

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

BETWEEN:

UNIVERSITY OF BRITISH COLUMBIA

(the "Employer")

AND:

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 116

(the "Union")

(Attendance Management Committee and Six-Point Letter Grievances)

ARBITRATOR:

Christopher Sullivan

COUNSEL:

Michael Korbin and
Judith Macfarlane for
the Employer

David Tarasoff for
the Union

DATES & PLACE OF HEARING:

April 8, 9, 10 & 11 and
May 27, 28 & 29 & June 30, 2008
Vancouver, BC

PUBLISHED:

October 24, 2008

The parties agree I have jurisdiction to hear and determine the matters in dispute. The case involves two policy grievances filed by the Union regarding the Attendance Management Policy (AMP) and the Attendance Review Committee (ARC). The Union seeks relief on behalf of employees affected by the grievances but the nature of the relief sought is not particular to the individual circumstances of those employees.

The first grievance filed by the Union is dated February 1, 2005 and it alleges the Employer violated Articles 17.07 and 17.04 of the Collective Agreement, "and any other relevant Article, Act or Code". The Union framed this objection as a policy grievance although it referred to a specific employee who was required to provide medical information outside the Attendance Review Committee process. The grievance was referred to at these proceedings as the six-point letter grievance in recognition of the number of matters raised in the Employer's letter requiring medical information. The Union essentially alleges the Employer violated the Collective Agreement in sending the letters outside of the agreed upon Attendance Review Committee process provided for in Article 17.07.

The Union filed its second policy grievance on June 12, 2006, alleging that the Employer violated Articles 2.01 and 17 of the Collective Agreement, "and any other relevant Article, Act or Code", by virtue of its introduction of the Attendance Management Policy in its Land and Building Services (LBS) Department. Amongst other matters the Union alleges this policy is being improperly and inconsistently applied in the workplace.

At the outset of the proceedings the Employer made a preliminary objection to the effect the Union's grievances are inarbitrable on the basis of there being a previous settlement, delay, waiver and abuse of process. The Employer also initially took the position the Union was estopped from pursuing its grievances but this claim was ultimately withdrawn. I reserved judgment on these matters and will address them later in this Award.

RELEVANT COLLECTIVE AGREEMENT PROVISIONS

During the course of these proceedings the parties referred to the following Collective Agreement provisions:

ARTICLE 2 MANAGEMENT RIGHTS

2.01 Management Rights

The management and the direction of the working force is vested in the University, except as in this Agreement is otherwise specified.

ARTICLE 6 GRIEVANCE PROCEDURE

6.03 Policy Grievances

Where a dispute involving a question of general application or interpretation occurs or where a group of employees or the Union or the University has a grievance, Steps 1, 2 and 3 of this Article may be bypassed. The intent of the foregoing Article is that it will apply only to General Policy disputes.

ARTICLE 17 SICK LEAVE

17.01 Sick Leave Defined

Sick leave means the period of time an employee is absent from work with full pay by virtue of being sick, disabled or quarantined, or because of an accident for which compensation is not payable under the Workers' Compensation Act. Employees, who exhaust their sick leave credits due to lengthy illness, etc., shall be allowed an automatic leave of absence without pay for two (2) months. A review of the case shall be made at the end of the two (2) month period.

17.02 Annual Sick Leave

One and one-quarter (1-1/4) day's sick leave at full pay for each month of accumulated service up to a maximum of one hundred and fifty-two (152) days will be allowed....

17.04 Employee's Report of Illness

Where an employee is absent through illness or injury, he/she must report by phone or otherwise to his/her immediate supervisor

In case of absences exceeding six (6) days, report by phone or otherwise must be made to the employee's supervisor each week whenever possible. On return after absence, an "Employee's Report of Illness" must be presented on a standard form provided.

A certificate of fitness issued by a licensed medical practitioner may be requested from an employee returning to work following prolonged illness or injury....

17.07 Attendance Review Committee

A joint Union/Management Attendance Review Committee consisting of one (1) Union Executive, one (1) Senior Department representative, and one (1) representative from Human Resources will be established. The mandate of this committee shall include but not be restricted to reviewing and making recommendations to the University regarding cases covered under Article 17.01 above where employees have exhausted their paid sick leave credits and the automatic two (2) month extension of sick leave without pay, disability cases rejected for Workers Compensation or Long Term Disability Insurance, and cases involving excessive absenteeism and/or medical appointments.

As part of the review process the committee shall be empowered to require an employee to provide medical certificates to substantiate periods of absenteeism, to confirm degree of physical limitations due to injury, to ascertain the prognosis regarding the employee's anticipated date of return to work and his/her ability to carry out his/her full range of duties on a regular and consistent basis, and the like. The employee shall have the choice of obtaining such certificates from either his/her own doctor or from the University's physician. Where the committee deems it appropriate, however, it shall be entitled to obtain a second medical opinion from a physician of its choice.

See: Letter of Understanding re: Attendance Review Committee

The Letter of Understanding that Article 17.07 refers to is LOU #8, which provides as follows:

**Re: Attendance Review Committee
(Article 17.07)**

It is understood and agreed that the Committee constituted under Article 17.07 shall function on the basis of consensus. However, if consensus cannot be achieved in a given instance, the University may exercise its rights as if Article 17.07 did not exist.

SUMMARY OF RELEVANT EVIDENCE

While a considerable amount of evidence was provided during the course of the hearing, much of it is not controversial. The Attendance Management Policy in LBS was implemented by the Employer to address concerns raised by the University Board of Governors regarding both the frequency of time loss accidents as well as sick time usage. LBS contains the largest group of CUPE members at the University with 696 employees. The great majority of these employees work in Plant Operations. The second largest component of these employees is in Utilities, which has twenty CUPE members.

In a letter dated March 28, 2002 Director of Human Resources and Administration, Deborah Austin, advised Local Union President, Paul Cooke, that the Employer, in concert with "UBC HR, Land and Building Services", had created the Attendance Management Policy, as well as an Absence Notification Policy, which were designed to support direction from the Board of Governors. Mr. Cooke was provided with a copy of the two policies for review and comment and his prompt feedback was requested.

On April 17, 2002 Ms. Austin sent a further letter to Mr. Cooke enclosing the LBS Attendance Management Policy, which had been revised to include the Attendance Review Committee pursuant to Article 17.07. By letter dated June 12, 2002 Colleen Garbe, at that time the Union's General Vice President, wrote to the Employer alleging it violated the Collective Agreement by questioning two employees regarding their

attendance under the new policy. It was alleged this action violated the procedure set out under Article 17.07 regarding the Attendance Review Committee.

After the Union filed its grievance, Mr. Cooke met with Dan Leslie, Associate Director Building Operations and Kyle Cormier, then HR Employee Relations Manager (now Director of Human Resources and Administration in LBS). Subsequently, changes were made to the LBS Attendance Management Policy. As set out in a letter from Ms. Austin to Mr. Cooke dated September 26, 2002 changes were made with respect to the Attendance Review Committee meetings and the issues to be discussed with employees.

In a letter from Mr. Leslie to Ms. Garbe, dated January 28, 2003 the Employer suggested a further change to the process, the result of which was that certain letters previously provided to affected employees were rescinded by the Employer. On January 29, 2003 the Union replied:

Grievance Number 2002-092
CUPE 116 – Land & Building Services – Attendance Review Committee

The Union is writing in respect to the above noted grievance, there is an agreement in principal regarding “Attendance Management Policy” that appears to be working relatively smoothly.

The Union is of the opinion that a Policy grievance on the matter is not required at this time.

The Union is withdrawing this grievance on a without prejudice or precedent basis to any future similar/identical issues that may arise.

The Attendance Management Policy is based on the premise that regular attendance at work is vital and the objective of attendance management is to promote regular attendance at work. The policy itself explains that non-culpable absences are not in themselves disciplinary and, for this reason, it is necessary to review attendance records, discuss attendance issues with employees and set attendance objectives.

In terms of the procedures for managing non-culpable absenteeism, the policy indicates that an interview is to be held with employees whose sick time is excessive or follows established patterns or for other reasons. A follow up letter is to be sent to the employee after the interview. Should attendance not improve, the policy provides that further interviews will occur, with progressively more pointed letters being sent to the employee, warning of consequences to their continued employment, including termination. The policy indicates that copies of the letters sent to the employee will be provided to the Union and that an employee has opportunity to file a grievance at any stage of the process.

The policy also makes reference to the Attendance Review Committee. Initially, the Attendance Management Policy provided that an employee would be sent to the Committee at the second step in the policy. In a letter dated April 19, 2004 to Mr. Cooke, Mr. Cormier confirmed that the parties had reached an “agreement to incorporate ...(certain) changes to the attendance management policy.” Specifically, the Attendance Review Committee would now become involved after the third absenteeism letter, unless there were unusual circumstances.

Mr. Cormier’s April 19, 2004 letter confirmed that the letters sent to employees under the Attendance Management Policy were written in form style although they could be expanded upon. The letter also indicated that employees would not be required to attend the Attendance Review Committee if no medical reason is provided for their absenteeism. Mr. Cormier’s letter added:

To date, it is acknowledged that the program has worked well and there has not been a grievance filed by either side. It is believed that the above change to the program will reduce the need to send employees to their doctor for medical exams and make the program more effective.

It is understood that Union is free to grieve the issuing of any letter that they feel was issued without just cause.

Please inform your stewards about the attached changes.

I trust you will find all the changes to your satisfaction.

The policy was applied thereafter in the Land and Building Services Department without any further negotiated alterations.

Evidence led in these proceedings addressed the Employer's use of the Attendance Management Policy and the thresholds/triggers/standards that were set for the purposes of determining when to interview an employee regarding their attendance record. The policy itself contains no specific threshold but makes reference to "an individual employee whose sick time is excessive", and "individual employees who are maintaining unacceptable sick time."

Prior to 2006 no specific threshold had been developed for the LBS Attendance Management Policy. Up until that time at least sixty letters had been sent to employees pursuant to the policy and none were grieved.

In 2006, after Mr. Cormier moved to his position in LBS, the Employer established a threshold of absenteeism of more than 100 days over the five-year period between 2000 and 2005. A second phase was introduced in 2007 which involved an annual review to determine whether employees were above a threshold of 36 days over a three year period. The evidence indicates the Employer has used the thresholds as a basis upon which to determine whether to interview an employee about his or her attendance.

The evidence also indicates the Employer includes in its calculation of absenteeism: sick leave, WCB absences, vacation in lieu of sick, and banked time in lieu of sick. The LBS policy is silent on this topic.

In LBS the Employer has conducted somewhat regular reviews to determine whether an employee is to be placed in Step 1 of the policy, or moved to the second, third or fourth steps. Between Steps 3 and 4 an employee may be referred to the Attendance Review Committee. Currently there are about 140 employees at some stage of the policy. Ninety are at Step 1; thirty at Step 2; fifteen at Step 3 and five at Step 4.

Evidence was led that despite the threshold established for review, discretion was exercised in the case of individual employees such that all employees who met the standard were not necessarily interviewed because of factors particular to their case.

Evidence was also led regarding the specifics of the six-point letter, which is addressed to the employee's physician, and asks the following questions regarding the employee's circumstances:

1. What is the nature of the illness or injury, either evident, latent, or otherwise, that caused [the employee's] most recent absence from work and how does it affect and/or limit [his/her] ability both to attend work on a regular and consistent basis and to properly perform job duties safely and effectively...
2. What is [the employee's] prognosis for recovery with a view to being medically fit to perform all of the responsibilities of [the] job, and what limitations, if any, are to be placed on the type or duration of activities that [the employee] is to undertake, and for how long?
3. When do you expect that [the employee] will be physically and mentally able to safely and effectively perform the tasks of [his/her] regular job, in either a standard or modified capacity? (Please try to be as precise as possible and indicate whether you are referring to either a standard or modified capacity and to what degree).
4. What is the nature of the treatment plan that has, is, or will be prescribed, and has [the employee] been following this plan?
5. In your opinion, after [his/her] current medical problems are resolved, is [the employee] at risk of re-injury if [he/she] performs

the tasks of [his/her] regular job? If so, how would you rate the magnitude of that risk?

6. Where possible, the department is supportive of returning injured or ill employees back into the workplace on modified duties. These modified duties can be as easy as just dust mopping or wiping furniture. What workplace modification will be required to facilitate [the employee's] return to work in at least a modified capacity, and how many hours per day can the employee work in a modified capacity?

At these proceedings the Union called the following bargaining unit members who testified about their personal circumstances and experience with the Employer's Attendance Management Policy, including the receipt of six-point letters: Bookstore Cashier Julie Frkovich, Carpenter Gord Dobie, Steamfitter Bruce Villman, Cook/Baker Peter Cunningham, Commissary Chef Gord Stewart, Steamfitter/Pipefitter Wane McCoy, Custodian Gulnaz Hussain, Communications Officer Sue Black, and Electrician Brian Templeton.

SUMMARY OF THE PARTIES' POSITIONS

On behalf of the Union Mr. Tarasoff argues the Employer has applied the Attendance Management Policy in a manner that is unreasonable and or inconsistently applied and or otherwise contrary to the Collective Agreement. Counsel alleges the Employer has not consistently applied the Attendance Management Policy, either within LBS or within other departments across the University and that consistent application of this policy is fundamental and essential in order for the policy to be upheld. He points to the use of different "triggers" within various departments as an example of the inconsistent application of the policy.

Mr. Tarasoff states the policy in question must also be brought to the attention of the affected employees before the Employer attempts to act upon it and that the policy was not sufficiently communicated to either the employees or the Union. Counsel states that failing to communicate the standard of attendance required of employees is sufficient