IN THE MATTER OF AN ARBITRATION

BETWEEN:

ACCENTURE BUSINESS SERVICES FOR UTILITIES

("Employer")

AND:

CANADIAN OFFICE & PROFESSIONAL EMPLOYEES' UNION, LOCAL 378

("Union")

RE:

APPLICATION FOR INTERIM RELIEF

COUNSEL:

FOR THE UNION:	**Allan E. Black, Q.C. and Jessica L. Burke**
FOR THE EMPLOYER:	**Earl G. Phillips**
DATE OF HEARING:	**July 15, 2008 Vancouver, B.C.**

COLIN TAYLOR, Q.C.
Arbitrator

File: CT2910

I

[1] This is another in a growing line of cases dealing with the conflict between the legitimate business interests of the employer on the one hand and the protection of the employee's right to privacy and the protection of the confidentiality of personal and medical information on the other hand.

[2] In *Privacy and Medical Examinations in the Arbitral Context*, Continuing Legal Education Society of British Columbia, 2005, (Taylor), it states:

> ***Different eras see different legal interests rise to prominence. Currently, the interest experiencing the greatest increase in recognition is privacy. Unlike, for example, the rise of human rights law in recent decades, this is not due to changing societal attitudes or a greater recognition of the interest at stake. Rather, it is because societal changes have caused the interest in question to be threatened as never before. There are new means for invasion of privacy, and new justifications for it.*** **(p.2.1.1)**

[3] Arbitrators have long recognized the privacy interest, often in the context of employer demands for medical examinations in a return-to-work situation. It is an interest that has found recognition in arbitral jurisprudence, regardless of the legal basis for it. This is demonstrated by the fact that the Privacy Commissioner has indicated that for the purposes of the *Personal Information Protection Act*, R.S.B.C. 2003, c.63, (PIPA),

he will apply its "reasonableness" test in the employment context in a manner similar to the arbitral principles that have already developed in the absence of such statutory basis (*ibid*, p.2.1.3). The federal counterpart to PIPA is the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5, (PIPEDA). The model code set out in Schedule 1, Principle 4.4, provides that organizations shall not collect personal information indiscriminately. The amount and type of information shall be limited to that which is necessary to fulfill the purposes identified. Commenting on this Principle in *PIPEDA Case summary #233*, the Office of the Privacy Commissioner said this:

> ***Application: Principle 4.4 of Schedule 1 to the Act states that the collection of personal information shall be limited to that which is necessary for the purposes identified by the organization.***
>
> ***The Office of the Privacy Commissioner has long recognized that every employer has the right to ensure that its employees' absences are justified, and the obligation to determine whether its employees are fit to return to work after a period of illness or whether other measures must be taken. It also recognizes that it may be necessary to obtain personal medical information on the employee for this reason. The question is thus, "What quantity of information suffices in a given situation?"***

That is an application of the "reasonableness" test developed in the arbitral jurisprudence quite apart from any statutory framework: *Canadian Merchant Service Guild and Seaspan International Ltd.*, 2007, unreported, (Taylor).

[4] In this case, the Union, by letter dated April 24, 2008, grieves the collection of medical and personal information by the Employer through its short term disability benefits administrator, Oncidium Health Group ("OHG") for the purposes of assessing claims for Short Term Disability. The grievance is scheduled to be heard in December 2008. This decision deals with an application by the Union for interim relief.

II

[5] Pursuant to Article 15.03 of the collective agreement between the parties, the Employer provides sick leave benefits of up to 105 calendar days within a continuous 26 week period. Article 15.04 provides for an "income continuance plan" to take effect for "an employee unable to work due to sickness or off-the-job injury" after the 105 calendar days covered by paid sick leave under Article 15.03. This coverage is provided by a Sun Life Long Term Disability Plan.

[6] Article 15.07 deals with the requirements for medical certificates:

> ***MEDICAL CERTIFICATE REQUIREMENT***
>
> ***(a) Medical Examination***

> 1. *If an absence due to sickness exceeds 5 working days, a medical certificate may be required by the Employer. Employees involved in frequent short-term absences (more than four during each 1 Jan to 31 Dec period) may be required to undergo a medical examination by their own doctor. The employee shall arrange that his/her doctor furnish a report of the examination results to the Employer.*
>
> 2. *If an absence due to sickness exceeds 30 continuous calendar days, and failing a medical examination being conducted by the employee's physician prior to return to work, the Employer may require such an examination.*

[7] Prior to March 2006, the Employer and BC Hydro (the predecessor employer), in accordance with Article 15.07 of the collective agreement, would ask for medical certificates or medical examinations on a case-by-case basis when administering sick leave benefits.

[8] Effective March 20, 2006, the Employer entered into a Short Term Disability Management Services Agreement (the "Services Agreement") with OHG which sets out the terms of a Short Term Disability Plan, including terms to define and limit eligibility for benefits.

[9] The Services Agreement includes provisions for dealing with the confidentiality of employee medical information.

[10] The Short Term Disability Plan at Article 1.1(i) defines "Total Disability" as:

> ***… a state of incapacity resulting solely from an injury, disease, illness or mental infirmity which continuously prevents the Eligible Member from performing all of the material or essential duties of his or her own occupation …***

[11] By letter dated October 14, 2005, the Employer advised the Union that it had engaged the services of OHG to administer the sick leave benefits.

[12] On October 28, 2005, the Union filed a grievance (the "first grievance") regarding the introduction of the Short Term Disability Plan which resulted in the Consent Award issued by Arbitrator Emily Burke on November 29, 2006.

[13] The Consent Award established a "Short Term Disability Claim Process" described as "The process for application and receipt of short-term sick benefits pursuant to Article 15.03 of the Collective Agreement" and established a "Short Term Disability Claim Form", commonly referred to as the "Tier 1 Form".

[14] The Tier 1 Form is for the employee and the employee's physician to complete and identifies the following:

(i) whether the medical condition arises out of the course of employment or is the result of an accident at work, and if so, the date on which the accident occurred;

(ii) whether the employee was admitted to hospital for the illness/injury;

(iii) the date last treated by a doctor for the medical condition;

(iv) the general nature of the employee's illness or injury;

(v) the date of the employee's last visit to the doctor;

(vi) the date on which the doctor anticipates a return to work;

(vii) whether the employee will require accommodation upon return to work;

(viii) name and signature of the attending physician and the date on which the Tier 1 Form was completed.

[15] The uncontroverted evidence in these proceedings is that in over 60% of applications for short term disability benefits, OHG requires applicants to

complete what is commonly called a “Tier 2 Form”. This Tier 2 Form is virtually identical to a form (the “Tier 2 Form ‘A’”) used by OHG prior to the negotiated resolution of the first grievance which resulted in the Consent Award and the Tier 1 Form.

[16] The Tier 2 Form currently in use, like its discontinued Tier 2 Form ‘A’ predecessor, requires, in over 60% of the cases, short term disability applicants to disclose the following information:

(i) primary diagnosis;

(ii) secondary diagnosis;

(iii) subjective symptoms;

(iv) date of first doctor visit;

(v) objective findings including all diagnostic test results and consultation reports;

(vi) medications taken, date commenced, dose/frequency and response to medications;

(vii) whether the employee has ever had similar conditions; if so, when;

(viii) whether the employee is pregnant; if so, due date;

(ix) any complicating factors delaying the recovery process;

(x) current treatment;

(xi) copies of all specialist, consultation, physiotherapy, operative, hospital and diagnostic reports.

[17] The uncontroverted evidence in these proceedings is:

- **The Tier 2 Form ‘A’ was used by OHG prior to the Consent Award but not afterwards.**

- **In meetings with the Union, the Employer asserted the right to “adjudicate” short term disability claims, to question “what the doctors were saying” and to “adjudicate the medical information.” These assertions are consistent with form letters sent to claimants by the Employer which contain this sentence: “As a health resource, Oncidium will also assist you by reviewing your medical treatment...”**

[18] One type of form letter sent by the Employer to claimants for short term disability benefits requests:

- **diagnosis;**
- **objective medical information supporting the diagnosis;**
- **DSM IV Criteria and Symptoms (if applicable;**
- **prognosis;**
- **restrictions and limitations preventing performance of essential duties of the job (comparable job);**
- **treatment plan with response and compliance to date.**

[19] The last section of the Short Term Disability Claim Process established by the Consent Award states:

> ***D. Where it is reasonable and appropriate in certain circumstances, the employer may request that an employee provide further specific information to substantiate an employee's absence due to illness/injury. Such will be determined on a case-by-case basis.***

[20] There is nothing in the Short Term Disability Claim Process, the Consent Award or the collective agreement about when further specific information may be reasonable and appropriate, nor about what type of information may be sought. There is, however, uncontroverted evidence in these proceedings that:

- **When the settlement of the first grievance was negotiated by the parties, (resulting in the Consent Award), the Employer told the Union that Section D would be used only in "limited circumstances" and in the "least amount of experiences".**

- **Following the Consent Award and the introduction of the Tier 2 Form, labour relations "started to die" and the relationship between the parties was "destroyed".**

- **That the impact of the dispute over the use of the Tier 2 Form is that the Union has no trust in agreements made with the Employer.**

III

[21] The Union submits that the evidence establishes that the Employer is regularly and routinely requiring more than 60% of applicants for short term disability to disclose confidential and highly personal

information in breach of the Consent Award and Section D thereof.

[22] The Union asserts that where such information is disclosed, it constitutes an irreparable breach of the Consent Award and can not be remedied because such private information, once disclosed, can not be taken back.

[23] The Union alleges a complete lack of restraint, discretion or deliberation exercised by the Employer in its requests for medical information beyond that contained in the Tier 1 Form. The Union argues that the Employer routinely makes the same request for information from employees regardless of their circumstances, regularly asking for all of the information that could exist about a given employee's illness or injury, without justification and in contravention of Section D of the Consent Award.

[24] The Union contends that what is sought by this application is quite different from the remedies that will be sought on the merits. What it seeks in this application is the introduction of a measure of restraint and discretion in the Employer's approach to validating sick leaves.

[25] The Union points out that the "Short Term Disability Claim Process" and Tier 1 Form included in the Consent Award was "laboriously" negotiated by the

parties as the form of medical certificate that the parties agreed to use. That form provides confirmation that the employee is ill or injured and under the care of a doctor. It identifies the general nature of the employee's illness or injury, the most recent doctor visit, anticipated return to work date and whether accommodation will be required.

[26] In consequence thereof, the Union seeks a number of interim orders including:

- **That employees will not be required to submit medical certification for absences of less than five days (unless they have been absent for less than five days, four times in the current calendar year, in which case they may be required to submit a Tier 1 Form for subsequent absences in that calendar year).**

- **That where an employee provides a completed Tier 1 Form in accordance with the Consent Award and the request of the Employer, the employee will be granted short term disability leave and benefits at least until the grievance is resolved.**

- **That at least until the grievance is resolved, the Employer will cease and desist from denying sick leave prospectively, i.e. in advance of it being taken.**

- **That until the grievance is resolved, the Employer will cease and desist from requiring the Tier 2 Form.**

- **That until the grievance is resolved, the Employer will only request information beyond that contained in the Tier 1 Form where:**

  (a) the Union agrees that the Employer may request the information it seeks, or

  (b) the Arbitrator so orders.

In the alternative, the Union seeks an Order:

- **That where the Employer asks an employee to provide information beyond the Tier 1 Form, that the employee not be required to disclose such information until and unless the grievance is resolved in the Employer's favour and the Arbitrator determines, on a case-by-case basis, whether such information should be disclosed.**

[27] The Employer opposes the granting of any of the interim orders sought by the Union on three grounds:

(a) That the balance of convenience and interests of the parties do not favour granting the interim orders sought. If the orders are

granted, the Employer asserts it will have no redress if it is eventually successful at an arbitration of the grievance on its merits and there is no irreparable harm that justify the interim orders.

(b) That the orders sought are more restrictive than the terms of the Consent Award agreed to by the parties on November 29, 2006 and are not consistent with the purposes of the *Labour Relations Code*.

(c) That the orders sought essentially require the Arbitrator to decide the very issue in dispute in the grievance: the interpretation of Section D of the Consent Award. The Employer submits that it is not expeditious, constructive or orderly to decide the issues in dispute twice and, therefore, granting the orders sought would be inconsistent with the purposes of the *Code*.

IV

[28] The statutory jurisdiction under Section 92(1)(c) of the *Labour Relations Code*, R.S.B.C. 1996, c.244, "to determine prehearing matters and issue prehearing orders" includes the power to issue interim orders:

White Spot Ltd., BCLRB No. 182/94; *CEP, Local 2000 v. Pacific Press (Relke)*, [2000] B.C.C.A.A.A. No. 121 (Dorsey).

[29] There is no provision in the collective agreement regarding interim orders.

[30] Arbitrators in British Columbia generally consider, in deciding applications for interim orders, the balance of convenience and interests of the parties. In so doing, four main principles are generally considered although Arbitrator Dorsey in *Pacific Press, supra*, said:

> ***Arbitrators have a broad scope of remedial and procedural authority. In their role under the collective agreement and Labour Relations Code they do look beyond the terms of the collective agreement in fulfilling their responsibilities. In exercising the statutory authority to make prehearing, interim orders there may be factors beyond those chosen by the Board*** **[referring to the decision in *RBA Canada Inc.*, BCLRB No. B31/97]** ***for its purposes that should be considered by arbitrators. Some of the factors chosen by the Board may not be appropriate in the manner in which they have been formulated by the Board. It is too early in the evolution of this jurisdiction for arbitrators to preclude consideration of any factors or unquestioningly adopt every factor the Board has formulated for its purposes.*** **(para.28)**

[31] The four factors generally considered are:

(a) An adequate remedy would be unavailable at the final hearing without an interim order;

(b) The claim must not be frivolous or vexatious and must usually be based on a *prima facie* case;

(c) An interim order must not penalize the respondent in a manner which will prevent redress if the application fails on its merits;

(d) The interim order must be consistent with the purposes and objects of the *Code*.

> ***Les Reichelt Trucking Ltd. and Kelly Douglas & Co. Ltd.*** **[1993] B.C.L.R.B.D. No. 433**
>
> ***White Spot Limited*****, BCLRB No. B182/94**
>
> ***Luscar Ltd. (Line Creek Mine) and I.U.O.E. Local 115*** **(2001), 95 L.A.C. (4th) 283 (Kinzie)**

[32] The Employer concedes, for the purposes of this interim order application, that there is a *prima facie* case.

[33] In *Pacific Press*, *supra*, Arbitrator Dorsey made the following comments with respect to the approach to be taken in interim order applications:

> ***26. The overall approach to be taken is one of balancing the harm in the labour relations context of arbitrating under a collective agreement and accepting that an interim order can prevent labour relations***

> ***harm, not necessarily irreparable or some other unspecific degree of harm. Delay is an important factor in assessing harm. It is still an open question whether an arbitrator should take the approach the Board does and require that an adequate remedy would not be available to the applicant without an interim order.***
>
> ***27. An interim order is not a remedy. There is no finding of a contravention of the collective agreement. The nature of the interim intervention should not pre-empt either party from maintaining its position with respect to the grievance. Early, interim intervention should assess the likely merits of the grievance and the context in which it arises in the ongoing union and employer relationship under the collective agreement. Obviously, a frivolous grievance does not create a situation where there is any balance of harm in favour of the grieving party. The balance of harm should favour granting the application for specific labour relations purposes. This does not preclude the interests of a party to the collective agreement or a person bound by the collective agreement and, perhaps, a public interest from tipping the balance in favour of making an interim order …***

V

[34] Before turning to the factors generally considered in deciding applications for interim orders, it is useful to review the law on employer requests for medical information to provide context for the balance of convenience and balancing of interests that is required in matters of this kind.

[35] The first grievance filed in October 2005 was resolved by way of the Consent Award issued in November

2006. The Consent Award provides in the "Short Term Disability Claim Process" the procedure to be followed when short term disability leave is taken and includes the Tier 1 Form which is to be completed by employees and doctors in the circumstances outlined in the Award. The parties agreed that the process and Tier 1 Form set out in the Consent Award would be used for short term disability leaves. Thereafter, the Tier 2 Form 'A', to which the Union had taken strong exception, was discontinued.

[36] The uncontroverted evidence in these proceedings is that for a period of about one year following the Consent Award, issues respecting its implementation were addressed cooperatively between the parties. Thereafter, the Employer, much more so than previously, required medical information beyond the Tier 1 Form. The Tier 2 Form introduced by the Employer is virtually identical to the Tier 2 Form 'A' used prior to the resolution of the first grievance by the issuance of the Consent Award.

[37] Section D of the Consent Award provides that "where it is reasonable and appropriate in certain circumstances, the employer may request that an employee provide further specific information to substantiate an employee's absence due to illness/injury. Such will be determined on a case-by-case basis."

[38] It is clear that employers can require employees to provide reasonable information sufficient to determine if an absence is *bona fide* and what impact it will have on attendance: *Victoria Times-Colonist and Victoria Newspaper Guild, Local 223,* (1986), unreported, (Hope), at p.20. In exercising its right to inquire about an absence, an employer, said Arbitrator Hope, must act reasonably:

> ***I repeat that the Employer has no inherent management right to compel an employee to provide confidential and personal medical information. If that right is to be found, it must be found in the language of the collective agreement or in the particular circumstances to which the Employer responds … Here there is no procedure set out in the collective agreement but, as stated, there is a requirement for an employee to account for an absence said to be due to illness and to provide reasonable information in support of that explanation. Whether the employer can compel the delivery of further information to the point of initiating disciplinary penalties or withholding sick pay will be a function of the particular facts.*** **(p.18)**

[39] Here, it is the Consent Award which establishes a procedure for claiming short term disability benefits. The Union says that the Employer is breaching that agreed procedure by routinely demanding that employees compromise their right of privacy through the unwarranted disclosure of personal medical information (characterized as a "special privacy interest" which should receive "no broader distribution than is reasonably necessary" in *British Columbia Teachers'*

Federation v. British Columbia Public School Employers' Assn., **[2004] B.C.C.A.A.A. No. 177, (Taylor)) .**

[40] The Employer relies upon Section D of the Consent Award, *supra* para.37. The issue of whether OHG's requests for employees to submit a Tier 2 Form are reasonable and appropriate depends on the facts of each individual case or, to use the language chosen by the parties to reflect their agreement, the "certain circumstances". In certain circumstances and where it is reasonable and appropriate, the Employer may request further "specific information" in order to "substantiate" an employee's absence and claim for benefits. It must be determined on a case-by-case basis.

VI

[41] I turn next to the factors to be considered in deciding applications for interim orders:

> **(a) An adequate remedy would be unavailable at the final hearing without an interim order.**

[42] The Union submits that an employee cannot be made whole for the violation of his or her privacy. There is arbitral authority to the effect that privacy, once breached, is "a right that is incapable of being

properly compensated at arbitration": *Re Shell Canada Products Ltd. and IWA, Local 1-357* (1990), 14 L.A.C. (4th) 75 (Larson) at p.84, cited in *Royal Oak Mines Inc. and CASAW, Local 4,* (1991), 24 L.A.C. (4th) 221 (Bird) at p.231.

[43] The Ontario Grievance Settlement Board in *Ontario Public Service Employees Union v. Ontario Management Board Secretariat,* [2003] OGSBA No. 21 (Stewart) determined that the privacy interests of employees outweighed the interests of the employer in implementing a security check process. In granting interim relief, the Board, at para.9, said:

> ***… if the initiative is allowed to proceed, there is potential harm that could not be remedied by an award of damages, should the Unions ultimately be successful. There is no way to actually reverse a fingerprinting exercise… It is my conclusion, in balancing the interests in relation to this branch of the test for interim relief that the privacy interests of the employees … clearly outweigh the interests of the Employer …***

[44] A similar result obtained in *City of Ottawa and Ottawa Professional Firefighters Association*, 2007, unreported, in which Arbitrator M.G. Picher noted at p.4 that he had directed in a preliminary application that implementation of a policy requiring employees to submit police record checks be held in abeyance pending the outcome of the grievance. On the merits, the arbitrator held the proposed police record check policy to be an undue infringement of employee privacy.

[45] In a case involving the employer's right to search persons, clothing worn and women's purses carried, the arbitrator granted an interim restraining order concluding that "compensating people for invasion of personal privacy by damage awards is generally not satisfactory.": *Royal Oak Mines, supra*.

[46] The Employer submits that the actual infringement of employees' privacy rights is minimal. It asserts that OHG is a third party experienced in administering short term disability claims and the only persons at OHG who review the medical information provided in Tier 1 and Tier 2 Forms are qualified occupational health nurses and medical professionals. It is argued that all persons at OHG maintain the strict confidentiality of the medical information and do not disclose it to those who do not need to see it. No medical information is shared with the Employer beyond the very limited information in a Claims Advice Form. Further, the confidentiality and security of the medical information is protected by comprehensive and explicit privacy provisions in the Services Agreement.

[47] The Union contends that the Employer is responsible for sending medical information requests to employees and from the perspective of the employee, the Employer is the party handling this sensitive medical information. On occasion, says the Union, the Employer may directly receive medical information forms since employees may send this information directly to the

Employer in response to its request instead of to the third party. The Employer's form letters by which the Employer requests information dictate that the Tier 2 Forms "may be filed with Oncidium" leaving it open for employees to file them with the Employer.

[48] The existence of a third party to which medical information was disclosed did not assist the employer in *NAV Canada and C.A.T.C.A. (Medical Examinations)*, (1998) 74 L.A.C. (4th) 163 (Swan) where, at p.13, the arbitrator said:

> *… medical information is intensely private and sensitive, and should receive no broader distribution than is reasonably necessary … even the release of medical information to third parties, even where those third parties are as apparently conscientious and careful about the security of that information as is MEDCAN, should not become a matter of routine … It would not be a reasonable exercise of the discretion … for there to be any general requirement for third party access to medical information.* (p.180)

[49] In *BCTF and BCPSEA, supra,* at para.24, it states:

> *There is a special privacy interest which attaches to medical information. The doctor-patient relationship is one of the most private and medical information should receive no broader distribution than is reasonably necessary.*

[50] Arbitrator Dorsey in *United Steelworkers of America, Local 7884 and Fording Coal Ltd.,* [1996] B.C.C.A.A.A. No. 94, cited in *BCTF and BCPSEA, supra*, put it this way:

> ***Confidentiality of medical records is a basic right to human dignity. Restoring and supporting dignity and the accompanying personal confidence is a therapeutic part of recovery, rehabilitation and adapting to life with a disability. Breaches of privacy may work against recovery.*** **(para.25)**

[51] In the alternative, the Employer submits that any concerns regarding invasion of employee privacy from providing the information to OHG may be adequately addressed by the Employer agreeing to have OHG destroy any medical information which is later found at arbitration to have been unreasonably requested.

[52] In balancing the interests on this branch of the test for interim relief, I am persuaded that an adequate remedy would be unavailable to the Union at the final hearing without an interim order. An employee in these circumstances cannot be made whole for the violation of his or her privacy. There is no satisfactory way of undoing the effect of exposing an employee's confidential and highly personal medical and private information in the circumstances of this case and I reject the Employer's submission that any infringement of privacy would be "minimal".

VII

[53] (b) The claim must not be frivolous or vexatious and must usually be based on a *prima facie* case.

The Employer concedes that the Union has a *prima facie* case.

VIII

[54] (c) An interim order must not penalize the respondent in a manner which will prevent redress if the application fails on its merits.

[55] The Short Term Disability Plan provides for 105 days of paid sick leave benefits which are funded entirely by the Employer.

[56] The Employer is entitled at law and pursuant to the Consent Award to be reasonably satisfied that claims for the sick leave benefits are *bona fide*.

[57] The Employer submits that if the interim orders are granted and the Employer is successful at arbitration, it will have no practical means to review all claims and then to collect payment from employees of claims which are not substantiated. If the interim orders are granted, the Employer asserts that it faces the potential liability of providing up to 105 days of sick leave benefits for employees who have not provided adequate medical justification for their absences. For this reason alone, the Employer submits that the

balance of convenience does not favor granting the interim orders sought by the Union.

[58] The Employer argues that while it may have a legal claim it can pursue against individual employees who received short term disability benefits to which they were not entitled, it does not establish liability and ensure recovery and therefore is no answer to the lack of redress available to the Employer: *White Spot Limited*, BCLRB No. B182/94.

[59] The Employer submits that the interim orders sought by the Union are more restrictive than the Consent Award that the grievance seeks to enforce.

[60] The Union requests an order which would, argues the Employer, restrict the agreement reached by the parties in Section D of the Consent Award.

[61] The Employer is entitled to the bargain it struck with the Union and which is found in the Consent award. Section D permits the Employer:

- **where it is reasonable and appropriate in certain circumstances**
- **to request further specific information**
- **to substantiate an employee's absence due to illness/injury**
- **on a case-by-case basis.**

[62] The uncontroverted evidence in these proceeding is:

- **that the Employer is regularly and routinely requiring more than 60% of the applicants for short term disability to complete the Tier 2 Form;**

- **that the Tier 2 Form is virtually identical to the Tier 2 Form 'A' used by OHG prior to the negotiated resolution of the first grievance which resulted in the Consent Award and the Tier 1 Form;**

- **that the Tier 2 Form, like its discontinued Tier 2 Form 'A' predecessor, requires in over 60% of the short term disability applications, the disclosure of personal and highly confidential medical information (see para.16, supra) which is not required by the Tier 1 Form. It was the use of the Tier 2 Form 'A' which prompted the first grievance. The Tier 2 Form introduced after the Consent Award mirrors the Tier 2 Form 'A';**

- **that when settlement of the first grievance was negotiated (resulting in the Consent Award), the Employer told the Union that Section D would only be used in "limited circumstances" and in the "least amount of experiences";**

- **that the impact of the dispute over the use of the Tier 2 Form is that the Union has no trust in**

agreements made with the Employer and introduction of the Tier 2 Form has "destroyed" the relationship between the parties.

[63] It is inherently improbable that over 60% of short term disability applications give rise to the "limited circumstances" and, however inelegantly put, the "least amount of experiences" contemplated by the parties when they negotiated the Consent Award. Section D of the Consent Award speaks to additional "specific information" to "substantiate" a claim to illness/injury where "in certain circumstances", it is "reasonable and appropriate" to do so "on a case-by-case basis". Whatever those words mean in the context in which they are used, it is inherently improbable that they apply to over 60% of applications.

[64] It follows that the interim orders sought would prevent the Employer from obtaining information to which its entitlement is in serious doubt. What the Employer is seeking in its routine requests for Tier 2 Form information (requests that are made in more than 60% of short term disability leave applications) is to conduct a perfunctory independent medical examination of most of the employees who take sick leave. It is true that this is by way of a third party, OHG, which does not examine the patients. But by requiring that all data, observations, lab results, reports and so on be disclosed to and re-assessed by OHG, the Employer is essentially requiring independent medical examinations

of the affected employees. It is well established that given the sensitive nature of medical information, additional medical examinations by an independent party may only be required in exceptional circumstances:

> ***Medical information is intensely private and sensitive, and should receive no broader distribution than is reasonably necessary. A medical examination by a third party physician is extremely intrusive, and should be resorted to only in rare cases:*** **NAV Canada and C.A.T.C.A. (Medical Examinations) (Re),** ***supra*** **(p.180).**

[65] The Employer's claim of harm must also be considered in light of the following:

(a) This is an application for interim relief only, intended to last only until the matter is resolved;

(b) Under the interim orders sought, the Employer will continue to have access to the Tier 1 Forms which identify the following:

(i) whether the medical condition arises out of the course of employment or is the result of an accident at work, and if so, the date on which the accident occurred;

(ii) whether the employee was admitted to hospital for the illness/injury;

(iii) the date last treated by a doctor for the medical condition;

(iv) the general nature of the employee's illness or injury;

(v) the date of the employee's last visit to the doctor;

(vi) the date on which the doctor anticipates a return to work;

(vii) whether the employee will require accommodation upon return to work;

(viii) name and signature of the attending physician and the date on which the Tier 1 Form was completed.

(c) The Employer will continue to have the right to apply Section D of the Consent Award. That permits the Employer where it is reasonable and appropriate in certain circumstances to request:

- **that an employee provide further specific information**
- **to substantiate an absence due to illness/injury**
- **on a case-by-case basis.**

[66] It follows that if interim relief is granted such that the Employer is prevented from using the Tier 2 Form, it will continue to be able to obtain timely and relevant medical information such that it would not be penalized in a manner which would prevent redress should the grievance fail on the merits.

[67] Should the Employer succeed on the merits and determine that a given sick leave should not have been granted, the evidence in these proceedings is that it can recoup sick leave benefits as it has been doing in the past.

[68] In balancing the interests on this branch of the test for interim relief, I am persuaded that an interim order would not penalize the Employer in a manner which will prevent redress if the application fails on its merits.

IX

[69] (d) The interim order must be consistent with the purposes and objects of the *Code*.

[70] The Employer submits that granting interim orders more restrictive than the Consent Award would be inconsistent with Section 2(c) of the *Code* which

encourages the practice and procedures of collective bargaining between employers and trade unions.

[71] The Union did not agree in the Consent Award that an arbitrator's order or the Union's consent would be necessary for the Employer to request additional information. The Union agreed that the Employer may seek additional information from claimants for short term disability leave in accordance with the terms of Section D of the Consent Award.

[72] The Employer argues that it does not encourage collective bargaining for the Union to agree to the Consent Award and later argue for a more restrictive interim order when the facts and circumstances have not changed. The difficulty with this argument is that the facts and circumstances have changed. The uncontroverted evidence in these proceedings is:

(a) That the Employer is regularly and routinely requiring more than 60% of applicants for short term disability to complete the Tier 2 Form.

(b) That the Tier 2 Form is virtually identical to the Tier 2 Form 'A' which the parties negotiated away with the Consent Award and the Tier 1 Form.

(c) That the Tier 2 Form (like its predecessor Tier 2 Form 'A') requires, in over 60% of short term disability applications, the disclosure of personal and highly confidential medical information. It was the Tier 2 Form 'A' which prompted the first grievance.

(d) That when settlement of the first grievance was negotiated, the Employer told the Union that Section D would be used only in "limited circumstances" and in the 'least amount of experiences".

(e) That the Employer's use of the Tier 2 Form has "destroyed" labour relations between the parties.

It is abundantly clear that the facts and circumstances have changed.

[73] The Employer relies upon Section 2(e) of the Code which states that one of its purposes is to promote conditions favourable to the orderly, constructive and expeditious settlement of disputes. The interpretation and enforcement of the Consent Award is the subject of the grievance and will be fully addressed at arbitration. The Employer argues that it is inefficient and not constructive or orderly to decide the same issues between the parties twice – once for interim

orders and a second time at the hearing on the merits of the grievance. The British Columbia Labour Relations Board in *White Spot Limited,* BCLRB No. B182/94 at p.9 said:

> ***Resorting to interim proceedings as a matter of course would obviously give rise to the attendant spectre of two hearings in most grievances with resulting costs to both parties.***

[74] In my view, the interim orders sought would not grant the entire remedy sought or otherwise tilt the balance in favour of one party. Some of the key issues which will be addressed at the arbitration of the merits are:

- **In what circumstances is the Employer justified in seeking information from an employee in addition to that contained in the Tier 1 Form?**

- **Where such justification exists, what are the limits on the information which the Employer may require?**

- **Is the Employer entitled to deny employees access to short term disability leave in advance of taking it?**

- **Has the Employer subjected employees to an unduly onerous process for obtaining short term disability leave?**

- **With respect to the time employees are permitted to submit medical information under Part B of the Consent Award, does it commence from the date of the Employer issuing a letter requesting the information or from the date that employees receive such a letter?**

[75] The interim relief sought by the Union would not answer those questions. The interim orders will serve only to insert some measure of restraint and discretion into the Employer's request for information. Interim relief will not grant the entire remedy sought at arbitration nor will it have the effect of tilting the balance in favour of the Union.

[76] In terms of the "entire remedy", the Union intends to seek orders at the arbitration that the Employer comply with the terms of the Consent Award and the collective agreement with regard to respecting the privacy of employees' personal and medical information and honouring entitlement to short term medical leave. The Union intends to seek orders and remedies including the following:

(a) That the Employer may only request further medical information (beyond the Tier 1 Form) where it is reasonable and appropriate in the circumstances and where the circumstances have been individually assessed. In order for

a requirement for further information to be warranted, the circumstances must be such that the information provided in the Tier 1 Form alone does not substantiate the employee's absence.

(b) That the Employer is not, under any circumstances, entitled to send out a general blanket form of questions to every employee from whom it requires further medical information under Section D; rather the Employer is restricted to only requesting specific information. That is, information specific to the reasons for absence. For example, if the reason for absence is a minor day surgery, then only questions about that minor day surgery absence and facts directly related to it, may be asked.

(c) The Employer can only request information to substantiate the employee's assertion that his or her absence was due to illness/injury. The Employer cannot, for example, seek information to ascertain whether in its opinion the employee is taking the correct medication. That is beyond the scope of the Consent Award.

(d) The Employer is not entitled to deny employees access to short term disability leave in advance of their taking it.

(e) The Employer has subjected employees to an unduly onerous process for obtaining short term disability leave; has violated employees' privacy and will be ordered to pay damages for this conduct.

(f) In violation of the Consent Award, the Employer has not permitted employees sufficient time in which to submit medical documentation requested.

[77] It is apparent that the interim relief sought is different from the ultimate remedies sought and if granted would not tilt the balance in favour of the Union for the hearing on its merits.

[78] There is uncontroverted evidence in these proceedings that the Employer's administration of the short term disability leave provisions and particularly the use of the Tier 2 Form, has severely damaged the ongoing collective bargaining relationship. The Union's strongly held view is that the Employer has failed to live up to the negotiated Consent Award and that its actions have "destroyed" the relationship between them. In the absence of interim relief, employees confronted with what they see as a clear breach of their rights

under the Consent Award and collective agreement may decide not to "work now and grieve later" and may well decide not to provide the Employer with the information requested. This back and forth intrusion and refusal is harmful to labour relations and does not serve the purposes of the *Code*.

[79] Issuing interim relief will promote conditions favourable to the orderly, constructive and expeditious settlement of disputes. It will preserve the integrity of the collective bargaining process and avoid the perception among employees that the collective bargaining process and the grievance arbitration process serves little purpose.

[80] In balancing the interests on this branch of the test for interim relief, I am persuaded that there is a critical labour relations purpose to be served by granting interim orders and such orders will not grant the entire remedy sought or otherwise tilt the balance in favour of one party.

X

[81] The interim relief sought is the protection of employee privacy and entitlement to sick leave and the prevention of unreasonable demands for medical information and unreasonable denials of sick leave during the time period in which the parties must wait

for the matter to be arbitrated. Where information in addition to the Tier 1 Form may be required, the interim relief sought is some exercise of restraint and discretion in requests for additional information.

[82] I conclude that the Union has made out a case for interim relief. I order as follows:

(a) As set out in the Consent Award, employees will not be required to submit medical certification for absences of less than five days in order to receive short term disability leave and benefits (unless they have been absent for less than five days, four times in the current calendar year, in which case, they may be required to produce a Tier 1 Form for subsequent absences in that calendar year).

(b) Where an employee provides a completed Tier 1 Form in accordance with the Consent Award and at the request of the Employer, the employee will be granted short term disability leave and benefits at least until the grievance is resolved.

(c) At least until the grievance is resolved, the Employer will cease and desist from denying sick leave prospectively, that is, in advance of it being taken.

(d) Until the grievance has been resolved, the Employer will cease and desist from requesting employees to submit the Tier 2 Form.

(e) Employer requests for information in addition to that contained in the Tier 1 Form must meet the requirements and limitations contained in Section D of the Consent Award. The Employer will cease and desist from making broad, general requests for medical information that inherently are unjustified in the circumstances and do not comply with the negotiated agreement of the parties as reflected in Section D of the Consent Award.

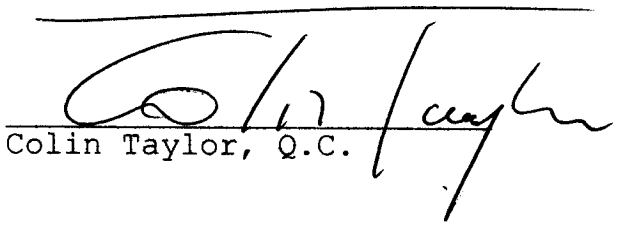
(f) Where the Union reasonably believes that the Employer's request for additional information is too broad in that it goes beyond Section D of the Consent Award, the parties shall use their best efforts to reach agreement on the information to be provided. In the event that the parties are unable to reach agreement, the employee shall comply with the Employer's request for additional information but the employee shall not be required to disclose the information until and unless the grievance is resolved in the Employer's favour. The Arbitrator retains jurisdiction

after issuing his award on the merits to address, on a case-by-case basis, whether such information should be disclosed. This may require the parties to amend the forms and requests issued by the Employer so that physicians would be directed to retain the forms/information requested or to give the forms/information to the employee rather than sending them directly to OHG.

(g) The issuance of these orders is not intended to, in any way, expand the circumstances in which the Employer may request that an employee provide the Tier 1 Form.

[83] I remain seized to deal with issues arising out of the interpretation, application and implementation of this Award.

DATED at Vancouver, British Columbia, this 29th day of July 2008.



Colin Taylor, Q.C.