

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

**Board of Governors  
of Laurentian University**

**-and-**

**Laurentian University Faculty Association**

**Policy Grievance re: Sick Leave**

**Lorne Slotnick, Arbitrator**

**Representing the Employer – Jack Braithwaite**

**Representing the Union – David Wright**

**Hearing – Sudbury, Ont., October 12, 2010**

## **A W A R D**

This decision deals with a policy grievance filed by the Laurentian University Faculty Association after the university began sending letters to employees on sick leave requesting more medical and return-to-work information than the employees had provided.

The union represents faculty at Laurentian University of Sudbury. As part of the collective agreement, the employer provides salary continuance for up to six months for members of the bargaining unit who are disabled by illness or accident.

The grievance is dated April 26, 2010, after the university began to send letters to employees who had been off, or were expected to be off, for several weeks or more.

While the only grievance before me is a policy grievance, there are also numerous individual grievances challenging the letters. Several of the letters were put in evidence at the hearing, and will be outlined below; however, it is not necessary in this decision to identify any of the individual employees concerned nor to provide any details of their individual situations. Neither party called any witnesses at the hearing.

The letters sent to employees are essentially identical. In each case, the letter acknowledges receipt of a doctor's note advising that the employee is off work for medical reasons, and confirming the sick leave. The letter then goes on:

Regarding your present sick leave, the University must request further and better medical information in order to properly understand your situation and assess the feasibility of an accommodation plan, pursuant to our duty to accommodate employees, and your duty to co-operate, under the Human Rights Code.

The letter attaches what it calls a faculty job description (which consists of clauses from the collective agreement outlining the employees' responsibilities and duties – teaching, scholarly activity, university governance, etc. – and workload provisions) and asks that the employee's doctor review it with a view to whether "there is a possibility of an accommodation plan involving an earlier return to work." The letter continues:

In light of the above, we ask that you kindly forward this correspondence to Dr. [name of doctor who signed medical note], along with your enclosed job description so that [s]he may provide us with a written follow up report and clarification regarding your ability to return to work in consideration of your regular job duties and responsibilities:

1. Please provide a detailed qualified opinion regarding the status of your present condition, without providing information regarding your specific diagnosis.
2. In addition to the information already provided, provide direction as to what Laurentian University can do to accommodate your return to work.
3. With respect to the specific duties that you cannot perform, we ask that Dr. [name] kindly advise when, if ever, you would likely be able to perform such duties.
4. Specifically, please advise whether, in reducing your teaching load by one course, you would be able to assume increased duties and, if so, to what degree, in alternative functions such as scholarly activity or university governance.
5. In the event that you are able to assume some specific duties, please advise when, if ever, you would be able to assume an increase in performing such specific duties and to what degree. In some cases, a graduated return to work plan is possible, and we request that the physician detail these for us.

6. Please advise whether there are any other alternatives to assist the University in facilitating your return to a full teaching workload and/or, in the interim, a full workload equivalent.

The seven letters put into evidence at the hearing each contained the above six requests, with the exception that two of the letters did not contain paragraph #4 above. The letters request the physician's follow-up report within either 15 or 20 working days.

The union objects to these letters, saying they go far beyond what the collective agreement specifically says about information that must be provided by employees, and about the employer's recourse if it wants more information. The union relies on case law establishing that there is no right for an employer to obtain medical information except as provided by statute or contract. The university argues that its request in no way invades employee privacy, and is designed to further its obligations to accommodate disabled employees, to return employees to work in a safe way, and to manage the workplace in a way that is efficient and cost-effective.

The collective agreement contains the following relevant provisions directly addressing sick leave:

#### **ARTICLE 7.55 – PHYSICAL AND MENTAL ILLNESS**

**7.55.1** The Members of the Bargaining Unit are eligible for sick leave up to a maximum of six (6) months at salary otherwise receivable from the date of disability due to accident or illness, for each separate disability cause, excluding pregnancy ... As soon as practicable after the start of each disability period, the Dean/University Librarian must be informed by or on behalf of the disabled about the absence and about its expected duration. ...

**7.55.2 (a)** A Member shall, when requested by the Dean/University Librarian, submit the certificate of a legally qualified medical practitioner certifying that the Member is unable to attend to the duties of her/his position;

- (i) For any sick leave in excess of five (5) consecutive working days.
- (ii) In the event a Member's sick leave pattern raises substantial doubt of the claim, even if the individual's sick leave periods are short enough not to require medical certificates otherwise.

...

(c) The Member shall only be required to submit one medical certificate of disability or illness per absence, unless the expected duration of the absence is extended beyond the prognosis provided in the original certificate. In such circumstances the Member shall submit additional certificates of disability or illness for each extension.

(d) Any certificate of disability or illness submitted, in addition to certifying that the Member is unable to attend to the duties of her/his position, shall indicate the probable duration of the Member's absence but the legally qualified medical practitioner shall not disclose any information respecting the diagnosis of the condition giving rise to the Member's absence, without the Member's written and informed consent.

(e) Where the certificate is requested under subparagraph 7.55.2 (a) (ii) above, a copy of the request for the certificate and a copy of the certificate of disability produced shall be provided to the Union by the Dean/University Librarian.

(f) Upon receipt of any certificate of disability, the Dean/University Librarian shall advise the Member of the Member's right to accommodation if such accommodation will assist the Member to return to work to full or partial duties, or will assist the Member to return to work at an earlier date than would otherwise be the case.

(g) If the Member requires or wishes accommodation, the Member shall submit to the Dean/University Librarian the certificate of a legally qualified medical practitioner certifying the details of the accommodation that the Member requires and the expected duration of the accommodation.

(h) A copy of the certificate provided pursuant to paragraph 7.55.2 (g) above shall be provided to the Union by the Dean/University Librarian.

(i) The Employer, the Union and the Member will cooperate fully to achieve the accommodation required by the Member, and to ensure, where possible, that any changes to the Member's workplace required by the accommodation are in place for the Member's return.

(j) The reasonable costs of any certificates required under this Article shall be paid by the Member and reimbursed by the Employer to the Member.

...

**7.55.6** Sick leave benefits will be reduced by the amount of any Worker's Compensation benefits or similar disability income benefits which the Member of the Bargaining Unit is eligible to receive by reason of accident or sickness, from a government plan, except Unemployment Insurance.

(a) A Member may be required by the Vice-President, Academic to undergo a medical examination by a legally qualified medical practitioner appointed by the University in the following circumstances:

- (i) If the Member submits a request for accommodation pursuant to paragraph 7.55.2 (g) above;
- (ii) At the time the Member indicates her/his readiness to return to work, if the absence has been for a period of a month or more;
- (iii) At one other time during the sick leave; and

(b) The Employer shall pay all costs of the medical practitioner and shall pay all reasonable expenses incurred by the Member with respect to such medical examination.

(c) Where the Employer requires the Member to undergo a medical examination pursuant to paragraph 7.55.6 (a) above it shall notify the Member with a copy to the Union and it shall provide the Member with the names of three (3) duly qualified medical practitioners and the Member shall select one of those practitioners to conduct the examination.

(d) The medical practitioner who conducts the examination shall provide a report to the Member, which report shall certify whether or not the Member is medically able to perform the duties of her/his position, or whether the Member could perform such duties with accommodation; a prognosis for the Member's return to work; and, where applicable, whether or not accommodation requested by the Member is appropriate. The report shall not contain any diagnosis of the Member's condition, unless the Member, in consultation with the Union, requests that the diagnosis be included.

(e) Within five (5) working days of the receipt of the report, the Member shall provide the report to the Dean/University Librarian who shall in turn provide a copy to the Union within five (5) working days.

...

**7.55.8** When the Member's behaviour raises reasonable and substantial doubt as to the state of her/his physical or mental health, which affects in a material way the Member's ability to perform her/his duties, or which raises real concern for the safety of the Member or other members of the University community, the Vice-President, Academic may require the Member to undergo a medical examination in accordance with clause 7.55.6 above....

The union's key argument is that these provisions are very detailed and specific, setting out a complete procedure for dealing with sickness-related absences and with accommodation, so that the employer is simply not entitled to the additional information requested in the letters whenever and how often it desires. If the employer has doubts about the validity of the sick leave claim, or wants more information about whether the employee could return with an accommodation, it has the right to request an independent medical examination under Article 7.55.6 (a). Even then, however, the medical practitioner is not to provide the employer with a diagnosis, except with the patient's consent – protections which the union says are undermined in the letters.

The university replies that nothing in the letters contradicts anything in the collective agreement or in any statute. It says there are additional relevant provisions in the collective agreement, including the management rights clause, the no-discrimination clause, health and safety language, and the general provisions about absences, which are set out below:

#### **2.10.2 *Rights***

The Union recognises that the Employer has retained and shall possess and exercise all rights and functions, powers, privileges and authority that the Employer possessed under the *Act of Incorporation* prior to the signing of this Collective Agreement with the Union, excepting only those that are clearly and specifically relinquished or restricted in this Collective Agreement, or modified by statute. The Employer undertakes that all rights and functions, powers, privileges and authority shall be exercised in a manner consistent with the provisions of this Collective Agreement.

#### **ARTICLE 3.15 – NO DISCRIMINATION, HARASSMENT OR BULLYING**

**3.15.1** The Employer recognizes the need to provide an environment free from discrimination and harassment, including bullying. To that end, the Employer has established a Human Rights Office, headed by a Human Rights Advisor. The Union acknowledges the Employer's Policy on a Respectful Workplace and Learning

Environment. This policy will be used by the Employer in dealing with all incidents of alleged discrimination, harassment, or bullying at Laurentian University.

#### **ARTICLE 3.25 – HEALTH, SAFETY AND SECURITY**

3.25.1 The Employer recognises a responsibility to provide an environment intended to protect the health, safety and security of employees as they carry out their responsibilities. To that end, the Parties agree that they are bound by the *Occupational Health and Safety Act R.S.O 1990* as revised and in effect July 1, 2008. The Employer agrees to maintain a Joint Health and Safety Committee ...

#### **ARTICLE 7.20 – ABSENCE – GENERAL**

7.20.1 The University as a community of scholars requires the availability of its Members on a regular and on-going basis to ensure that the activities of the University scheduled and unscheduled can be carried out in an orderly manner.

7.20.2 Any absence shall not normally interfere with assigned and/or scheduled activities and the harmonious functioning of the Department/School.

Nothing in this collective agreement, the university says, fetters the employer's right to seek the information it is seeking in the letters. In fact, the employer argues, the information requested in the letters is necessary so the university can discharge its obligations under statutes such as the *Human Rights Code*, as well as its obligation to provide a safe and respectful workplace and its obligation to manage its workforce and deploy employees efficiently by knowing when employees are returning and what restrictions they may have. As well, the objective of controlling costs of an expensive sick leave provision is a legitimate goal, the university says.

The university argues that the letters are not threatening or punitive, nor are they an invasion of privacy, in that they explicitly tell employees that their diagnoses are not to be disclosed unless they so choose. The university is not attempting to force accommodation on an unwilling employee, but rather to prepare for an accommodation

issue if it arises. In any event, it says, accommodation is not solely employee-driven, but rather a collaborative process in which the employer has obligations regardless of whether the employee triggers them. When the university receives a medical note indicating an employee will be off work for a substantial period of time, it must start examining whether there are accommodation issues, hence the letter. The right of the employer under Article 7.55.6 to an independent medical examination is only a last resort, where the collaborative process collapses, the university says. The request for an independent medical examination may be preceded by a non-accusatory request for information such as these letters, it says.

It is relevant to provide some details regarding the medical notes that prompted the university to send the letters. One letter was sent after one month of absence to an employee whose medical note said she would be off for three months, and another was sent after about two weeks to an employee whose note indicated an absence of 2 ½ months. In one case, the employee was to be off work starting five days from the note's date, "time indefinite." Another note simply has the word "indefinite" filled in on a form with a space for the return to work date. Another says the patient "should stay off work until further notice." In another case, the letter from the university was sent after four medical notes spread over four months, each with a later expected date of return to work. In one case, the note simply says the employee is "unable to return at the moment." The university makes the point that the letters raise questions in the mind of the employer but provide no information or answers. As the party that is paying the sick benefit, the university has a vested interest in knowing more about what is going on, including when

the employee is likely to return and what accommodation might be feasible or necessary, the university argues. In fact, the university asserts that it would have been entitled to send more than one of these letters to an employee whose absence had been extended, but that the university chose to limit itself to one letter per employee.

The university also argues that Article 7.55.2 (d), which requires the medical certificate to state the employee is unable to attend work and the probable duration of absence, does not limit the information that can be requested to only those two items.

The university referred to the following cases, related to the duty under human rights laws to accommodate employees with disabilities: *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union* (known more commonly as *Meiorin*) [1999] 3 S.C.R. 3; *Central Okanagan School District No. 23 v. Renaud* [1992] 2 S.C.R. 970; *Scarlett v. Hamilton Health Sciences Corporation* 2010 HRTO 5 (CanLII); *Dunlop v. Alter Moneta* 2010 HRTO 651 (CanLII); *Chen v. Ingenierie Electro-Optique Exfo* 2009 HRTO 1641 (CanLII); and *Lane v. ADGA Group Consultants Inc.* 2007 HRTO 34 (CanLII); *ADGA Group Consultants Inc. v Lane* (2008) 91 O.R. (3d) 649 (Div. Ct.).

The union responds that there is nothing in any statute that gives an employer the right to any particular medical documentation, even where those statutes, such as the *Human Rights Code* and the *Workplace Safety and Insurance Act*, mandate a duty to accommodate. The union says the scheme in this collective agreement requires the

employer (in 7.55.2 (f)) to notify employees who are off sick that they have the right to be accommodated. The onus then shifts to the employee to make a request for accommodation, the union says. Where no request for accommodation has been made by the employee, the employer cannot claim it is seeking information pursuant to its duty to accommodate, nor would an employer be held liable for failure to accommodate when the employee has not requested it, the union says.

The union concedes that the one medical note saying the employee cannot return to work “at the moment” does not give the employer even the information specified in the collective agreement, but says the university’s remedy is to ask for the proper information as set out in 7.55.2 (d) or to ask for an independent medical examination pursuant to Article 7.55.6. Either way, however, the union says the information requested in these letters goes beyond what the employer is entitled to have. As for the medical notes that say the employee is off “indefinitely”, the union says these comply with the requirements in the collective agreement and that sometimes “indefinite” is the only answer that is applicable. Again, the employer has the option of requesting an independent medical examination or even stopping benefits if it has serious doubts about the claim, the union says.

The union referred me to the following cases: *Ontario Nurses’ Association v. St. Joseph’s Health Care* (2005) 76 O.R. (3d) 22 (Div. Ct.); *Re Federated Cooperatives Ltd. and General Teamsters, Local 987* (2010) 194 L.A.C. (4th) 326 (Ponak); *Re Hamilton Health Sciences and Ontario Nurses’ Association* (2007) 167 L.A.C. (4th) 122

(Surdykowski); *Re Brant Community Healthcare System v. Ontario Nurses' Association* [2008] O.L.A.A. No. 116 (Harris); *Re Hobart Brothers of Canada and Glass, Molders, Pottery, Plastics and Allied Workers International Union, Local 446* [2006] O.L.A.A. No. 149; and *Re City of Hamilton and Ontario Nurses' Association* (2009) 187 L.A.C. (4th) 96 (Bendel).

### **Decision**

This case raises the sometimes difficult issue of exactly how much information about an employee's medical status an employer can obtain when that employee is away from work on sick leave for a long period of time. Here, the employer, a university, provides a valuable benefit by continuing employees' full salary for up to six months while they are off sick. It is not surprising that the employer may feel it needs more information, given some of the very vague notes as set out above. Aside from having an interest in ensuring that the costs of the sick-pay benefit are not excessive, the university also has obligations to its other employees and its students to manage the workforce in a way that ensures courses are offered by instructors qualified to teach them and that the other work of the university is performed.

However, these interests of the university, while legitimate, do not in themselves authorize release of medical information that would otherwise remain confidential. The starting point is, and must be, that an employee's medical information is confidential except to the extent that its release is either compelled by legislation or contract, or is

given after a genuine and informed consent. As the court said in the *St. Joseph's Health Care Centre* case, cited above, "the doctor-patient relationship is among the most private in Canadian society." (at paragraph 18) The arbitrator in the *Hamilton Health Sciences* case, dealing with an issue of what information can be requested at the initial stage of a sick leave, expanded on this theme with the following comments (at paragraphs 21, 27, 34, 35):

There is nothing in the mere existence of an employment relationship that gives the employer any inherent right to compel its employees to compromise their legitimate right to keep personal medical information confidential. ...

The employer's desire for more information, or its genuine concern for an employee's well-being or desire to assist the employee, do not trump the employee's privacy rights. Nor do questions of expediency or efficiency. In the absence of a collective agreement provision or legislation that provides otherwise the employer is entitled to know only that the employee is unable to work because she is ill or injured, the expected return to work date, and what work the employee can or cannot do. A document in which a qualified medical doctor certifies that an employee is away from and unable to work for a specified period due to illness or injury is *prima facie* proof sufficient to justify the absence. ...

...An employer cannot require an employee to consent to a release of more confidential medical information than is permitted or required by statute or the collective agreement, and that is demonstrably necessary for the particular purpose.

Further, the intensely personal nature of confidential medical information, the individual, societal and institutional interests in preserving the confidentiality of such information, and the protections that have been legislated to protect its privacy and use, suggest a conservative approach. Accordingly, collective agreement provisions that speak to the information that an employee must provide to the employer in order to satisfy the employee's obligation to justify an absence or to obtain STD [short term disability] benefits in that respect should be strictly construed.

The general tone of these comments is echoed in the *Brant Community Healthcare, Federated Cooperatives* and *Hobart* cases, cited above.

Here, the collective agreement is in my view a specific and comprehensive attempt to balance the employees' interest in privacy of medical information with the employer's interest in managing its workforce and ensuring that sick pay claims are valid. The employer is entitled to request a certificate from a medical practitioner that the employee cannot attend work and the probable duration of the absence, but is entitled to only one such certificate, unless the expected date of return has been extended. The employer is not entitled to any information respecting the diagnosis. On receipt of the certificate, the employer must advise the employee of the right to accommodation, and the employee may then submit a medical certificate outlining the details of the proposed accommodation. These provisions, including the limit on the number of medical notes, protect the employee's interests. But the collective agreement goes on to provide protections for the employer, where it has doubts about the validity of the claim, or believes there is a chance the employee might be able to return earlier than forecast if accommodations are made – or when it simply wants more information. In particular, the employer can, pursuant to Article 7.55.6, require the employee to submit to an examination by a doctor chosen by the employer, a right that it does not have outside the collective agreement (see *Federated Cooperatives* and the cases cited in that decision). A report from this examination must be provided to the employer and is required to address whether the employee is able to work with or without accommodation.

In sending the letters at issue in this grievance, the employer is, in my view, acting beyond the limits that the parties have established in these detailed provisions of the collective agreement. While the letters are careful not to request a diagnosis, they do ask

for specific information that goes beyond what the university has bargained with the union in Article 7.55.2, which says the employer is entitled to know that the employee is unable to work and the probable duration of the absence. This is the only information that can be compelled under these provisions, unless the employee asks for accommodation or the employer invokes its right to require an independent medical examination. When the letter asks, for example, for direction on what the employer can do to accommodate the employee's return to work, it is asking for precisely the sort of information contemplated by the report of the independent medical examiner. Yet in the individual cases for which I was provided documentation, the employer has apparently chosen not to require the independent medical examination and instead request that same information through the letters at issue here. The request is outside the scheme set out in the collective agreement, which provides for only one medical certificate (unless the return date is extended) and limits on employer-initiated medical examinations.

In effect, the letters at issue here are asking for a further medical certificate, but one not authorized by the collective agreement. On the face of it, it is an effort to sidestep the clear limits in the collective agreement on the number of such certificates it can obtain.

The employer has referred me to some of the leading cases on accommodation, including *Meiorin* and *Central Okanagan School Board*. These cases set out the procedural element and collaborative nature of the accommodation process, but are of limited relevance here since in none of the individual cases where I have evidence has there been a request for accommodation, nor even, as was the case in the *ADGA Group* decision,

disclosure of a disability that might give rise to an accommodation requirement. Many of the other cases referred to by the employer, such as the Human Rights Tribunal decision in *Hamilton Health Sciences*, concern situations where the employee has requested accommodation but is not co-operating by providing information. Again, that is not the situation here.

Normally it will be the employee who initiates the request for accommodation. However, I see nothing inherently wrong with the employer initiating the process – and it seems more likely an employer will wish to do so when that employer is directly paying the full salary of the employee who is not working, as here. But this collective agreement is clear on the process that must be used if the employer wishes to initiate an exploration of accommodation options, and that is the independent medical examination. That same process is to be used when the employer is not satisfied with the information it has.

In summary, the collective agreement here contains a comprehensive process to deal with sick leave. This specific language cannot be sidestepped in the way the employer has attempted to do here. Nor is the employer assisted by the general provisions in other parts of the collective agreement, including the management rights clause, health and safety language, the non-discrimination clause or general provisions about absences, which cannot override the specific provisions related to sick leave.

I therefore declare that the employer has violated the collective agreement by requesting additional medical information from employees beyond what is specifically set out in the

collective agreement, and I order the practice to cease. The grievance requests an order that the university rescind these letters in individual cases and that any medical certificates obtained in violation of the collective agreement be removed from employees' files. Given that there are individual grievances that are not before me, and that I have not heard evidence on those individual cases, I decline to make this order. Similarly, I decline the request in the grievance to order the university to make whole any member who has suffered losses due to the violation of the collective agreement.

For the reasons above, the policy grievance is allowed.



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Lorne Slotnick, Arbitrator

October 28, 2010