

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Aly Kachra, Plaintiff

AND:

OPSEU Pension Trust, Defendant

BEFORE: Associate Justice Jolley

COUNSEL: Natalie MacDonald, counsel for the moving party plaintiff

Christian Paquette, counsel for the responding party defendant

HEARD: 2 April 2026

REASONS FOR DECISION

- [1] Mr. Kachra seeks an order for leave to examine a non party, Reg Swamy, pursuant to rule 31.10. Mr. Swami was the former head of Human Resources at the defendant OPSEU Pension Trust. Mr. Kachra argues that there is reason to believe that Mr. Swamy has information relevant to a material issue in his wrongful dismissal action.
- [2] Mr. Swamy is quite prepared to speak to the plaintiff and his lawyer, and to be subject to an examination, but for an NDA between him and the defendant, which the defendant refuses to waive.

The Test

- [3] Rule 31.10 provides as follows:

31.10 (1) The court may grant leave, on such terms respecting costs and other matters as are just, to examine for discovery any person who there is reason to believe has information relevant to a material issue in the action, other than an expert engaged by or on behalf of a party in preparation for contemplated or pending litigation.

31.10(2) An order under subrule (1) shall not be made unless the court is satisfied that,

- (a) the moving party has been unable to obtain the information from other persons whom the moving party is entitled to examine for discovery, or from the person the party seeks to examine;

(b) it would be unfair to require the moving party to proceed to trial without having the opportunity of examining the person; and

(c) the examination will not,

(i) unduly delay the commencement of the trial of the action,

(ii) entail unreasonable expense for other parties, or

(iii) result in unfairness to the person the moving party seeks to examine.

There is reason to believe Mr. Swamy has information relevant to a material issue in the action

- [4] Mr. Kachra was Director of Investment Risk with the defendant from April 2017 until his dismissal on 9 January 2020. He pleads that his direct manager, Mr. Hudacin, berated him, retaliated against him, caused dysfunction in the team, and interfered with his ability to properly manage risk. He pleads that he was dismissed for complaining about this harassing behaviour.
- [5] Mr. Kachra pleads that he complained to the defendant's Human Resources business partner on a number of occasions about the harassment to which he was subjected. He also complained to Mr. Hudacin directly when Mr. Hudacin allegedly arbitrarily reduced his bonus as a form of reprisal for his complaints.
- [6] Mr. Kachra also contacted Mr. Swamy, who was then Chief Pension Officer and Head of Human Resources, about his harassment concerns. The plaintiff alleges that Mr. Swamy promised to raise the issue, but no apparent steps were taken to improve the situation.
- [7] In response to his complaints, Mr. Kachra pleads that he was told to look for new employment. He pleads that he was shocked and confused by the defendant's response "especially given his understanding that Mr. Hudacin had a history of bullying and harassing behaviour, as evidenced by numerous prior complaints against him." (per paragraph 41 of the amended statement of claim). The plaintiff's employment was terminated shortly thereafter.
- [8] Mr. Kachra seeks damages for wrongful dismissal, as well as moral damages in the amount of \$250,000 for the bad faith manner of his dismissal and punitive damages in the amount of \$500,000 due to the defendant's failure to investigate and address his complaints of harassment and reprisal (see paragraph 1 and 51 of the amended statement of claim).
- [9] Part of the plaintiff's moral damages claim is founded in his allegation at paragraph 50(d) of the amended statement of claim "that a number of other employees had brought forward similar complaints to Human Resources about Mr. Hudacin's behaviour, and despite its members' knowledge, nothing was done about it" and that "Human Resources knew or ought to have known that Mr. Hudacin had been the subject of several other complaints of harassment ... and Human Resources deliberately chose not to do anything about it, forcing the plaintiff to continue to work in a toxic work environment" (paragraph 50(k)).

- [10] During his examination for discovery and on this motion, the plaintiff provided the names of seven other employees who he believed had made complaints about Mr. Hudacin's behaviour toward them, including Mr. Swamy himself, who, the plaintiff said, had initiated an investigation into Mr. Hudacin's behavior. While he did not have any specifics of the complaints, Mr. Kachra indicated in his affidavit filed in support of this motion that the behaviour of Mr. Hudacin complained of by others included "bullying, harassment, mistreatment of others, yelling and rudeness, ... taking staff to strip clubs, offering them narcotics and asking Asian staff to take an Accent reduction course." He believed concerns had been raised by those complainants "through various channels including diversity counsel, HR, external investigators and to OP Trust executives." He understood through his discussions with Mr. Swamy at the time of his employment that Mr. Swamy knew of others who had raised similar complaints.
- [11] Given that Mr. Kachra complained to Mr. Swamy, given Mr. Swamy allegedly made his own complaint against Mr. Hudacin and commenced an investigation into Mr. Hudacin's conduct and given that Mr. Swamy, according to Mr. Kachra, knows of others who made similar complaints, it is clear that Mr. Swamy has information relevant to a material issue in the action, namely, the defendant's knowledge of employee complaints concerning Mr. Hudacin's behaviour and the actions the company took or did not take concerning those complaints.

The plaintiff has been unable to obtain the information from other persons whom he is entitled to examine for discovery, or from the person the party seeks to examine

- [12] When asked on discovery about whether he was aware of any complaints made against Mr. Hudacin regarding his behaviour in the workplace, the defendant's representative advised that he was not. The defendant has not updated or corrected that answer.
- [13] Further, the defendant refused questions about whether there were complaints from anyone about Mr. Hudacin's behaviour and also refused a narrower question about whether there were complaints from members of the investment risk department in particular.
- [14] On this motion, it argued that questions concerning other complaints were not relevant or material and that the plaintiff's claim for punitive damages would not justify this "invasive" questioning.
- [15] After Associate Justice Rappos ordered the defendant to provide any complaints about Mr. Hudacin's behaviour in the workplace from January 2018 to January 2020, the defendant delivered one heavily redacted complaint and advised there were no others.
- [16] A.J. Rappos also ordered the defendant to contact Mr. Swamy and ask him to provide any notes related to discussions with Mr. Kachra in the summer of 2019. In answer, the defendant advised that Mr. Swamy did not have notes related to those discussions.
- [17] In the context of this motion, Mr. Swamy advised that he did speak to the defendant's lawyers and provided them with information about the matters in issue in a telephone call that took place now more than a year ago. He emailed plaintiff's counsel, stating: "I would

have assumed that you have the details from [defendant's counsel] that I provided on that call, I also made handwritten notes of the relevant information I provided on that date." The defendant has not provided any of that information to the plaintiff.

- [18] The plaintiff seeks to examine Mr. Swamy with respect to a single issue – complaints made by other employees regarding Mr. Hudacin. The defendant cannot answer this as it does not know of any other complaints. If it knew of others, it was obliged to produce that information already and has not.
- [19] The defendant did not file any responding affidavit to indicate whether it searched its records for the names of the seven complainants that Mr. Kachra provided or spoke to those alleged complainants directly to obtain their evidence.
- [20] It has not sworn an affidavit stating that it would agree to ask Mr. Swamy about the other employee complaints or about his own complaint. Given its position on the first refusals motion that any questions concerning other complaints were not relevant and given that it continued to argue on this motion that questions concerning other complaints are not material to the plaintiff's claim, (despite information about them already having been ordered produced), I find there is no real likelihood that the defendant will answer that line of questioning and permit Mr. Swamy to fully answer what he knows about his own alleged complaint concerning Mr. Hudacin, or about the complaints of others concerning Mr. Hudacin.
- [21] Based on the above positions, in the language of *Din v Melady* 2010 ONSC 6852, I am satisfied that there is an actual or constructive refusal by the defendant to obtain – and deliver to the plaintiff – the information either internally or from non-parties. This is further evidenced by the fact that the defendant was ordered to provide some of this information in October 2024 and has provided only one heavily redacted complaint from one of the names that the plaintiff mentioned and has provided nothing from Mr. Swamy. The defendant's position is that the plaintiff is required to bring another motion if he wishes to challenge the redactions. These facts are distinguishable from those in *Din v Melady, supra*, where the defendant hospital had answered all the undertakings it had given, and had also provided an open-ended undertaking to provide whatever further information the plaintiffs' experts might require. There is no such undertaking here.
- [22] There was some suggestion during argument that the defendant was waiting until it was re-examined to provide the plaintiff with this information. Even if this were in evidence, which it is not, that is not what the order provided. The defendant was to provide the information and "additionally" to attend to be re-examined on the "answers provided".
- [23] I do not accept the defendant's argument that the plaintiff must first put these questions to it on a continued discovery and await either answers that the defendant will then obtain from Mr. Swamy and pass on, or await further refusals and another refusals motion. While it is clear that Mr. Swamy will answer these questions, it is not clear (and, in my view, unlikely, based on its positions on this motion) that the defendant will put the plaintiff's questions to Mr. Swamy and permit him to answer them. This alone distinguishes these

facts from *Famous Players Development Corp v Central Capital* (1991) 6 O.R. (3d) 765. To date, the defendant has taken a very narrow view of relevance and materiality, a view that would exclude questions to Mr. Swamy about complaints made by other employees regarding Mr. Hudacin.

- [24] Because the defendant refuses to waive Mr. Swamy's NDA, the plaintiff has been unable to obtain the information from Mr. Swamy, who is otherwise willing to provide it.

It would be unfair to require the plaintiff to proceed to trial without having the opportunity of examining Mr. Swamy

- [25] Mr. Swamy has information relevant to the plaintiff's claim and, on the evidence before me, is the only party with that information. The defendant does not have that information, or has not produced it, even though it has already spoken to Mr. Swamy.
- [26] The plaintiff has general information about the complaints but has deposed that he does not have the specifics he will need to prove that there were other similar complaints about harassment by Mr. Hudacin and to prove that the defendant did not take steps to address those concerns.
- [27] I give weight to the fact that Mr. Swamy is more than willing to testify. The concern about compelling an unwilling non-party to be examined is not a factor here. Even if it were, as noted in *Kissoon v Aviva Insurance* 2018 ONSC 2167 at paragraph 17,

[17] That being said, a court should not be too ready to refuse a party access to discovery of a non-party where the non-party is unwilling to cooperate in providing evidence that is not otherwise available. The requirement for leave is directed at avoiding subjecting a non-party to the discovery process unnecessarily. It is aimed at minimizing costs and inconvenience to non-parties who are not otherwise participants in the action. It is not directed at arbitrarily limiting access to a witness with relevant evidence. While Rule 31.10 is clearly not intended to invite fishing expeditions, or subject non-parties to unnecessary inconvenience or expense, Rule 31.10 should still be considered and applied having regard to the general purposes and objectives underlying discovery.

[18] Fulsome discovery allows parties to know the case available to them and to meaningfully understand the case against them. Discovery allows parties to properly prepare for trial, but it also allows parties to narrow the live issues requiring trial. In many instances, discovery of relevant witnesses in advance of the trial may obviate the need for a trial altogether. As such, unduly limiting discovery may force parties to unnecessarily assume the expense of a trial. The approach to be taken to the discovery of non-parties is directed at the efficient use of resources, not at increasing expense and delay.

- [28] The issue on which the plaintiff intends to question Mr. Swamy, that is, complaints made by other employees, including Mr. Swamy, regarding Mr. Hudacin, is central to the plaintiff's claim for moral damages and punitive damages. It would be unfair to the

plaintiff to require him to proceed without himself putting those questions to Mr. Swamy, for the reasons set out above.

The examination will not unduly delay the commencement of the trial of the action, entail unreasonable expense for other parties, or result in unfairness to Mr. Swamy

- [29] Mr. Swamy is ready and willing to be examined. No trial date has been set so an examination of Mr. Swamy will not unduly delay the trial of this action. In my view, given the defendant's position that Mr. Swamy's evidence does not go to a material issue, I find that an examination of Mr. Swamy by the plaintiff will assist in moving the case forward expeditiously, as well as avoid what appears will be another inevitable refusals motion.
- [30] Lastly, on this portion of the test, there no evidence that this examination will involve unreasonable expense.

Conclusion

- [31] I am satisfied that the plaintiff has met his onus on this motion. Looking then to Rule 1.04, I find that exercising my discretion to permit this examination on the facts of this case will assist in achieving the just, most expeditious and least expensive determination of the proceeding on its merits.

Costs

- [32] Costs of the examination are to follow rules 31.10(3) and (4). I make no order deviating from those subsections.
- [33] The parties agreed that the unsuccessful party would pay the successful party \$20,000 as costs of the motion. While I may have come to a different conclusion, the parties came to this consensually and did not file costs outlines in any event that would have supported my reaching a different number. Accordingly, the defendant shall pay the plaintiff the all-inclusive sum of \$20,000 within 30 days of the date of this decision.

Associate Justice Jolley

Date: 10 April 2026