

IN THE MATTER OF AN INTEREST ARBITRATION

Between

OVERWAITEA FOOD GROUP
A DIVISION OF GREAT PACIFIC INDUSTRIES INC.

(the "Employer")

-and-

UNITED FOOD AND COMMERCIAL WORKERS UNION
LOCAL 1518

(the "Union")

(Accommodation Protocol Agreement)

ARBITRATOR: John B. Hall

APPEARANCES: Michael H. Korbin, for the Employer
Shona A. Moore, Q.C., for the Union

DATES OF JOINT SESSIONS: June 30 and July 12-14, 2005

PLACE OF JOINT SESSIONS Vancouver, British Columbia

DATE OF AWARD: September 30, 2005

INTERIM AWARD

I. INTRODUCTION

The Employer and the Union agreed in their most recent Collective Agreement to a new Letter of Understanding headed "Permanent Accommodation Protocol". The stated objective was to develop "a signed-off protocol agreement" for permanent accommodations.

The Letter of Understanding contemplated a two-step process: first, the parties would meet with a mediator, and use legal counsel to assist them; and second, if no agreement was reached in mediation, the outstanding issues would be referred to arbitration for a final and binding resolution.

The Letter of Understanding identified three outstanding issues described as "sufficient medical, temporary bumping and when does an employee go to a lower rate of pay". However, either party could refer "other items" for resolution under the process.

I was named as the mediator under the Letter of Understanding. When the first phase of the process did not produce a signed-off protocol agreement, the parties agreed I should arbitrate the outstanding issues. They disagreed, however, over the nature of my jurisdiction. That question was addressed on a preliminary basis and, in an award dated May 4, 2005 (the "Preliminary Award), I held the Letter of Understanding provided for binding interest arbitration. This award follows from the second phase of the process.

II. THE ARBITRATION PROCESS

I will not describe the broader background to the Letter of Understanding as it can be found in the Preliminary Award. After the award, the parties understood I would meet

separately with each side to clarify the outstanding issues; I also met with counsel to discuss appropriate procedures for both further mediation and the interest arbitration.

Very little progress was made at the June 30 mediation session. Much of the discussion revolved around the Employer's insistence that a document known as "the Guidelines" form part of the Protocol Agreement. It quickly became apparent that the parties hold divergent views over the history and status of the Guidelines. Later discussion revealed similar differences over the status of what I will describe as "prior agreements". One of the prior agreements is Letter of Understanding No. 19 which, among other subjects, addresses "permanent accommodations".

I wrote to counsel after the mediation session to set out various procedural directions for the July 12-14 interest arbitration. Consistent with those directions, counsel exchanged proposed alternative language for provisions of a draft Protocol Agreement which remained in dispute. Each party had an opportunity on the first day of the arbitration to explain their position and respond to the other side's proposals. The next day was devoted to separate and joint discussions over the draft Protocol Agreement. Some terms were resolved by agreement; in other areas, where the differences were minor (if not merely semantical) I made final rulings. I also directed that two issues would not be argued on the last scheduled day of arbitration: the status of prior agreements, including the Guidelines; and the status of the Protocol Agreement in relation to the Collective Agreement and prior agreements. The parties acknowledged the first issue required an evidentiary hearing and would take more time than had been scheduled. As the two issues are related, they were deferred to a later date for resolution.

The third day of the arbitration was devoted to legal argument. Counsel submitted multiple briefs of authorities to support their respective proposals for terms of the Protocol Agreement. The most contentious questions concern language related to the provision and use of "medical information". Another difficult area is the Union's proposal for the reassignment of employees in order to arrange temporary

accommodations. These and other differences reflect significant points of principle on both sides.

I have read all of the authorities submitted by counsel, and wish to acknowledge their thoughtful presentations. The result of my deliberations is the attached Protocol Agreement, while the balance of this award explains how the outstanding terms were resolved.

III. TERMS OF PROTOCOL AGREEMENT

The headings below correspond with those found in the attached Protocol Agreement. There is no reference to provisions which were not in dispute or were resolved by the end of the arbitration. The Protocol Agreement should be read together with this award.

PART A - GOVERNING PRINCIPLES

(i) General

All of the provisions under this heading were resolved by the end of the arbitration. However, I have since noticed that for consistency the word "disabled" should be deleted from Section I.2.

(ii) Permanent Accommodation Committee

The Union seeks to include language in Section II.3(d) describing what additional medical information may be obtained by the Committee. As the nature of additional medical information requested by the Committee will be informed by provisions of Section III that deal specifically with the same subject, the language need not be included here.

The parties disagree over whether there should be a clause in this Section about the Committee's role in "ensuring the parties' accommodation practices remain consistent with the law". I have not included such a provision. Neither side takes exception to Section V.2 which addresses the same topic, and there is no need for duplication.

The Union seeks to include wording in Section II.5 recognizing the Committee's "exclusive" authority over accommodation matters. The Employer maintains it can act unilaterally where for example, the Committee fails to agree. While I have not included the Union's proposal, the Employer would be acting inconsistently with the Protocol Agreement if it by-passed the Committee or otherwise acted unilaterally on matters covered by the Protocol Agreement. The answer to the Employer's concerns over delay and other issues lies -- as the Employer itself argues elsewhere -- in the expedited dispute resolution provisions.

At the same time, and for purposes of clarification, nothing in the Protocol Agreement affects the Employer's ability to decide whether it will continue to employ someone (e.g. if an employee refused an accommodation arranged by the Committee). Any resulting difference on that front would be subject to the usual grievance and arbitration provisions of the Collective Agreement, although the Union and the employee would be entitled to appropriate advance notice of the Employer's intended action: *Re Canadian Pacific Railway Co. and Brotherhood of Maintenance Employees* (2003), 74 C.L.A.S. 74 (M. G. Picher). See also *Highland Valley Copper* cited below.

(iii) Obtaining and Reviewing Medical Information

The parties directed most of their legal arguments to this contentious subject. Among other things, the Union submits confidential medical information "should be directed to those facts relevant to determining an employee's medical condition, capabilities and limitations". The Employer argues for more comprehensive disclosure, and says the information should include "an employee's medical condition (i.e.

diagnosis), physical capabilities and limitations, prognosis and treatment plan". Both parties submitted extensive case authorities to support their respective positions. The Employer relies additionally on prior agreements although, as already indicated, the latter question is not being addressed at this stage of the arbitration.

I do not intend to discuss all of the authorities in detail. Instead, I will highlight the applicable principles and elaborate where directly relevant to this award.

There is no dispute about the underlying principles. The employer-employee relationship does not give an employer a discretionary right to compel employees to compromise their right of privacy through the disclosure of personal medical information. An employer can only intrude on their privacy if it has a legitimate business purpose. In other words, a balance must be struck between an employer's need for information and an employee's interest in privacy: *Victoria Times-Colonist -and- Victoria Newspaper Guild, Local 223* (February 12, 1986), unreported (Hope), cited at p. 359 of *Re St. James-Assiniboia School Division No. 2 and St. James-Assiniboia Teachers' Association No. 2* (2004), 131 L.A.C. (4th) 313 (Peltz).

It is apparent from the authorities that the outcome of this balancing (i.e. the extent to which employees will be required to divulge personal medical information) depends largely on the context. At the far end of the spectrum -- that is, where one finds the greatest degree of intrusion -- are cases where the disclosure has been necessary to ensure a fair hearing at arbitration. See, for instance, *Re Canada Post Corporation and Canadian Union of Postal Workers* (1998), 69 L.A.C. (4th) 393 (K.M. Burkett), where the arbitrator directed the grievor to be examined by a psychiatrist selected by the employer. But even in those circumstances, there must be a balancing of interests and an "independent medical examination" may not be necessary to satisfy the fair hearing requirement: *Re Pope and Talbot Ltd. and I.W.A. Canada, Local 1-423* (1996), 57 L.A.C. (4th) 63 (Taylor); and *Overwaitea Food Group -and- United Food and Commercial Workers Union, Local 1518*, [2003] B.C.C.A.A.A. No. 311 (Burke).

The authorities also establish that the extent to which employees may be compelled to provide medical information will depend on whether the subject is addressed in the collective agreement. That is often the case where employees are asked to provide information to support a claim for sick leave or sick pay. As stated in *Victoria Times-Colonist, supra*, the employer's inquiry must be "in accordance with the provisions of the agreement" (p. 20). My review of the authorities also suggests that the sick leave or sick pay cases are at the lower end of the spectrum in terms of the extent to which employers will be allowed to intrude upon an employee's privacy rights -- at least at the point of an initial claim for benefits: see *Overwaitea Food Group, a Division of Great Pacific Industries -and- United Food and Commercial Workers' Union, Local 1518*, [1997] B.C.C.A.A. No. 323 (Bruce).

For the reasons just given, many of the awards which initially support the Union's position must be distinguished. For example, in *Customerworks Inc. -and- Office and Professional Employees' Union, Local 378*, [2003] B.C.C.A.A. No. 128 (Greatbatch), the employer declined to pay the grievor sick leave because the benefits administrator determined "there was no objective information in the file supporting disability" (para. 40). The arbitrator held, however, there was no requirement in the collective agreement that an employee submit objective medical evidence to qualify for benefits (paras. 59 and 88). On the facts, the arbitrator found there was "overwhelming medical evidence" (para. 84) to prove the grievor's condition, limitation and disability, and ruled she was entitled to sick leave benefits.

Another case cited by the Union is *Re Salvation Army Grace Hospital and United Nurses of Alberta, Local 47* (1995), 47 L.A.C. (4th) 114 (Tettensor). The hospital required certain nurses to provide certificates from their physicians disclosing, among other things, the nature of their illness, the type of treatment recommended, and the prognosis for improved attendance. The union objected to the requested information because the employer would, in most cases, obtain a specific diagnosis and other details which were confidential. The arbitration board found the case involved "the legitimate but competing interests of the employees' rights to privacy as against the employer's

right to information in cases involving excessive absenteeism” (p. 120). It cited with approval the statement in *Victoria Times-Colonist, supra*, that there can be no objection to “routine information as to the nature of the illness or disability, the prognosis, if any, and the expected date of return of the employee”. The arbitration board acknowledged the union’s argument that the hospital did not need to know “a detailed diagnosis”, but found this was not sought by the certificate of illness. However, the board believed an amendment might clarify the request, and suggested “Nature of Illness” could be followed by “(Not Detailed Diagnosis)” (p. 122). Thus, the award does not establish the Union’s position here that the Employer is not entitled to some form of diagnosis. Rather, the award appears to preclude “a *detailed* diagnosis”.

The arbitration board in *Salvation Army Grace Hospital* went on to hold “the type of treatment” -- provided it was not a detailed description -- might assist the employer in understanding the seriousness of the problem and the likelihood of full recovery; further, the request for a prognosis was reasonable as it was qualified by a reference to improved attendance. In summary, the arbitration board concluded the certificate was a reasonable balancing of interests, recognizing the employee would have a chance to review the certificate before it was provided to the employer.

The *St. James-Assiniboia* award mentioned earlier also concerned an employer request for medical information in the context of sick leave. The Union submits it supports a distinction in the authorities between disclosing the “nature of an illness or injury” and a “diagnosis”. A series of questions were put to the arbitration board, including whether the employer was entitled to receive medical information about an employee’s “diagnosis, treatment plan and prognosis” (pp. 317 and 358 *et seq*). The board found the medical certificate in question really sought a general statement as to the nature of the illness and should not be taken as requiring the physician to provide a specific diagnosis (p. 359). However, aside from being a sick leave case, the Union’s reliance on *St. James-Assiniboia* is weakened by the admission of the teachers’ association that the employer would be entitled to a diagnosis where it was required to deal properly with fitness for return to work (p. 358). Further, the association did not

dispute the employer's entitlement to a prognosis for the purpose of assessing an employee's return to work potential and timing.

Another authority cited by the Union is *Desormeaux v. Ottawa-Carleton Regional Transit Commission*, [2003] C.H.R.D. No. 1 (MacTavish), where an employee who suffered from migraine headaches had been terminated for excessive absenteeism. The employer argued there could be no finding the employee suffered from a disability (i.e. migraines) in the absence of a diagnosis by a neurologist. The tribunal rejected this argument, and held the diagnosis and treatment of migraine headaches was within the expertise of a reasonably competent family practitioner, and that such a diagnosis had been provided by Ms. Desormeaux's doctor (para. 67). The Union relies on the tribunal's alternate finding to support its position that there need not be a diagnosis to establish a disability requiring accommodation:

Further, even if I were to accept counsel's submission in this regard [that a diagnosis by a neurologist is necessary], I would still find that Ms. Desormeaux's headaches constitute a 'disability' within the meaning of the Canadian Human Rights Act. It is undisputed that Ms. Desormeaux has suffered from chronic, debilitating headaches for many years. Whether these headaches are properly classified as migraines, or some other type of headache, is immaterial. Ms. Desormeaux's description of the symptoms, and the effect that these symptoms, as well as the necessary medication, have on her ability to function has not been challenged. It is clear that she has long suffered from a chronic headache condition that periodically causes her to become significantly incapacitated, and interferes with her ability to do her job. This, in my view, constitutes a 'disability' within the meaning of the legislation. (para. 68)

The problem with the Union's reliance on *Desormeaux* is that the tribunal's decision was overturned on appeal: *Desormeaux v. Ottawa-Carleton Regional Transit Commission*, [2004] F.C.J. No. 2172 (Fed. Ct.). The court expressed its conclusion in these terms:

In the case of Ms. Desormeaux, I conclude that the Tribunal's finding that she suffered from a disability was unreasonable based upon

the evidence. Dr. Meehan was qualified as an expert in family medicine, not as a neurologist. Accordingly, I find that the Tribunal's reliance on her evidence was in error to the extent that her evidence exceeded the legitimate purpose for which her expert testimony was receivable: see *R. v. Reid* (2003), 65 O.R. (3d) 723 at 736. I conclude that there is no *prima facie* case for the employer to answer as I am not satisfied that there is properly admissible evidence to support a finding of disability. The application for judicial review will be allowed in respect to Ms. Desormeaux. (para. 101)

I disagree with the Union's suggestion that the result on appeal does not undermine the reasoning in paragraph 68 of the tribunal's decision. The appeal would not have succeeded had that reasoning been accepted; i.e. that there was no need for a diagnosis by a neurologist. Instead, the court held properly admissible evidence was needed to support a finding of disability; in the circumstances, this necessarily implies the need for a diagnosis from someone qualified as an expert to give that opinion.

I will return to the human rights context in a moment. Before doing so, I briefly note the Employer's reliance on a passage from Brown & Beatty, *Canadian Labour Arbitration* (2nd Edition), quoted in *Highland Valley Copper and United Steelworkers of America, Local 7619*, [1996] B.C.C.A.A. No. 37 (Chertkow). Like *Desormeaux*, this award resulted from a termination for excessive absenteeism. The arbitrator cited paragraph 8:3342 of Brown & Beatty for his view that there is "little doubt that an employer has the right to demand appropriate medical information from an employee as to his fitness to return to work which includes a definitive diagnosis and a firm prognosis for recovery" (para. 116 of *Highland Valley Copper*). I have been cautious in my deliberations about accepting "older" authorities in this area given developments in the duty to accommodate and increased emphasis on privacy interests during the intervening years. Nonetheless, paragraph 7:6142 in the current edition of Brown & Beatty states it is proper for an employer to demand additional medical information when an employee returns to work and presents a standard medical form without any "diagnosis of the grievor's illness, prognosis for recovery or details as to the nature of treatment provided".