracted legal matter, and wanted to explore viable options for him. He therefore tried "to take my corporate hat off and to talk to him person to person about options, not to threaten him or to unduly influence him". The idea, to explore a resignation and an exit package with the grievor, went nowhere as Meyer was insistent upon returning to work. The two men met at a donut shop and there were follow up telephone calls.

70. In cross-examination, when asked about why he wanted to explore an exit option with Meyer in April, Hill replied:

> I looked at the culminating events. There was a lot of inconsistency in the stories, unsubstantiated allegations, a frustrated management team, department and co-workers functioning well in Randy's absence, potential discipline.

71. When asked "What potential discipline?", he said: "Because he had been off on leave. We needed to look at it on his return." When it was suggested that the Hospital had been prepared to take the grievor back on many earlier dates, Hill responded:

> Yes but we recognized where this case was going. Randy's integrity, his statements would be under question, and his future potential and well-being. It was prudent to provide an option to take a package and to get assistance from the

> Hospital during a transition. Randy was getting backed into a corner with lots of inconsistencies. Understanding him as a previous union president and proud man, someone who would understand the process of arbitration, that he would consider an option to leave with dignity. To avoid discipline and termination.

72. Hill said that when he called Meyer on April 11, he was contemplating discipline up to and including termination. "I believe there had been no decision to discharge but there was always the possibility that that could be the outcome." When it was suggested that "your representation to the worker was that 'you're coming back to work'", the answer was: "Talking about that, yes."

73. Meyer taped three phone calls with Hill on April 14 and 18 without Hill's knowledge. He said he did so:

> because I felt now my job was being threatened. I'm realizing there is no will for him to help me. He just wants to get rid of me. That's why I asked him at the donut shop to put it in writing because no-one would believe what I'm going through.

74. In late April Hill became aware that Meyer had filed an MOL complaint alleging that he had been denied a work refusal back on January 28. He also learned that Meyer had sent an e-mail to Dr. John Wright, the Chief Executive Officer of the Hospital, on April 29 which read:

> Hello Dr. John Wright. I'm sending this email as a last attempt to try to help the hospitals management team sort out the problems I've been enduring since Jan.14, 2011 when I was given a life threatening warning by a fellow co-worker. I've contacted the police on 3 occasions where they have at least documented what has happened. I've entered a health and safety incident report as required by our hospitals policy. I reported the threat directly to human resources and was left with nothing happening until after I reported it directly to Ralph the director. Human Resources did not respond till four and a half days and *since then I've been lied to by everyone from my supervisor to manager to HR, to Colin Hill* who suggested I resign because my truth does not add up to the number of lies he's been told by his unnamed sources. *Not one person has done the ethical thing*, I am cleared by my doctor to return to work for two weeks now, an now I'm told they need to wait for the results of the wsib investigators report about how conflicting statements made it's way to them which is considered a serious offence. There's no doubt in my mind how the information sent to wsib was false but I'm sure they have a lot of stories to back up thier (*sic*) claims. I've been told by Colin Hill that if I return to work it will

> be a bad scene and a volatile atmosphere. Colin has made no attempt to find out the truth and continues to follow the lead of his management teams conclusions. I'm asking that if Alison Williams and yourself look at my information which Colin doesn't want to hear or believe before this leaves yet another bad scare on the hospitals reputation. Part of the hospitals major problems are they attack people who try to do the right thing.
>
> (emphasis added)

75. When asked in chief why he filed his MOL work refusal complaint on April 28, Meyer explained that:

> I didn't make it that day as Ken had accommodated me and I didn't need to complain then. But I had discovered that what Ken said was all false and he had lied about the meeting with Shirley Procher.

76. When asked in a follow up question, "to what extent if at all was this complaint motivated by your desire to return to work?", the answer was: "It was all about my return to work."

77. In cross-examination, Meyer was asked why he waited three months to file his MOL complaint when he had learned as early as the first week of February that Ken had been lying about the Procher meeting. The answer was: "It was a very busy three months. I was dealing with WSIB. I was ill and I was gathering this information. I anticipated meeting with Colin Hill so we could go over all that was going on."

78. When asked in chief why Meyer was fired, Hill stated:

> As stated, the employment relationship was frustrated to the point of no repair. He claimed that a number of management people including myself were lying to a point that my assessment was that it was not in the Hospital's or Randy's best interest to continue his employment with the Hospital…I felt there would potentially be a difficult situation for Randy to return to the Hospital.

79. When asked what was meant by "unsubstantiated allegations" in the letter of termination, Hill said that: "The main one was the threats to him, that management had lied, that there had been no work refusal, that police reports were not filed that Randy

said were filed." When asked in a final question "is there was anything else you can think of now?", his answer was: "No".

80. Notwithstanding his answers elsewhere in evidence about the contemplation of discipline in April, in cross-examination Hill stated that firing Meyer only became an option "early in May". When asked about what had changed between April 20 when the Hospital had been prepared to return Meyer to work and early May, Hill mentioned the continued inconsistencies in his story, that the police reports didn't add up, the MOL intervention, "a lot of things didn't add up". When the e-mail to Dr. Wright was mentioned, Hill said: "I didn't like it." Referring to the MOL work refusal complaint, Hill said: "all the inconsistencies started adding up, putting into question the truthfulness of the statements made by Randy". Hill admitted that Meyer had the right to send an e-mail to Dr. Wright given the "open door policy at the Hospital" and the right to file a MOL complaint: "of course".

81. In cross-examination Hill indicated that he made notes at some meetings but did not know where they were as he was no longer employed at the Hospital. No notes were found. He said that the decision to terminate Meyer was a joint decision made by himself and Crocker with the approval of Chief Financial Officer Ralph Anstey. "Ultimately the decision was made by the Manager. If they make a decision, I might provide counsel but it's ultimately a management decision to terminate."

82. When further pressed in cross-examination as to what led the Hospital from being prepared to reinstate the grievor to deciding to discharge him, Hill agreed that there was no single culminating incident. When asked for detailed particulars as to what facts or allegations came to his attention after April 20 and before May 10, the answer was:

> The police report information. No occurrence report was filed when Randy said it had been filed. Around that time there had been a claim of work refusal which could not be substantiated. In reviewing the functionality of the department since Randy had left, the observations and comments that the department was running a lot smoother. Not as much internal conflict. The team was functioning better in Randy's absence. Employees were saying it was better without Randy and that

> even union representatives concurred that Randy had been a negative factor in that department. They were better off without Randy. He said he had filed a number of police reports when he had not. His overall credibility was in issue.

83. When asked if the Hospital had considered a lesser penalty than discharge, Hill said: "We contemplated all the options but because of the frustration of the work situation, it was not in the best interests of either the Hospital or Randy."

84. In re-examination Hill stated that the e-mail sent to Dr. Wright had played no part in the termination decision although it further underlined the inconsistencies in the grievor's story.

85. Crocker testified in chief that the "relationship between [the grievor] and Scarborough Hospital had been frustrated beyond the point of repair and, also, the confidence and trust in him had been compromised at that point." He referred to the conflicting statements made by Meyer, principally that he was threatened followed by statements that he was not threatened.

86. In cross-examination Crocker acknowledged that the Hospital's information about Meyer's alleged failure to file a police report when he said he had done was one of the considerations as to the employer's estimation of his credibility and was a factor in his termination. He said that somewhere toward the end of April he and Hill discussed their concern that it would be challenging to have Meyer back because they felt "he didn't trust us and we didn't trust him, the relationship of employer and employee was breaking down". He conceded however that these factors were present prior to April 20 when the Hospital had been prepared to return the grievor to work.

87. When asked "if he had not sent the e-mail to Dr. Wright, would he have been terminated?", Crocker replied: "I can't say for certain." He said "it was a factor in the mistrust, concluding that it was an irreparable relationship". When asked if the work refusal complaint played a role in the termination, Crocker stated: "It increased our view

of the mistrust. He was within his right to do so but his view of the work refusal, the event was inaccurate."

88. On May 5th Crocker left a message [recorded by the grievor] asking "to set up a meeting time so that we can go over the ahm (*sic*) finalities of the return to work program..". Meyer came in for the meeting on May 10 and was terminated at that time. When it was suggested in cross-examination that his message to Meyer had been a lie, Crocker conceded that it was "not accurate". Meyer had union representation at the discharge meeting.

89. At the conclusion of his examination in chief Meyer described the impact of his discharge upon him and his family. It was severe both personally and financially. He said:

> I still don't sleep well. *I pick a different person every night, why they would make up telephone conversations and documents…I still don't think this will be finalized until there is a proper investigation into the matter, to find out who is responsible for what occurred.*
>
> I have five years invested in that job, a very important role I played as president at the Hospital. I feel I was refused the opportunity to run for election and denied getting on the ballot by the president, Evelyn and Doug. I have many people at the Hospital who are colleagues and friends. I had a very good working relationship with everybody. I hope to go back as I feel my name and reputation has been smeared. I might be able to repair that. I'm aware of many people that have been told damaging things about my reputation.
>
> ***
>
> I had intentions to run for president and hoped to work in union business.

90. In cross-examination Meyer identified Ward, Crocker, Janes, and Marcu as having lied. *If he returned to work he said he would offer Marcu the opportunity to tell the truth. If he failed to do so, it could be a matter for the police or the Ontario Ombudsman with whom he said he had been in contact about his treatment by the police. It was his view that Ward had not shared available documents with the arbitrator and*

*with others including the union*. He agreed that he had suggested to Di Rienzo that Di Rienzo file his own SAFE report regarding the 'pray to God' encounter.

91. When it was suggested to him that he had connected the "they" of the alleged Marcu threat with people at work, Meyer answered: "*I assumed there must be a group of people who are pretty pissed off at me and I also assumed that it was management people and union people*."

92. In a statement to the MOL dated April 30 Meyer had written:

> *Right from the beginning the hospital and Union worked diligently to undermine my complaint and document the happenings in any manner they felt necessary to destroy my claim of being threatened*. Any representation by the union was the president sitting saying not one word. But I'm sure they had a lot to say when I left the meeting. The day after the witness was interviewed he had been threatened by Constantin and nothing was done.

93. When asked about that statement in cross examination, Meyer said: "Yes, I feel they were doing inappropriate things." He also confirmed that he still agreed with the comments sent in the e-mail to Dr. Wright set out above. Meyer told Hospital counsel that *he had been lied to by just about everyone and that all of the witnesses had lied at the arbitration. He named Janes, Ramsey, Crocker, Ward, Marcu, and the Hospital's Human Resources people*.

94. *It was Meyer's belief that the Hospital had sent false information to the WSIB:*

> *I was told that the Hospital and the union were working together to frame me*. When I was told that, everything became clear as to why people were doing certain things. I mentioned to Colin Hill that I received a telephone call from another employee in our department. I actually called him. He told me that the Hospital and the Union were working together to frame me and I have transcripts of that also.

95. When it was suggested to him by employer counsel that that would be a horrific thing for the Hospital and the union to do and that it would not sit well with him today, Meyer said:

> *I know that a small group of people orchestrated this and dragged many others into their scheme. If I sound crazy, they also dragged a police officer down.* Police Officer Cole. He removed his name and when I asked the Police Commissioner for his notes he didn't realize I already had them.

96. When counsel suggested that if he came back to work this unjustness would need to be resolved, the grievor said:

> *The matter should be looked at seriously and something good may come of it. It may be that some people might have to be fired.*
>
> Question: *Human resources?*
> Answer: *I don't know.*
>
> Question: *Some union people?*
> Answer: *A small number of people working together for the sole purpose of getting me fired.*
>
> Question: *If you came back, you would want to see them fired?*
> Answer: *I would want my name to be cleared and what happens to those people, I don't know who they are but I have a good idea. I think those people should be disciplined. The EAP counsellor and the employee suggested that I sue them.*

97. In re-examination, Meyer stated that he had called the star.com and learned that the Mexico article had been online but not published in the physical newspaper. He concluded therefore that this was proof of Marcu's lie.

*Submissions by the Hospital*

98. Counsel submitted that the employer had just cause for discharge. He said that Crocker and Hill decided in May that the grievor had been dishonest when he made the original allegation of threat by Marcu and, also, that he had made a false claim on April 28 that the employer had denied his lawful right to engage in a work refusal on January 28. Meyer had been dishonest about a number of other matters, for example, about his desire to have Marcu fired, and maintained that dishonesty during the arbitration hearing.

It was his position that Meyer's falsehood about the purported work refusal was sufficient in itself to sustain a termination.

99. By way of contrast counsel asserted that the Hospital's witnesses maintained their credibility despite intense prolonged cross examination. The allegation by Meyer that all of them were lying only goes to undermine his own credibility. It took the employer some time to reach the conclusion which it did and the work refusal allegation was the tipping point. From that point, the Hospital concluded that everything else had been fabricated, for example, Meyer's stress leave. Given that he was a short service employee, just cause was appropriate. Meyer has never once apologized or indicated any contrition for his behaviour.

100. The employer submitted that there was no time limit provision in the collective agreement governing the imposition of discipline. In all of the circumstances there had been no undue delay and, in any event, the grievor could point to no prejudice resulting from any delay which may have occurred.

101. In support of its submission that making serious false allegations renders employees subject to discipline up to and including discharge, the Hospital referred to: *Ontario Store Fixtures Inc*. [1998] O.L.A.A. No. 279 (Tacon); *Canada Post Corp. (Sinnock Grievance)* [2007] C.L.A.D. No. 416 (Lanyon); and *Aspen Planers Ltd*. (2010) 200 L.A.C. (4th) 100 (Korbin).

102. In support of its submission concerning the delay issue, the Hospital referred to: *Ottawa-Carleton District School Board (Preston)* (2003) 121 L.A.C. (4th) 405 (Chodos); *National Steel Car Ltd*. (2010) 194 L.A.C. (4th) 232 (Bendel); and *AFG Industries Ltd*. (1998) 75 L.A.C. (4th) 336 (Herlich).

103. In the alternative, the employer submitted that the grievor should not be reinstated even should there be no finding of just cause. The Hospital relies in particular upon *DeHavilland Inc*. (1999) 83 L.A.C. (4th) 157 (Rayner) where at para. 5 the arbitrator

recorded several factors to be considered relevant to any decision to award compensation in lieu of reinstatement:

1. The refusal of coworkers to work with the grievor.
2. Lack of trust between the grievor and the employer.
3. The inability or refusal of the grievor to accept responsibility for any wrongdoing.
4. The demeanour and attitude of the grievor at the hearing.
5. Animosity on the part of the grievor toward management or coworkers.
6. The risk of a 'poisoned' atmosphere in the work place.

104. The Hospital submitted that the evidence disclosed all of the criteria identified by Arbitrator Rayner and that reinstatement would be highly inappropriate.

105. On the question of quantum of compensation the employer filed a chart which set out formulae which have been adopted by arbitrators in a number of cases varying from a low of 1 month per year of service to a high of 3 weeks with a typical addition of 15% in lieu of benefits together with a provision for interest.

106. The Hospital referred to the following cases on this point: *Lethbridge Community College* [2004] 1 S.C.R. 727; *Canvil, a division of Mueller Canada Ltd*. (2006) 152 L.A.C. (4th) 378 (Marcotte*); Cassellhome Home for the Aged* (2007) 159 L.A.C. (4th) 251 (Slotnick); *Re Ontario (Liquor Control Board of Ontario)* (2011) 213 L.A.C. (4th) 119 (Abramsky); *Re Toronto (Metropolitan)* (2001) 99 L.A.C. (4th) 1 (Simmons); *Re Hendrickson Spring Stratford Operations* (2009) 191 L.A.C. (4th) 116 (Solomatenko); *Re British Columbia (Ministry of Public Safety)* (2009) 186 L.A.C. (4th) 168 (Steeves); *DeHavilland Inc., supra.; NAV Canada* (2004) 131 L.A.C. (4th) 429 (Kuttner); *Re Health Sciences Centre* (2001) 96 L.A.C. (4th) 404; *Cameco Corp*. (2008) 179 L.A.C. (4th) 97 (Graham); *York Region Board of Education* (1999) 84 L.A.C. (4th) 90 (Shime); *Wasaya Airways LP* (2010) 195 L.A.C. (4th) 1 (Marcotte).

*Submissions by the Union*

107. Counsel submitted that the Hospital has elected to terminate a controversial political actor and that its failure to return the grievor to work on April 11 was "disgraceful". If the Hospital was admittedly prepared to return him to work two weeks before his termination, how can it be said that his employment cannot be rehabilitated? Hill's effort to convince Meyer to resign is proof that the Hospital had no interest in his return. As soon as the grievor announced that he wished to return to work, the Hospital initiated 'package' discussions and then moved to termination when that initiative failed. The grievor's appeal to Dr. Wright and the MOL should be seen as frustrated appeals for help and no more.

108. The discharge letter is devoid of particulars. It makes no specific allegation that the grievor lied about the Marcu incident. "If he didn't lie, the Hospital loses the case." The time for disciplining the grievor if at all was shortly after February 1 when Crocker determined that the grievor was "making it up". "It is difficult for the Hospital to argue that it was a lie if the author of the discharge letter [Hill] does not see it as a lie." There is no culminating incident. The Hospital is now reliant on *post facto* submissions by counsel to attempt to justify its conduct. What message is sent if the Hospital is permitted to rely upon the grievor's exercise of a statutory right [the work refusal complaint] as cause for discipline? The true cause for the discharge was simply that the Hospital did not want Meyer to come back. If there is cause for discipline at all, a short suspension should be adequate.

109. The Hospital's alternative submission is highly problematic. If the arbitrator were to accede to it, the Hospital will have been permitted to accomplish precisely what just cause protection is intended to prevent. Counsel filed a comprehensive legal memorandum which referred to too many authorities to usefully record here. The memorandum challenged the very basis of the *DeHavilland* rationale arguing that recourse to compensation in lieu of reinstatement undermines a fundamental purpose of a collective bargaining regime. Citing *Integra* (2012) 215 L.A.C. (4th) 398 (Cummings)

and *Re Tenant Hotline* (1983) 10 L.A.C. (3d) 130 (MacDowell), the union argued that many of the *DeHavilland* factors were at play in many discharge cases where, almost by definition, employers have lost trust in terminated employees and employees could be expected to have reacted negatively.

110. In the alternative, the Union submitted that the discharge should be set aside because the grievor was denied union representation. Hill made a specific decision to meet with Meyer alone; that constituted prohibited individual bargaining. Reference was made to Article 7.02 which reads:

> At the time formal discipline is imposed or at any stage of the grievance procedure an employee shall have the right upon request to the presence of his/her steward. In the case of suspension or discharge the Hospital shall notify the employee of this right in advance.

111. The Union filed the following authorities on the delay issue: *Re Corporation of the Borough of North York* (1979) 20 L.A.C. (2d) 289 (Schiff); *Re Brunswick Bottling Ltd*. (1984) 16 L.A.C. (3d) 249 (Iwanicki); *Re AFG Industries, supra.; Re University of Ottawa* (1994) 42 L.A.C. (4th) 300 (Bendel). Reference was also made to *Terminal Forest Products Ltd*. [1996] B.C.C.A.A.A, No. 484 (Kelleher).

*Hospital Reply*

112. The Hospital emphasized that this is not a typical discharge case. Given the grievor's view of his colleagues both in management and in the union, any idea of reintegration into the workplace with counselling or otherwise is a "fantasy". The collective agreement does not confer a right to union representation prior to the imposition of discipline and, in any event, the discussions between Hill and Meyer produced no agreement which would require being set aside even had their been a breach. Any delay in effecting the termination led to no prejudice to the grievor whose ability to recall events remained unimpaired. Reliance upon the evidence of Di Rienzo is suspect given his friendship with Meyer and their cooperation with the earlier duty of fair representation complaint. "The only person who believes that anyone had it in for Randy

was Randy and he still thinks that". The suggestion that he was mistreated because he was the union president is not credible.

*Decision*

113. It is of course impossible to determine beyond reasonable doubt precisely what was said during the Marcu/Meyer exchange on January 14. I am satisfied however, on a balance of probabilities, that what happened was far more likely to have been consistent with the explanation provided by Marcu than not-- at the very least to the extent that no threat to Meyer was intended or uttered. With respect to this incident and other events I have considered the usual *Faryna v. Chorny* factors including the demeanour of the witnesses, the reasonableness of their version of the facts, and their ability to resist the temptation of self interest when giving evidence.

114. While Marcu was capable of testifying in the English language he did so with a thick accent which was not always easy to decipher. For that reason alone, it may be that what he said, or intended to say, was misinterpreted by Meyer. I am also struck by the fact that, whether or not it appeared in the physical newspaper or in an internet edition, the Toronto Star did indeed publish an article that day fully consistent with what Marcu said he had been talking about. Marcu appears to have had no advance notice of his interview with Ward and, if so, would have had no opportunity to conceive such a clever invented cover for a fabricated excuse for what he said. It is also the case that one has to struggle to conceive of a plausible motive for Marcu to have threatened Meyer as alleged. There was no immediately proximate event which might have given rise to a threatening statement and the two men worked together without incident both before and after January 14. I do not see as particularly probative the suggestion that they may have had occasional differences in the past where it is not evident that any such differences were lingering.

115. I also observe that neither Meyer nor Di Rienzo took any immediate offence to the conversation and simply went home. Neither Meyer nor Di Rienzo appeared to me to

be faint of heart and I am left to wonder why they would just say nothing if the alleged threat was as impactful as they later related it to be. Meyer's evidence in chief that, once he reviewed the Hospital's workplace violence policy on line he believed he had no choice but to make a report, was also a curious choice of words. I accept his statement that as he thought about it "more and more" he became more concerned. That description however rests more easily with a conclusion that, a confusing exchange festered into an imagined threat in his mind, than a finding that a threat, self evidently serious, was uttered in the first place.

116. Insofar as the later exchange between Marcu and Di Rienzo on January 21 is concerned, Marcu's explanation appears credible and I so find. The gist of the words exchanged is entirely consistent with the conclusion that an upset Marcu was outraged that, as it appeared to him, Di Rienzo was prepared to testify falsely against him. The same comment about Marcu's heavy accent applies. I do not see that Marcu choosing to speak softly to Di Rienzo translates by itself into a threat. I conclude that Di Rienzo was mistaken. I also note that the SAFE complaint about this incident was registered approximately three weeks later-- after he and Meyer had discussed the situation which the grievor saw developing.

117. The Hospital investigation should have been better recorded but I have reached the same conclusion as did Ward in the first instance on January 20 and, then, as did Hill after he met with the grievor in mid February. It is impossible to reconcile the words spoken on January 14 as separately recalled by Marcu/Di Rienzo and Meyer but, as previously stated, I do not believe that whatever was said was intended as a threat. "Inconclusive", to echo Ward, sounds entirely appropriate to me. But I also believe that Ward and Hill were correct in their initial conclusion that Meyer had a genuine, albeit mistaken, understanding of what had occurred. He did report the alleged threat both to the Hospital and to the police almost immediately. Meyer's concern may have been mistaken but it was not late blooming.

118. What then occurred in my opinion was that an honest belief graduated into an attitude of increasing certitude, elevated worry, and finally rectitude. That certitude and eventual rectitude blinded Meyer to any other possible view of the matter and led him to question the motives and conduct of almost everyone around him. The Hospital's reasonable offer of security measures was unreasonably interpreted by him as confirmation that his concerns were valid. One day he accepted security measures only to reject them as "ridiculous" the next day. He began to speculate about who the "they" might be who might wish to do him harm and why they might wish to do so. I have little doubt that his encounters with management during the days and weeks which followed January 14 were deeply unsatisfying and confusing for all concerned.

119. Initial tolerance for the grievor's perception and persistence began to unravel. Crocker appears to have been the first to abandon a willingness to give Meyer the benefit of the doubt given what appeared to be the grievor's erratic behaviour and the seeming contradictions in his story. And what may have appeared to Crocker to be contradictions may not have been contradictions looked at from Meyer's vantage point. They had begun to speak different languages. As early as February 1, Crocker concluded that Meyer should be discredited and communicated that belief to Hill reasonably soon after that. It is important to note however that this was not Hill's opinion on February 14 after he met with Meyer. Hill stated in cross-examination that, at that time, he accepted that Meyer was telling the truth about the Marcu incident-- although Hill himself did not believe that a threat had been made.

120. One thing that is absolutely clear is that the Hospital's investigation into the incident was closed in February and that this closure was communicated to Meyer on several occasions. Whatever Crocker may have privately thought, and whenever he communicated his doubts about Meyer to Hill in February, the decision was made that month that Meyer would not be disciplined. The controversy could and should have ended right there and then.

121. It did not because Meyer was unable to let go. He demanded to see an investigation product but was denied—although in cross examination Hill agreed that such a request was reasonable. He became increasingly worried and then went on stress leave. Crocker plainly saw the leave as highly questionable and could not understand why Meyer could not return to work at the General campus. While Meyer says otherwise, Hospital witnesses were insistent that Meyer frequently requested that Marcu be discharged and their testimony is supported in contemporaneous e-mails. Meyer thought that if anyone should be transferred to the General campus it should be Marcu.

122. What is also clear about the stress leave period however is that the Hospital took no steps to question the legitimacy of Meyer taking such leave. He was supported by his physician and all of the dialogue which ensued between the physicians, and between Meyer and occupational health personnel, centred on the grievor's return to work. Whatever Crocker and perhaps others may have thought, there was no suggestion to Meyer at the time that his medical need for a stress leave was unwarranted—whether or not that leave was entitled to WSIB recognition. The Hospital's entire focus was upon facilitating the grievor's return to work. It never suggested to anyone that the leave might have been fraudulently taken in the first place. Hill himself acknowledged that there might have been a medical or psychological explanation as has been previously noted above.

123. Whether or not it was permissible from a collective agreement point of view, from a practical perspective and also with the benefit of hindsight, it is difficult to be critical of the motivation behind Hill's attempted intervention in mid April. By that time it had become obvious to him that it would be best for all concerned if Meyer were to resign and seek employment elsewhere. A former union president was fixated on what the Hospital perceived to be an illegitimate personal issue. Management and professional staff were increasingly engaged with and distracted by the problem. Hill wanted to negotiate a practical solution. He foresaw and wished to prevent exactly the lengthy legal proceeding which ultimately ensued. The Maintenance Department was running well without Meyer.

124. But Hill could not find a solution. The problem did not go away. From the employer's point of view it got worse. Meyer became insistent on an immediate return to work and saw the continuing delay as another example of employer perfidy. It must have looked that way to him given that his doctor had authorized his return on April 11 and the employer had been after him to return to work for some time. For its part, the Hospital wanted a clear understanding with Meyer's physician as to the terms of his return before he came back. Apparently there was a delay in the grievor's doctor getting back to his Hospital counterpart.

125. Meyer did not delay at all. He responded by filing his work refusal complaint with the MOL on April 28 and sent an emotional e-mail to the Hospital's CEO on April 29. Union counsel portrayed both of these actions in effect as *cris de coeur* and there is surely something to that. The employer on the other hand saw the work refusal complaint as completely unwarranted and yet another Meyer fabrication. By this time not only Crocker but others had come to doubt everything that Meyer had said or done since January 14. The e-mail sent to Dr. Wright was right over the top.

126. In the circumstances, the Hospital believed itself entitled to re-evaluate its original assessment about the alleged Marcu threat and to have the right to act upon that reassessment. In my opinion the employer was wrong.

127. The Hospital's Director of Human Resources, Hill, testified that while he provided advice, the ultimate decision maker about the discharge was the grievor's Manager [Crocker]. Crocker on the other hand understood that it had been a decision made collaboratively by Hill and himself, with the actual termination carried out by Hill. Others were consulted and concurred in the decision.

128. It may be recalled that it was Crocker who repeatedly told Meyer in February that the Marcu/Meyer incident of January 14 was closed. Crocker testified that he doubted the grievor's version of that event as early as February 1st but chose not to impose

discipline. Hill concluded two weeks later that the grievor was telling the truth as he understood it. Both Crocker and Hill acted appropriately at that time in my view. I believe that they were correct in their assessments that the investigation was inconclusive, that no threat had been made, and that Meyer had been telling the truth as he perceived it.

129. But in my view it was simply not open to the employer, particularly when no new facts had become available, to reverse itself three months later, to reach a different conclusion about this precipitating event, and then to act upon such a newfound conclusion. See: *Terminal Forest Products Ltd.*, at para. 56:

> When an employee does not take action in a timely way an employee is entitled to conclude that no discipline will be imposed: See Palmer, "Collective Agreement Arbitration in Canada", (3rd edition 1991) at 280-281.

130. As pointed out by the Hospital in argument, there is discussion in the case law about a possible union requirement to show prejudice where an employer delays unduly in imposing discipline. With respect however, whether or not there is any such requirement, such a submission is not relevant to a situation where an employee has been specifically and repeatedly told that an investigation has been closed. It cannot be acceptable for an employer to reconsider a closed file on the basis that recent behaviour of an employee has caused it to re-evaluate his basic integrity and, for that reason, its previously settled conclusion about a prior event. There might never be closure in such a scenario.

131. If the pitfall of such an approach is not immediately obvious, the facts of this case provide further illustration of the potential hazard. The reason given by both Crocker and Hill for their reassessment about the January 14 incident was their increasing doubt about Meyer's overall credibility. But they were both dead wrong about one key element cited by both of them when asked about why the decision to discharge Meyer was reached. Both Crocker and Hill took into consideration their [mistaken] belief that Meyer had not been in contact with the police as he had been telling them from the beginning. They

were indisputably wrong about that as demonstrated by exhibit material, yet that error was a significant piece in their concluding that Meyer had misled them from the start.

132. There is a further fundamental problem with the employer's decision to terminate the grievor.

133. The May 10 letter of termination was written in the most general of terms with no particulars whatsoever. Crocker and Hill spoke somewhat differently about its meaning and Hill admitted in cross-examination that there had been no single culminating incident. The actual content of the letter is entirely consistent with that concession. It is also consistent with the conclusion, which I have reached, that the Hospital had simply determined that it would be far better off if Meyer were no longer an employee. It appears to me to be the case that the employer moved rapidly to termination once it became apparent that Meyer's return to work was imminent and that he could not be persuaded to leave of his own volition. It is noteworthy that both Crocker and Hill emphasized in chief their belief that the employment relationship had been "frustrated" by lack of trust. When giving their evidence they required some, if not undue, pressing to speak to the details.

134. From that perspective, Meyer's filing of a highly questionable work refusal complaint on April 28 constituted a veritable, albeit aggravating, gift to which I now turn. As previously noted, the employer submitted that this complaint constituted just cause for discharge standing alone. It will be recalled that Hill conceded in cross-examination ["of course"] that the grievor had the legal right to file his MOL complaint which raises the question of how a termination might be permissible in light of that admitted right. Union counsel made a passionate submission that an arbitrator should be slow to conclude that the filing of a complaint, whether or not misguided, should give rise to discipline given the 'chill' to vulnerable employees which might be a foreseeable result of such a finding.

135. Although the outcome of such cases is always fact driven, arbitrators have faced situations such as this in the past. In Canada Post Corp. (Sinnock) it was said at para. 170:

> As the Union argues, an important distinction must be made between a complaint that is ultimately determined to be unfounded and a determination that such a complaint has been made in bad faith…Arbitrator Kelleher in *Re University of Victoria v. Professional Employees' Association (James Grievance),* [2002] B.C.C.A.A. No. 231 A-169/02 commented on this important distinction:
>
> > A distinction must be drawn between a complaint that is not substantiated and one that is made in bad faith. It was put this way in Ontario Public Service Employees Union v. Ontario (C.L. Grievance), a decision of the Ontario Grievance Settlement Board dated May 7, 2001:
> >
> > > My conclusion, however, that filing a complaint in bad faith is cause for discharge should not be [mis] construed…There is a profound difference between concluding that a claim, on a balance of probability standard, is unfounded and a conclusion that a claim was filed in bad faith. Bad faith requires an improper motive. It is entirely different than a finding that the claim could not be sustained. (para. 191)
> >
> > The term "bad faith" has been defined as 'dishonesty, recklessness or gross negligence". In Kripps v. Touch Ross & Co. (1990) 48 B.C.L.R. (2d) 171 Mr. Justice Hollinrake said for the Court of Appeal:
> >
> > > While there can be no doubt that dishonesty can constitute a component of want of good faith, in my opinion it is not a necessary component. I think facts, which establish recklessness and gross negligence, could lead to a conclusion of fact that there had been a want of good faith within s.152. (paras. 78-79.)

136. In this case I do not accept the grievor's uncorroborated version of what took place on January 28 with Janes. Pettigrew, Ramsey, and Procher did not give evidence and I heard about nothing else which might have supported his version of events. There is no contemporaneous document from Meyer which refers to any work refusal concern. He explained that he was satisfied at the time with Janes' agreement that he work with Di Rienzo that day. He admits that he made no complaint about this issue to Hill in February or at any time. While it may be regarded as hearsay evidence in this respect, the final MOL report recorded that:

> The certified worker member of the joint health and safety committee [Althea Ramsey], who was present on site on January 28, 2011 was not aware of or was notified of any situation of a work refusal, though the certified member met with the complainant during the course of the day.

137. What I do find interesting is Meyer's explanation in chief that the complaint was "all about his return to work". It may well have been some type of desperate plea, justified in the grievor's mind by what he perceived to be his unfair treatment, but I conclude that it was not just an unfounded claim. Rather, I conclude that it was not made in good faith in the sense that it was a reckless claim-- intended to place additional pressure on the Hospital. Whether or not somehow Meyer had convinced himself that it was an honest claim on some level is immaterial. I accept Janes' testimony that no work refusal was initiated on January 28.

138. In these circumstances I have no hesitation in finding that the Hospital did have just cause to impose discipline for making the work refusal allegation as he did. The work refusal allegation was improper.

139. Whether or not the Hospital had the right to discharge the grievor for such an offence is a separate question which raises another consideration.

140. I do not accept that the filing of the work refusal complaint was a significant driver for the decision to terminate the grievor. The reasons given by Hill for seeking to secure Meyer's voluntary resignation have a remarkable resonance with those ultimately provided by both Hill and Crocker for the discharge. In my view, if the termination train had not already left the station by mid April, its imminent departure required only a final whistle. All of the evidence suggests that the Hospital had finally 'had it' with the grievor. The Hospital was running extremely well without his nagging persistence and that persistence showed no sign of abating. The work refusal complaint and the e-mail sent to Dr. Wright provided final proof of a conclusion which I find had already been reached, for all intents and purposes, by Hill and Crocker.

141. I pause to say that I find the union's alternative submission that the discharge should be set aside on the grounds of the employer's denial of union representation to be without merit. The grievor was represented at the May 10 termination meeting in

accordance with Article 7.02 of the collective agreement. Whether or not the union should have been advised of Hill's private meeting and conversations with Meyer from a labour relations perspective is a separate question which does not raise a contractual issue. In any event, the Hill intervention with Meyer in mid April went for naught.

142. On the evidence before me, I therefore find that the Hospital has shown cause for discipline solely for the filing of the work refusal complaint by the grievor. As Meyer was an employee with approximately five years service and without a prior disciplinary record of any kind, I conclude that the Hospital had just cause to suspend the grievor but not to terminate his employment. In a normal case, the remedy in circumstances such as these would include the substitution of a suspension for the discharge likely with compensation.

143. In this case however the Hospital has submitted that an order reinstating this grievor would not be appropriate having regard to the principles set out in the *DeHavilland* line of cases. This is not a throwaway submission. Counsel for the Hospital accepts that *DeHavilland* should be reserved for exceptional circumstances.

144. The union has responded in turn with a powerful submission that failure to reinstate this grievor would permit the Hospital to accomplish exactly what Hill failed to do when he sought Meyer's voluntary resignation. This employer never had just cause for discharge and hoped that termination might lead to a downstream change of mind by the grievor after which he might then resign with a package. Valuable collective agreement rights have been trampled upon. They should not be subject to expropriation because an employer determines that it would be better off without a difficult employee. The Hospital's approach here repudiates the 'just cause' bargain it made with the union and that bargain commands arbitral protection.

145. I recognize the cogency of the union submission but I also accept that there is a legitimate place in the jurisprudence, for what might be called a *DeHavilland* approach, to be reserved for very exceptional cases. The concerns expressed, for example, in *Re*

*Tenant Hotline* and *Integra* should never be given short shrift. If union counsel's stated experience, that reference to *DeHavilland* is becoming routine in discharge cases, is true, such a tendency should be discouraged.

146. Is the Meyer case a truly exceptional circumstance? I am satisfied that it is.

147. I reach this conclusion without reliance upon evidence provided by the Hospital witnesses although their opinions were clear. It rests entirely upon the evidence given by the grievor much of which has been recited above in italics. Without the grievor's own testimony I might well have reached another conclusion.

148. Despite my assessment of his evidence, the grievor presented for the most part as a calm, rational, intelligent, honest individual. The Hospital agreed that he performed his job as a plumber well and his employment record shows no prior discipline. At one point he enjoyed sufficient confidence from his colleagues that he was elected local union president. No small accomplishment in a large bargaining unit. No small sign of respect.

149. However, and this is a major *caveat*, more than two years later he has not been able to get past the deep feelings of injustice, persecution, and conspiracy which have afflicted him since January 14, 2011. Meyer is convinced that numerous people have lied about him in the past and continued to lie throughout the arbitration proceedings. Those people include management, union representatives and workplace colleagues. With the exception of his colleague, Di Rienzo, no one who participated in the arbitration has been spared this judgment which includes others. I am not sure whom else he suspects has participated in the ignoble enterprise to do him ill. I have found those feelings to be unwarranted but have little doubt that my conclusions will do nothing to alter his core views. The grievor has had nearly two years to re-evaluate but his position has only hardened.

150. Meyer is entitled to his opinions and I do not suggest that he has been wrong in his perception about everything which has happened. What however I am certain about

is that the interests of no one, including him, will be served by his return to the Hospital. Meyer has no interest in putting all of this behind him and he believes that he should not be required to do so. If he were to be reinstated at the Hospital I have no doubt that he would feel fully entitled, perhaps obligated, to continue his quest for justice as he sees it. It is the grievor's opinion that, although this arbitration has taken many days of hearing and involved the most thorough cross examination of his protagonists by senior counsel, a further investigation is still required which might involve the police.

151. With all due respect, this is one of those truly exceptional circumstances recognized very occasionally by arbitrators. The union has done everything possible on his behalf during this arbitration which has been protracted and expensive. Union counsel has left no stone unturned and made every possible argument in support of his reinstatement. But this just cannot go on.

152. I might also say, although it is by no means a significant factor, that I am fortified in this conclusion by the knowledge that Mr. Meyer has found permanent employment with another major public sector unionized employer, adjudged by him to be equivalent or superior to that which he enjoyed at the Hospital.

153. If reinstatement is not available to the grievor, the parties are agreed that he should be compensated in damages which raises the issue of quantum. The parties are agreed that this determination should be made now to avoid, if possible, the necessity of any further hearing.

154. The union submitted that the grievor should be fully compensated for his losses prior to his securing alternative employment and that he should receive, in addition, the largest sum awarded by arbitrators as disclosed in the chart provided by the Hospital, together with *Employment Standards Act* entitlements, all of it bearing interest. The chart provided by the Hospital derived from its cited authorities illustrates awards which have ranged from two or three weeks per year of service at the low end to two months per year

of service at the high end with a typical 15% top up in lieu of benefits, all bearing interest according to various formulae.

155. The employer made submissions based upon the chart which it provided. I understood the Hospital's position to be that maximum recovery should reflect an amount based on no more than one month per year of the grievor's service with a 15% top up in lieu of benefits, bearing interest.

156. The basic theory underlying the relevant arbitral jurisprudence is that there is an economic value to working under a collective bargaining regime, above that conferred by the common law of employment. I regard the validity of this proposition to be beyond dispute and see no need to attempt to state it better than many others have previously done.

157. This is not of course to say that it is a simple task to place a value on this type of loss which is patently not amenable to precise measurement. Arbitrators have just done their best and there are many good reasons why they have done so using broad strokes. Measurement of the loss of employment under a collective agreement is capable of analysis from a variety of perspectives. It takes into account factors including but not limited to seniority and the prospect for future employment. Cases of this kind should not be prolonged by theoretical debate or pretence that some holy grail of precise calculation is ever achievable. The approach of awarding x months per year of service with a top up for benefits plus interest, seems presumptively useful. Arbitrators have more recently tended not to make such awards subject to normal mitigation principles. See, for example, *Re Toronto (Metropolitan)* at para. 20: "It is a fixed sum without regard to what may happen following the breach."

158. The instant case presents a fact pattern somewhat differently from the norm.

159. I have found that Meyer should not have been discharged in but suspended instead. Absent that termination he would have continued to work at the Hospital to date.

However, unlike many others who have lost their employment in difficult economic times, he found comparable unionized employment during the course of the arbitration proceedings. I appreciate that Mr. Meyer has lost his accrued bargaining unit seniority and the right to employment under *this* collective agreement and that value should not be discounted. Nevertheless, the measure of his actual loss from a practical point of view is more readily identifiable in this situation than many others.

160. Given this fact, the union's argument that the grievor should be compensated until the date that he secured other employment has some appeal. Why would an arbitrator perform a largely subjective, but inevitably somewhat formulaic, assessment as to the appropriate measure of damages when there is available a more useful yardstick which gives some individual definition to his loss?

161. With respect, I do not believe that an award made on that basis would be a fair and just result in this case. There is a strong likelihood that Meyer would have been reinstated in his employment with the Hospital if he had demonstrated any insight into his role in the events which transpired, or, at the very least, had demonstrated a genuine willingness to put these events behind him at last.

162. But that is not what happened and, in my opinion, the grievor must bear some responsibility for this outcome. The employer was initially responsible for Meyer's termination but it is his attitude alone which has precluded a finding that his employment should be continued at the Hospital. In *Hendrickson Spring Stratford Operations*, at page 125 it was said:

> Thus in my view it is wrong even to suggest that the grievor is not being reinstated because of the employer's breach of the collective agreement. The simple fact and reality is that the grievor is not being reinstated because of factors which are personal to the grievor, not to the employer, and it cannot be ignored that there is an element of culpability, such as, refusal to accept responsibility for his actions and animosity towards management. It is on the basis of such factors that an arbitrator, not the employer, has determined that the grievor's employment shall not be reinstated. Thus, in determining the quantum of the compensation payable there is, in my view, no logical or legal basis to premise that exercise on the

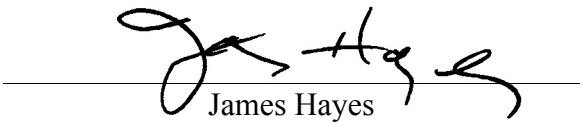
> principle that the employment relationship has come to an end as a consequence of the employer's breach of the collective agreement.

163. Accordingly, in all of the circumstances, I find that the grievor should be awarded compensation, for loss of employment under the collective agreement with this hospital, within the range of compensation normally found to be appropriate by arbitrators. The Hospital should not be exposed to an enhanced claim simply because the grievor took somewhat longer than expected to secure the alternative employment which would have been unnecessary if he had conducted himself otherwise.

164. The parties have stated their desire that this arbitration be brought to an expeditious conclusion. For this reason, I have attempted to define as clearly as possible the quantum of damages which should be paid. It is to be hoped that this litigation will end here. I direct therefore that the Hospital compensate the grievor with an amount equivalent to that which he would have earned on a straight time basis from May 30, 2011 until February 17, 2012. The time prior to May 30, 2011 shall be treated as a disciplinary suspension, notional as it will now be. The amount paid shall be deemed inclusive of any *Employment Standards Act* entitlements, should there be any. It shall also be deemed inclusive of any claim for 'top up' in lieu of benefits and inclusive of interest. This form of award is not intended to suggest that these heads of damage are not compensable or have not been compensated within the global amount I have awarded. The amount to be paid is not subject to any mitigation obligation.

165. I remain seized if the parties are unable to agree on the precise amount of compensation and should any further issues arise between the parties concerning a final resolution of this grievance.

Dated at Toronto, Ontario this 3rd day of April, 2013.



James Hayes