

IN THE MATTER OF AN ARBITRATION UNDER THE
BRITISH COLUMBIA LABOUR RELATIONS CODE

BETWEEN:

INSURANCE CORPORATION OF BRITISH COLUMBIA

(the "Employer")

AND:

CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES' UNION LOCAL 378

(the "Union")

(HR 187- Short Term Disability Form Grievance)

COUNSEL FOR THE EMPLOYER:

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ARBITRATOR:

Emily M. Burke

DATE AND LOCATION OF HEARING:

January 11 and 14, 2010
Vancouver, B.C.

DATE OF AWARD:

January 31, 2010

I. INTRODUCTION

This matter concerns a policy grievance filed by the Union on July 2, 2009 challenging the Employer's implementation of a new Occupational Health Fitness Assessment Form (HR 187). The Union takes the position the introduction of the new HR 187 Form and its administration improperly seeks medical access and the release of personal-medical information in contradiction of the collective agreement between the parties.

The parties have agreed the issue to be decided before the arbitrator in this case is:

What inquiries may be made (questions posed and/or information sought) in the Occupational Health Fitness Assessment (the "HR 187 Form") referred to in, and for the purposes of Article 17.12 of the collective agreement.

The issue concerns absences commonly referred to as short term illness or disability.

Pertinent provisions of the collective agreement include:

0.10 Management Rights

All management rights heretofore exercised by the Corporation, unless expressly limited by this Agreement, are reserved to and are vested exclusively in the Corporation.

17.01 Eligibility

All eligible employees who incur illness or injury are entitled to and shall receive paid sick leave in accordance with this Article.

17.12 Medical Information

The parties agree that the intent of the sick leave plan is to provide an employee with a level of income protection in the event the employee is absent from work due to illness or injury. The parties

further agree that in situations of absence due to such illness or injury, it is the employee's responsibility to take appropriate measures to ensure proper diagnosis, treatment, and recovery from the disabling condition. To that end, the following provisions have been established:

- (a) In cases of infrequent but lengthy absences (i.e. in excess of three (3) consecutive days) due to serious illness or injury, the Corporation may require the employee to submit a completed Occupational Health Fitness Assessment from the employee's own doctor, or some other form of medical documentation to substantiate the nature, extent, and duration of the illness or injury. In such instances, the cost of completion of the form will be borne by the Corporation. The Corporation may also require a second medical opinion, the costs of which shall be borne by the Corporation.
- (b) In cases where an employee has in excess of three (3) sick leave occurrences in a calendar year, the Corporation may require the employee to offer a satisfactory explanation for her/his absence, including completion of the Occupational Health Fitness Assessment by the employee's own doctor. The Corporation may also require a second qualified medical opinion. The costs, if any, of either of the above will be borne by the Corporation.
- (c) An employee who is required to submit medical documentation pursuant to this Article will be given adequate notice to secure it. With the exception of Article 17.12(e), the cost of providing such documentation will be borne by the Corporation.
- (d) The Corporation may require completion of an Occupational Health Fitness Assessment confirming the employee's fitness to return to work after a serious injury or prolonged illness. The Corporation may also require a second qualified medical opinion. The costs, if any, of either of the above will be borne by the Corporation.
- (e) The Corporation and the Union have agreed to cooperate in preventing improper utilization of the sick leave program and where the Corporation has reasonable grounds to believe that an employee is improperly utilizing the program, the employee will be required to

substantiate her/his absence with a completed Occupational Health Fitness Assessment signed by her/his own doctor. The employee may also be required to undergo a medical examination by a doctor selected by the Corporation, the costs of which shall be borne by the Corporation.

17.15 Sick Leave Privacy Protection

The Corporation will respect the privacy of employees on sick leave. Contact initiated by the employee's manager will be for essential emergency or administrative purposes. Such contact will be limited to correspondence and/or by telephone.

II. BACKGROUND

The Employer is a large corporation employing 5,500 employees. Approximately 4,500 employees are in the Union bargaining unit. The Employer operates in over 50 work locations across the Province, including claim centers, driver service centers and the head office.

Brent Hale, Manager, Employee Relations and Claire Yeung, Manager, Employee Health and Wellness testified on behalf of the Employer in this matter. Hale administers the collective agreement, manages the grievance process, case management, arbitration, and leads collective bargaining on behalf of the Employer. Yeung previously the Labour Relations Manager, is Manager of Employee Health and Wellness and responsible for areas including the administration of sick leave; wellness; Work Safe; prevention; and return to work.

The Employer has a corporate attendance management policy in place which sets out attendance expectations of the employees. Sick leave is an insured benefit with short-term benefits being Employer funded. Article 17 of the collective agreement sets out a scheme for sick leave where employees have a bank of sick leave which may be drawn down when they incur illness or injury. Hale is responsible for administering Article 17 of the collective agreement.

Article 17.12 sets out when medical information may be required. That provision refers to an Occupational Health Fitness Assessment. An employee is eligible for long-term benefits after exhausting 400 hours in a calendar year. The long-term disability plan is operated and insured by the Union.

The current HR 187 form is the form used for the Occupational Health Fitness Assessment referred to in Article 17.12. It has been used for many years. The current HR 187 was initially introduced in August 2001 following a review and approval in July 2001 by the Joint Return to Work Committee described in LOU #6. (See *Insurance Corporation of British Columbia v. Office and Professional Employees' International Union, Local 378*, [2002] BCCAAA No. 316 (Dorsey).

Two rounds of bargaining have occurred since then; one in 2003, and one in 2006. Article 17 continues to refer to the Occupational Health Fitness Assessment.

In late 2006/2007 when the Employer sought to implement a new HR 187 form, the Union filed a grievance. The grievance remained unresolved until the Employer agreed to continue to use the present form. The Employer however desired to develop a new form.

Yeung initiated the creation of a new revised form. On June 29, 2009 Yeung e-mailed the Union indicating she was planning to implement the revised attached form. Her e-mail of that date indicated the revised form would: "...save the Return to Work Co-ordinators from having to go back to the employee and the doctor several times to get the required information..." Yeung indicated when she took over her role as Manager of Employee Health and Wellness in February 2009; she reviewed the files, discussed the matter with the Return to Work coordinator and concluded the form was inadequate. The Return to Work coordinator advised the form was cumbersome and would go to

the doctors a number of times creating a delay in obtaining information when trying to get an employee back to work. This would delay the return to work for the employee, as it would delay information such as assist devices required that could facilitate the employee's return to work.

Yeung also said she tried to review other employers "best practises" and received advice as to the content of other forms in use. Yeung concluded the form was not adequate to substantiate illness and did not provide sufficient information to allow employees to return to work in an expeditious manner. The current form allowed doctors to "just tick off the boxes" without thought as to whether that was necessary for a return to work.

Yeung was of the view it was up to the Employer to develop the form. A revised form was designed and shared with the Union once completed. The check box form of information was deleted as the Employer felt it would be more helpful to receive a narrative from the doctor. In discussing the specific revised questions on the form, Yeung indicated whether and where it had previously been in the form and the intent was to substantiate the nature, extent and duration of the illness consistent with Article 17 of the collective agreement. With respect to questions concerning "subsequent visits" of the employee to the doctor, Yeung said this would allow the Employer to plan. If further medical information is needed to assist with a return to work, the opportunity to get this information is not missed with the employee being required to see the doctor again. In addition, the narrative and questions concerning the severity of the illness would assist the Employer with information concerning the possible time period away; and possible ascertaining if there were any resources it could provide such as medical referrals if necessary, and/or assist devices. In asking for objective symptoms, the Employer said it would allow them to asses whether the subjective symptoms were in line with the objective and assist in substantiating the claim. Also if a chronic issue, the Employer may be able to help an employee by providing assist devices.

Hale became involved once the Union indicated its objection to the revised form. The Union filed a grievance on July 2, 2009. Hale noted the Union's concerns were largely associated with privacy rights. Hale said the Employer had concerns about sick leave costs which was part of its decision to revise the form. The organization is large and decentralized which can lead to disparate practises making it difficult to gain consistency in practise. Hale noted an appropriate sick leave process can lead to better outcomes for employees thereby increasing employee wellness by timely intervention. Delay in returning to work is sometimes caused by lack of sufficient medical information. Having a consistent centralized process that is followed fairly and equitably enables all employees to get help sooner. If the Employer has the information at the start that assists with early intervention and return to work leading to a better outcome and sick leave is reduced. The form would provide more information from which resources and solutions in the workplace can be identified, including resources in the employee health and wellness department. Hale noted mental health issues are a primary issue affecting the workplace and early intervention of a psychiatrist leads to better outcomes. The intent of assistance by the Employer is to get the employee help and ensure fairness and health solutions for the employees. In addition, some employees have access to confidential information are in safety sensitive positions which their health and medical condition could adversely affect.

Hale agreed in cross-examination this was his opinion informed by his experience. Hale agreed he did not have an expert report on this. In addition, he did not recall the Union's position with respect to the Employer's unilateral right to change the HR 187 form.

Between July and October 2009, there were a number of privileged exchanges made between the parties in attempts to resolve and settle this grievance regarding the questions to be posed in the Revised HR 187 form.

Some headway was made and certain issues were resolved.

The Employer provided a “with prejudice” last offer on October 23, 2009. The Employer corrected that offer on the following Monday to include an additional question 4. This will be referred to as the “October form”.

In the covering e-mail by which the Employer provided the October form to the Union, the Employer advised as follows:

By making this proposal the Employer does not relinquish its right to unilaterally alter the HR 187 form in the future...That said, the Employer will endeavour to provide notice to the Union of any changes it intends to make on the HR 187 form prior to any implementation of a revised form.

An issue arose between the parties in the course of the hearing as to whether the Employer could lead evidence concerning the communication between the parties on this matter since the filing of the grievance on July 2, 2009. I issued an oral ruling on January 11, 2010. I incorporate this at the Union’s request and for the parties’ reference at this juncture:

I have considered the submissions of the parties on the Union’s objection to any communication between the parties since the filing of the grievance in this matter being accepted into evidence and conclude it must be upheld. While I am cognizant of the obligation and mandate of an arbitrator to have regard to the real substance of the matter in dispute and the ability to accept evidence whether or not it is admissible in a court of law, I find the principles expressed in *Re Calgary Board of Education (SD # 19) and CUPE Local 40* (1999), 84 LAC (4th) 410 and others to be determinative in this matter. As noted in that case the generally accepted view is that conversations in the course of the grievance procedure are privileged and there is a presumption that except in unusual circumstances or a waiver has occurred they are not to be admitted into evidence. While some exceptions exist such as when an agreement is called into question or the conduct of an individual during the grievance procedure is at issue, those are not applicable in this case.

I note further I do not find a waiver of that principle to have occurred by virtue of the December 14 correspondence from the Union. That correspondence assists in identifying the matter at issue and cannot be characterized as a waiver. While the Employer also characterizes this situation as falling within "unusual circumstances" such that it is an exception to this principle, I do not find it falls into that category. It is not unusual for parties to settle part of a matter and refer the remaining issues to arbitration. More importantly it is the type of matter the principle is designed to protect by encouraging a dialogue to reach reasonable solutions.

While I appreciate this limits the evidence on this point, it does not preclude evidence from the Employer identifying the need for a particular question on the disputed form and why that question is needed.

As per the Union's request, I will include this ruling in the final award on this matter and reserve the right to edit or add to the above reasoning in that Award should I deem it necessary.

The parties have an agreement that the purpose of having the physician's phone number, fax number and e-mail address is limited to identification of the physician, and to expedite employee requests for the form to be sent directly to their physician when the employee is unable to get the form to their doctor. The Employer will not initiate direct contact with an employee's physician absent containing proper and appropriate consent (consent which the Union asserts the Employer is not entitled to require.)

An issue has arisen at this hearing regarding the threshold at which the HR 187 form might be required from employees. There is disagreement on that point but the parties do not require adjudication of this point at this arbitration.

The decision in this matter must be issued by the end of January 2010. The Employer had advised it will impose the October form subject to the content this decision immediately upon the issuance of the decision.

The Union asserts first the Employer has no right to unilaterally alter the

current HR 187 form as that form is embedded by its reference in Article 17.12 and therefore fixed in the collective agreement. Accordingly, it maintains no changes can be made to the HR 187 form absent agreement between the parties. Secondly, the Union sets out specific objections to Questions 1, 3-6, 10-12 and 23 of the revised HR 187 form. Question 6 was ultimately agreed to by the parties in the course of the hearing, which agreement is reflected later in this decision.

I will deal with each issue separately.

III. ABILITY TO ALTER THE HR 187 FORM

(A) Argument

In making its argument on the first point, the Union argues the current HR 187 form is specifically referred to as a proper noun (denoted by capital letters in the collective agreement in Article 17.12). It is incorporated by repeated reference and fixed within the collective agreement. Its content was determined by a Joint Labour Management Committee established under LOU #6 of the collective agreement in 1998 (See *ICBC, supra*).

The Union points out since that time the parties have executed and ratified two collective agreements. As with any term of the collective agreement, any changes must be raised and addressed at the bargaining table.

The Union says the reference in Article 17.12(a) to “some other form of medical documentation” does not contemplate two or more different Occupational Health Fitness Assessment forms. The collective agreement refers to the Assessment in the singular, and to the Assessment in Article 17.12(b).

Furthermore, the Union says the meaning of the term “some other form of medical documentation” is, by agreement between the parties, beyond the scope of this hearing, as the parties specifically agreed that this arbitration panel would be empowered only address the specific issue of:

What inquiries may be made (questions posed and/or information sought) in the Occupational Health Fitness (the “HR 187 Form”) referred to in, and for the purposes of Article 17.12 of the collective agreement.

The Union reserved its right to address the remaining issues, once this issue has been addressed. This grievance, then, is about what type of medical information may be required on the HR 187 Form (a form used for every absence in this workplace, subject to the three days/three times threshold).

In support of its argument, the Union referred to in *Whitehorse (City) and IUOE, Local 155C* (1997, 68 LAC (4th) 208, which cited *Nova Scotia Civil Service Commission and NSGEU* (1980), 24 LAC (2d) 319 and states “words located elsewhere which must be read to give meaning to the primary document may be considered incorporated by necessary intendment” (at p. 326).

The Union also relied upon *Kelowna (City) v. Kelowna Professional Fire Fighters Association, Local 953*, [2003] BCCAAA No. 320 and *Camosun College v. CUPE Local 2081 (Per Diems Grievance)*, [2009] BCCAAA No. 50 to argue the HR 187 form is incorporated into the collective agreement and cannot be changed without the agreement of the parties.

The Union maintains the parties have agreed under the Collective Agreement, that employees will be required to complete the Current HR 187 form in particular, in order to claim sick leave benefits.

The Employer has objected to this issue being within the mandate of this

arbitration. As a result, the Union says this issue is properly within the scope of this grievance for a number of reasons. The grievance was filed in response to the Employer's attempt to make unilateral changes to the current HR 187 form. In the Union's October 29 letter, it specifically rejected the assertion the Employer could unilaterally change the current HR 187 form. In addition, the Union's December 14, 2009 letter of particulars, noted this same objection. The Employer raised no objection to the Union's position in this regard in its December 23, 2009 particulars, nor at any other time prior to the commencement of the hearing on Monday. In any event, the Union says the covering e-mail to the Union's grievance specifically states that "The Union reserves the right to raise before an Arbitrator...any issue identified by the Union or counsel in preparing this case for arbitration."

In response to the Union's argument, the Employer says first this case is most unusual as no evidence was presented from the Union to support its objection to the revised form other than the December 14 letter from the Union outlining particulars of its objection. The Employer maintains it is entitled to prepare its case based on these particulars. The Employer maintains the Union is now taking a contrary position.

The Employer maintains the revised October form is consistent with Article 17.12 and does not go as far as the collective agreement contemplates. The first paragraph of Article 17.12 sets out the general purpose including the obligation to ensure the employee is properly diagnosed, treated and properly recovered. This, the Employer maintains illustrates the breadth of this collective agreement. The Employer points out the sentence before Article 17.12(a) states "to that end, the following provisions have been established" including Article 17.12(a), a permissive provision which says the Employer may require the employee to submit a completed form or another form of medical documentation to substantiate the nature, extent and duration of the illness or injury. This language the Employer maintains does not suggest the HR 187 form is

imbedded in the collective agreement nor does it refer to specific content. Rather, it suggests the opposite. If the document was embedded as the Union argues there would not be the option of another medical document set out in Article 17.12.

Further the Employer points out, under this provision it has the ability to require a second medical opinion under Article 17.12(a) further demonstrating the breadth of this provision. Once arbitral principles that recognize management rights to develop a standard form are injected, the Employer says it is clear the form is far less invasive. It is consistent with the collective agreement and these arbitral principles.

B. Analysis and Decision

I have concluded this issue is appropriately addressed as part of this grievance. The Union raised the issue of unilateral imposition of revisions both inherently by its particularized objections, and in both its October 29 and December 14 correspondence. In doing so, it specifically asserted the Employer had no right to unilaterally alter the HR 187 form. Accordingly, I conclude that issue is appropriately before me.

I turn to consider the Union's argument that there can be no change to the current HR 187 form absent agreement between the parties. In making this argument the Union relies upon the reference to an "Occupational Health Fitness Assessment" in Article 17.12 characterizing this reference as a proper noun denoted by capital letters to the collective agreement. It also relies upon the review and approval of the HR 187 form in July 2001 by the Joint Committee established under LOU #6 and jurisprudence dealing with the incorporation of a document or ancillary agreement by reference into the agreement.

The Union relied first upon *City of Whitehorse, supra*, referencing *Nova*

Scotia Civil Service Commission, supra, which noted words located elsewhere which must be read to give meaning to the primary document, may be considered incorporated by reference into the agreement. The Union says it is not possible to know what the “Occupational Health Fitness Assessment” referred to in Article 17.12(a) means without reviewing the actual current HR 187 form. Accordingly, it is incorporated by reference into the collective agreement.

In my view, this case is unlike *City of Whitehorse* where a number of factors ultimately led to the conclusion wage entitlement conditions of a weekly indemnity benefit were incorporated by reference. As set out in *City of Whitehorse*, the finding the entitlement conditions were incorporated into the collective agreement turned on the specific wording in the collective agreement in conjunction with the evidence presented. That conclusion was based on a number of factors; not simply a reference to the words alone. Specifics of the benefit schedule were set out in the article at issue, contrasting with other provisions setting out a premium cost only for another plan in the collective agreement. In *City of Kelowna, supra*, the arbitrator found a matter arbitrable, noting an extended health plan had been negotiated between the parties over a number of rounds of bargaining and referred to specifically in the collective agreement. Details of the negotiating history was recounted in evidence including proposals on specific amendments to the plan that were either agreed to or not. The arbitrator concluded from this “that there were benefits which the parties knew were agreed to be provided and in the end the only way to modify them was through bargaining” (para. 21). No such bargaining history is present in this case.

In *Camosun College, supra*, the collective agreement provided for a staff development program under Article 30.02(b) of the collective agreement which said The Labour/Management Committee “...shall establish guidelines for administration of the staff development programme...”. The arbitrator emphasized the mandatory nature of “shall” and was fortified in his conclusion by the nature

and function of the “Staff Development Fund”, a sum of money earmarked for union purposes alone.

While Article 17.12 references in this case an “Occupational Health Fitness Assessment”, it does not contain a concomitant provision whereby a Labour/Management Committee “shall establish guidelines for the administration of the ...” as in *Camosun College, supra*. While there is a reference in LOU #6 to a Return to Work Committee establishing amongst a number of things “guiding principles” these go to forming “the foundation of an effective program” and are not as specific as the language contained in *Camosun College, supra*. There is no provision requiring that the Occupational Health Fitness be approved in that manner or by the Union.

Furthermore, unlike in *Camosun College, supra*, there is no evidence concerning the role the Return to Work Committee plays with respect to the HR 187 form other than the comment in *ICBC and OPEIU [2002] BCCA AAA No. 316* at para. 116:

...The joint [Return to Work] committee dealt with operational aspects of the return to work program at the July meeting. The joint committee reviewed and approved a revised HR 187 form...

I find this to be no more than a reference to the review and approval of the HR 187 form by the Committee in the context of the operational aspects of the return to work program. The arbitrator did not indicate this was a requirement under these provisions.

There is no doubt consultation and cooperation is beneficial between the parties in this area. That however does not by inference incorporate the requirement of the Union’s agreement for any changes to the HR 187 form. I find this analysis applicable as well to the Employer’s attempts to change the form unilaterally since 2001 and its agreement not to do so in resolving at least

one previous grievance filed by the Union as a result of that attempt. I do not find support for the Union's position from that action of the Employer.

I note also even though the wording "Occupational Health Fitness Assessment" can be characterized as a proper noun and therefore representing a unique entity, the content of that entity is not fixed or embedded in this collective agreement by this reference alone. Ultimately, I note Article 17.12 is broader, referencing as it does the need to substantiate the "nature, extent and duration of the illness and injury" under Article 17.12(a).

Finally, I note the reference to "or some other form of medical documentation" immediately after the Occupational Health and Fitness Assessment is problematic for the Union's argument. While it notes "Assessment" is referred to in the singular, the existence of this term weakens the Union's argument that the Occupational Health and Fitness Assessment is embedded in the collective agreement and cannot be revised without agreement. The Union says the meaning of the term "some other forms of medical document" is by agreement between the parties beyond the purview of this hearing. I comment only on the existence of the term itself in Article 17.12 and not the meaning. This adds credence to the Employer's argument that Article 17.12(a) is a permissive provision whereby the Employer may require the employee to submit a completed form or another form of medical documentation to substantiate the nature, extent and duration of the illness or injury. It provides the option of another medical document. Indeed, as noted by the Employer under Article 17.12 it may also require a second medical opinion.

Accordingly, I conclude the Employer is not precluded from making changes to the HR 187 form.

I will deal with the permissible nature of those changes as part of my consideration of the second issue in this case.

IV. CONTENT OF THE HR 187 FORM

(A) Argument

Turning to the content of the form, I note the Union says first the fact an individual is employed does not diminish his or her common law right to privacy *vis-à-vis* his or her employer. An employer is not by the mere fact of the employment relationship entitled to obtain any and all information it wishes in respect of an employee. (See *Victoria Times-Colonist v. Victoria Newspaper Guild, Local 223* (12 February 1986), unreported (Hope) cited in *British Columbia Public School Employers' Assn. v. British Columbia Teacher' Federation* (2002, LAC (4th) 224 (*Korbin Award*) at paragraph 49.)

The Union relies upon *Brant Community Healthcare System v. Ontario Nurses' Assn. (Medical Form Grievance)*, [2008] OLAA No. 116 (Harris), cited with approval in *Society of Energy Professionals v. Ontario Power Generation (MAR Grievance)*, [2009] OLAA No. 348 (Etherington) to argue there is no management right to medical information. Rather, the collective agreement defines what information an employer is entitled to. As a result, the Union says the Employer must find specific authority for its requests in the language of the collective agreement, and must establish it is reasonable and legitimate to require individual employees to comply with its requests.

The Union reviews the specifics of Article 17 and says Article 17.12 defines the types of medical information the Employer is permitted to access, and the types it is prohibited from inquiring into. Article 17.12 of the collective agreement recognizes the employee is responsible for "diagnosis, treatment and recovery". The Employer's entitlement is limited to information substantiating the "nature, extent, and duration of the illness or injury".

The fact the collective agreement specifically demarcates “diagnosis, treatment and recovery” as the employee’s responsibility, and not the Employer’s, and the clear provision that the Employer may require information to substantiate the “nature, extent and duration” of an illness or injury, indicates that the parties did not intend for the Employer to access information as to diagnosis, treatment and recovery. The Union submits this interpretation is consistent with the *expression unius est exclusion alterius* principle. (See *Chinook Health Region* (2004), 131 LAC (4th) 69 (Tettensor), para. 76) *Cambrian College of Applied Arts and Technology and OPSEU* (2005), 140 LAC (4th) 153 (Bendel) at p. 159).

As a result of the collective agreement language and type of sick leave at issue, the Union maintains the questions on the October Form must be interpreted narrowly to allow only the most limited disclosure.

The Union argues the Employer must demonstrate there is a problem in the workplace giving rise to a “bona fide” need for the contested questions to be on the form; and if it can demonstrate that, must also show that its insistence on the contested questions is consistent with the collective agreement, reasonable, and that the workplace problem could not be handled in a less intrusive way.

The workplace problem that the Employer seeks to rely on is an allegedly high rate of absenteeism and sick leave costs which the Employer has failed to establish. The Employer has not established that its collection of the following information sought in the contested questions will in any way reduce absenteeism or sick leave costs.

There are myriad ways in which absenteeism and sick leave costs might be reduced which do not intrude on employee privacy, including, for example, reducing workload (and workplace stress); reducing workplace conflict; improving occupational health and safety; instituting wellness initiatives and other similar initiatives.

In response to the Union's objection to the content of the revised HR 187 form, the Employer points out the Union objects to questions which have been used in the current form for many years. There was no evidence called by the Union to explain this reversal, other than the rationale provided in the December 14 particulars by the Union. Accordingly, the Employer points out one is left with the extensive evidence of Hale and Yeung which establishes the rationale for the questions at issue. The Employer is a large employer with multiple locations in British Columbia, a wide variety of positions, many of which are safety sensitive and a separate health and welfare department. That department includes a return to work coordinator, a disability specialist, and injury prevention coordinator. It is a sophisticated department with a wellness focus.

The Employer points out the evidence established information that can help employees avoid going off on sick leave and return to work earlier reduces sick leave. It also increases self-esteem and value to the employee by continuing to work. The Employer points out there is no evidence the employees have difficulty with the current form. Further, the Employer maintains in the context of these medical certificates and multiple locations with many managers, a consistent standard is needed that can be applied to all employees in the administration of sick leave.

The Employer maintains the application of the jurisprudence as part of this task comes down to the *KVP* principles, one of which is the reasonableness of the nature of the questions and inquiries. To appreciate the milieu of the employees applying for benefits, the Employer says questions for short term disability are less intrusive than those for long term disability which supports the Employer's argument of the reasonableness of the inquiries.

The Employer points out employees seeking benefits under the short term

disability leave provisions must provide certain information before being assessed as eligible. The Employer maintains it has a right to do this as part of its management rights in general as interpreted in the jurisprudence. It is also a right acknowledged in this jurisprudence. It is also a right acknowledged in this collective agreement. Indeed, the Employer argues the parties have taken it beyond that and recognize this in the collective agreement by wording which contains significant acknowledgements and recognition of the Employer's right to a broad variety of medical information in its administration of the program. The Employer maintains the form at issue is consistent with the substance of the collective agreement and does not require as much as the Employer could require under these provision.

The Employer argues the foundational case of the *Victoria Times Colonist, supra*, has established that in the context of the benefits of sick leave and sick pay the Employer is entitled to require the employee to provide sufficient information to permit it to satisfy itself that a particular absence was for a *bona fide* sickness or disability. Where the matter is addressed in the collective agreement, the Employer agrees that agreement must be complied with. While the Employer agrees Article 17.12 in the collective agreement does contain some provisions, it is not a procedural requirement in the collective agreement but rather reflects the principle that the Employer has the right to require certain information. Even in the absence of a collective agreement provision an employee is obliged to account for absences from work. The Employer maintains the Union's reliance on *Victoria Times Colonist, supra*, is taken out of context. As set out in the concluding paragraph of that case, the Employer is entitled to require all employees to provide particulars of each absence attributed to illness or disability.

The Employer points out much of the law has been decided in a series of three cases which it maintains is helpful to this issue. In *BCPSEA (SD 36)*, (June 6, 2000) (*Munroe Award*), the arbitrator referred extensively to *Victoria Times*

Colonist, supra, and the *District of Kitimat and Canadian Autoworkers local 2300*, [1998] 74 LAC (4th) 351. In *District of Kitimat, supra* the arbitrator found in administering that plan, the Employer is entitled to be satisfied an employee claiming sick leave payments under the plan is due to one of the disabling conditions defined in the collective agreement. If there are concerns regarding the grievor's medical condition, the Employer may request additional information concerning the disability. Accordingly, the Employer maintains the Union's argument that the right to request information stems from the collective agreement is wrong. Rather, both are relevant. Management's right to promulgate rules under *KVP* as long as it is not inconsistent with the collective agreement has been part of the jurisprudence for many years.

This approach was adopted in *British Columbia School Employers Association, School District No. 5 and School District No. 59 and BCTF (Korbin Award), supra* and *British Columbia Public School Employers Association and BCTF (Taylor Award), supra*. The Employer points out the interests of the employer as reflected in this decision include seeking sufficient information to properly discharge responsibilities in the administration of the sick leave provisions as well as fulfilling the duty of accommodation in making informed and timely decisions in the interest of returning teachers to work as quickly as possible. As noted earlier, the information on the form enables the Employer to determine the appropriateness of the request for leave and the next step to be taken, i.e. accommodation, an early referral to a rehabilitation program; resolution of non-medical barriers and/or request for more information.

A fourth decision dealing with medical certificates the *School District No. 36 and Canadian Union of Public Employees, Local 728 (District Medical Certificate Grievance)*, February 27, 2006, (*Lanyon Award*) confirmed the same principles. (See also *West Coast Energy Inc., supra*; *Air Canada v. International Association of Machinists* [1994] CLAD No 338; *Airline Division of Canadian Union of Public Employees and Air Nova Inc.* (November 9, 1995) (Derby)).

The Employer also referred to *Health Employers Association of British Columbia* [2002] BCLRB D. No. 1122 pointing out the B.C. Labour Relations Board has recognized employers have a legitimate interest to deal with attendance management and reduce the impact of excessive absenteeism. Further, employers have the right and arguably the obligation to take active steps to manage absenteeism as is recognized in Article 17.12.

With respect to the specific questions objected to by the Union (questions 1, 3, 4 and 5 the Employer points out first it is incumbent on the Union to provide a rational explanation as to why there is objection to questions which are in the current form and have been implemented for a decade. The Employer has led evidence about the reason for these provisions which have not been challenged. Question 3 is essentially the same information as in the current form. Question 5 which provides for an objective finding is endorsed by the collective agreement language in Article 17.12(a) to substantiate nature and extent of the injury which encompasses having knowledge of the objective findings. Question 23 concerning the doctor specialty is relevant. If a person does not have that specialty, the Employer will seek to provide that service.

(B) Analysis and Decision Concerning Content of HR 187 Form

(a) General Principles

In addressing the competing views of the jurisprudence set out by the parties I will not review in depth the previous arbitration awards dealing with medical certificates. That has been done extensively in a number of decisions and recently in *School District No. 36 (Surrey) and CUPE, Local 728, supra*, (Lanyon) which provides a useful summary of the current law. In that case the union argued the employer must show that rules concerning employees' medical

records not only must be consistent with the collective agreement, but the collective agreement must both “authorize” and make “mandatory” an employee’s obligation to provide medical information to the Employer. It argued *Victoria Times-Colonist, supra* established a “higher burden” on the Employer when it institutes a rule concerning the disclosure of medical records.

In dealing with this argument and the concept articulated by *KVP, supra*, the arbitrator said at p. 29:

Arbitrator Hope [in *Victoria Times-Colonist*] neither cites nor relies upon the *KVP, supra*, award. Indeed, he does not see the right of an employer to compel medical information as falling within the retained rights concept of the management’s right clause. He states the following:

But in that context it is important to recognize that there is nothing inherent in the employer-employee relationship which vests in an employer a discretionary right to compel employees to compromise their right of privacy through the disclosure of personal medical information. In particular, that is not a discretion which falls within the retained rights concept which vests in an employer those rights coincidental with the management and direction of the enterprise and the work force which have not been bargained away. An employer can only intrude upon the privacy of an employee if it has a legitimate business purpose tied to the employer-employee relationship which justifies the intrusion.

However, Arbitrator Hope does incorporate the first two factors set out in *KVP, supra* – reasonableness and consistency with the collective agreement....

Although the concepts are the same, is there, as the Union argues a higher burden on the Employer in regard to the disclosure of medical records?

He then noted at p. 30:

It is clear that in *KVP, supra*, the issue of employee privacy did not arise. Since the decision in *KVP, supra* the issue of

privacy has undergone significant development, both in the courts and in arbitration. In regard to the issue of privacy, a right established under Section 8 of the *Canadian Charter of Rights and Freedoms*, the Supreme Court of Canada in *R V. Mills* [1999], 3 S.C.R. 668, discussed the paramount importance of this right:

This Court has most often characterized the values engaged by privacy in terms of liberty, or the right to be left alone by the state. For example, in *R. v. Dyment*, [1988] 2 S.C.R. 417, at 427, La Forest J. commented that “privacy is at the heart of liberty in a modern state.” In *R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 50, per Cory J., privacy was characterized as including “[t]he right to be free from intrusion or interference.”

He said at p. 32:

I conclude that within the concept of reasonableness, arbitrators have in fact imposed a higher burden on an employer when it comes to the disclosure of medical records as opposed to the imposition of work rules or in regard to policies such as the garnishment of wages....

He said further at p. 33:

However, I do not conclude that in the *Victoria Times-Colonist, supra*, decision, Arbitrator Hope set out a test that required collective agreement language which both authorized and made mandatory an obligation to produce medical records. I do see the *Victoria Times-Colonist, supra*, decision and subsequent arbitration awards, as setting a standard of reasonableness which is higher than that set out in *KVP, supra*, which did not address the fundamental issue of privacy. I conclude, therefore, that the standard is at least one of whether the documents are *reasonably necessary* as Arbitrator Taylor stated in *British Columbia Teachers' Federation, supra*, (para 24).

I agree that medical privacy is a significant employee right; *Taylor award, supra*, at para. 24. See also *Canadian Office and Professional Employees, Local 378 v. Accenture Business Services of British Columbia (Application for Interim Relief)*, [2008] BCCAAA No. 115 (Taylor) at par. 48, citing with approval

NAV Canada and CATCA (Medical Examinations) (1998), 74 LAC (4th) 163 (Swan); (*Re Hamilton Health Sciences and Ontario Nurses, Association* (2007), 167 LAC (4th) 122 (Surdykowski) at para. 20. Employer inquires into medical information are subject to employee privacy concerns (*British Columbia v. Professional Employees*, [2001] BCCA No. 438 (Burke) at para. 24.

Furthermore, the Employer in this case has specifically recognized its obligation to protect employee privacy in these circumstances: “The Corporation will respect the privacy of employees on sick leave” (Article 17.15).

I conclude the development of privacy rights in the context of this jurisprudence makes clear the disclosure of employee medical record must be on the basis it is “reasonably necessary” in the administration of sick leave benefits and not simply reasonable under traditional *KVP* analysis. The reality is that privacy rights now infuse the developments in this area.

There is much debate between the parties as to the state of the law and whether the Employer has a management right to medical information, or whether the collective agreement defines what information an employer is entitled to. In my view, the answer to that question is contained in a further note, where Arbitrator Lanyon in the above reference award says at p. 34:

First, I conclude that the italicized portion does permit the Employer to require the completion of a medical certificate prior to the granting of sick leave. Therefore, a doctor’s certificate may be required before sick leave/sick pay may be granted. However, it must be remembered that even in the absence of such express language Arbitrator Hope in *Victoria Times-Colonist, supra*, found that such a right was implicit within the management rights clause to administer the sick leave provision of the collective agreement.

In my view the right of an employer to ask for medical information either stems from specific language in the collective agreement or management’s right to administer sick leave provisions of the collective agreement. As set out

above *Victoria Times Colonist, supra* did not require language in the collective agreement to authorize medical information. While the Union relies upon *Brant Community Healthcare System, supra*, and *Ontario Power Generation (MAR Grievance), supra*, to argue the collective agreement defines what information an employer is entitled to and no management right to medical information exists, I note the arbitrator in *Ontario Power* said:

I fully endorse Arbitrator Harris' correction of the reasoning in paragraph 22 of the *West Coast Energy Inc.* decision, which he quotes in the above except, a careful reading of the decisions referred to in that paragraph, and the *Ottawa Citizen* decision in particular, supports the statement made by Arbitrator Harris that arbitrators have generally held that the employer has no right to the medical information unless the collective agreement grants a right and the employee consent to its release. I would simply add that in the absence of collective agreement language clearly requiring the provision of the personal medical information, there are several decisions that have applied the *KVP Co. Ltd.* requirements to determine whether a unilateral employee policy that requires the provision of the personal medical information can be justified as a reasonable necessary company rule to protect important employer business interests. I will return to that issue below when addressing the employer's argument based on *KVP Co. Ltd.*

As expressed by the Employer and recognized by both arbitral and B.C. Labour Relations Board authority employers have a legitimate interest in reducing the impact of excessive absenteeism (see *Re Health Employers Association of B.C., supra*). Policies unilaterally introduced in respect of that however must take into account statutory obligations, be reasonably necessary and consistent with the collective agreement.

It is also important to note as the Union says in interpreting the scope of medical information the Employer is entitled to under the collective agreement, the type of sick leave requested is an important consideration (*Health Employers' Association of British Columbia and British Columbia Nurses' Union, [2006] BCCAAA No. 162 (Hickling)* at par. 42. Matters involving short term absences

attract limited disclosure:

The matter before me relates to the appropriate form of doctor's certificate to be provided to the [employer] on the third day of illness. The [employer] submitted and I agree, that there is a continuum along which an employee's obligation to provide detailed medical information increases with the length of absence and/or complexity of accommodation required upon return to work. The matter before me is at the lowest end of disclosure along that continuum.

Brant Community Healthcare System and ONA, [2008] OLAA No. 116 (Harris) at para. 24)

While I agree with the Employer that this collective agreement recognizes the Employer's right to a variety of medical information in its administration of the sick leave plan, the issue in this case involves a standard form that will be used on a routine basis for all employees for short term illness or injury. Routine requests for medical information are limited to information which reasonably necessary for the administration sick leave benefits (*B.C. Public School Employers' Association (Korbin Award), supra* at par. 70; *British Columbia Public School Employers' Association v. British Columbia Teachers' Federation, [2004] BCCAAA No. 177 (Taylor Award) at para. 24*). The focus is on information necessary to assist management in determining whether the illness or disability is *bona fide* and what impact it will have on the presence and attendance of the employee (*Victoria, supra, cited in B.C. Public School Employers' Association (Korbin Award), supra, at para. 49*).

I have no hesitation in concluding more information is useful to the Employer in administering its sick leave policy and encouraging early return to work and accommodation initiatives. Indeed, it is evident the Employer has initiated wellness initiatives to prevent illness and assist employees who seek to maintain good health. The enhancement of these initiatives and the desire for an earlier return to work does not however override the recognition in the

jurisprudence of the privacy of employee's medical information such that it must be considered "reasonably necessary" to justify the provision of that information under the *KVP* decision or indeed any analysis on this point. The arbitrator in *Brandt* and other cases have similarly commented to this effect; comments with which I agree. (See also *Health Employers' Association of B.C. and BCNU [2006] BCCAAA No. 162 9 (Hickling Award) at para. 43*).

I note also a consideration of the specific language in article 17.12 reveals as the Union argues a demarcation between "diagnosis, treatment and recovery" as the employee responsibility and that the employer may require information to substantiate the "nature, extent and duration" of an illness or injury. Without commenting as to the specifics of this demarcation, I conclude this language in conjunction with the fact this is the standard form applicable to all employees for short-term sick leave, assists with the conclusion the questions to be considered must be interpreted narrowly to allow limited disclosure consistent with the jurisprudence articulated above.

As a result of the general conclusions above, I do not find it necessary to deal with the Union's argument concerning the impact of the *Freedom of Information and Protection of Privacy Act* ("FOIPPA"). I turn to consider the contested questions at issue. At the outset I preface my remarks by noting this is a short term disability form and therefore requirements for medical information are as noted above, at the lowest level. This does not preclude the Employer from requesting more information should that be required in the circumstances.

(b) The Contested Questions

Of the questions on the October Form which are contested by the Union, the Union says questions 4, 5, 6, 10, 11, 12 and 23 are new in the October Form and are not found on the Current HR 187 form.

Question 1: Date illness began or symptoms first appeared: M/D/Y

This question inquires into when an employee's illness began or alternatively when symptoms first appeared. The Union submits this question should be deleted from the Form. It says inquiring into the duration of the illness does not extend to inquiring into the first date the illness began or symptoms first appeared. Rather, this provision must be read in the context of substantiating sick leave benefits. Thus, although this provision refers to duration, this should only be understood as the duration of the illness or injury as it relates to the current absence.

The Employer says the intent of this question is to substantiate the nature, extent and duration of the illness as per Article 17.12(a). It allows the Employer to know when the illness began and is contained in the current HR 187 form which has been implemented for a decade. As a result, the Employer says the onus is on the Union to substantiate its objection. Indeed, it makes the point with respect to the Union's objection to other questions arguing their existence for ten years belies any concern on behalf of the employees and establishes "reasonableness" and the *KVP* analysis.

On this point I note as set out earlier, the development of the jurisprudence has been refined by a deepening acknowledgment of privacy concerns and the jurisprudence which encapsulates that concept. In this context the application of a *KVP* analysis now incorporates a "reasonably necessary" perspective when an employer seeks private medical information. The existence of a question in the previously utilized form while certainly relevant to a consideration of "reasonably necessary" does not insulate it from objection and examination based on the refined jurisprudence acknowledging privacy rights in this context. This conclusion is generally applicable to those questions objected to by the Union which the Employer maintains have previously been in

existence between the parties.

In considering the Union's objection to this question, I note the comment in *Health Employers, (Hickling Award) supra* best expresses these concerns:

...How does one answer the question in the context of a permanent condition; a chronic disease; or a long-term, recurring illness? The union was concerned that the responses might lead to the disclosure of the diagnosis of a disease such as HIV or some other condition from which the employee is unlikely to recover. It recognizes that in the case of a long-term or recurring illness, at some stage the parties might have to address the ability of the employee to carry out her job, whether she was capable of performing it with accommodation, and even the possibility of termination on non-culpable grounds. This was not the point at which such information should come out. It goes beyond what is necessary to assess the genuineness of a routine sick leave claim. The answers could have significant adverse employment consequences and in Ms. Young's submissions, the questions were not, like the anticipated date of return, necessary to planning purposes.

...In short, I am not persuaded that this is an appropriate question to be asking on a routine basis at the initial state.

(at para. 143 and 148)

I agree with the concerns as articulated above in this matter. As noted by the Union routine questions as to the date of the employee's initial visit to his/her physician in standard sick leave cases have been found to unnecessarily "dredge up an employee's past medical history" when the question should be focused on "whether this particular absence was due to sickness or injury" (*Health Employers' Association of BC (Hickling Award), supra*, at para. 86). The problem with these types of questions is that they focus on the illness, which may have been diagnosed years before, rather than the current absence (*Health Employers', supra*, at para. 86). Disclosing the initial start of the illness or injury may unnecessarily divulge an ongoing or permanent condition. The same rationale applies to symptoms.

I find however a revision to the question by adding “for this current absence” directs the answer to the appropriate issue – which is information about the current absence and not long-standing or chronic illness. As set out in *Health Employers’ Association of B.C. v. BCNU, supra*, this is sufficiently clear and addresses the Union’s concern.

Accordingly I direct a revision of Question 1 as set out above.

Question 3: Date of first visit for this absence: M/D/Y

This question inquires into the date the employee first visited their physician. The Union submits this question should be omitted, or in the alternative, that a more appropriate question to ask is “Date of Examination for current absence” for similar reasons as expressed above.

The Union maintains this question is virtually indistinguishable from the questions proposed and ultimately prohibited in the *Korbin Award, supra*, and *Health Employers, supra*. In both cases, the arbitrators rejected the notion that it was reasonably necessary for an employer to know the date the employee first visited their physician. In the *Korbin Award, supra*, the question was: “He/she was first seen by me regarding this illness/injury on” (para. 18). Arbitrator Korbin held that such a routine inquiry into the first or initial visit constituted an unreasonable intrusion into the privacy of the employee. Subsequently, *Health Employers, supra*, held that the request for the “date of initial examination for current absence” (para. 81) must be replaced with “date of examination for current absence or application for sick leave” (para. 86).

The Employer reiterates the objections set out above. I find for the same reasons this question is too broad and must be modified.

I agree with the Union's concerns for the reasons set out above. The date of the first visit may relate to a chronic illness and is not reasonably necessary for the administration of short-term disability. I conclude as *Health Employers'* mandates, the more appropriate question is "Date of examination for current absence".

Question 4: Dates of subsequent visits

The Union submits seeking the dates of all visits to the employee's physician for all conditions unlimited by any time frame provides the Employer with far more medical information than is necessary for or directly related to the Employer's administration of sick leave.

This question requires the physician of an employee absent for four days to identify the dates of all subsequent visits even after the employee has returned to work, and regardless of what those visits were for and whether they will necessitate absence from work. The Union points out the Employer has already requested the anticipated date of return, estimated duration of reduced capacity and scheduled follow ups in Questions 15, 21 and 22. There is therefore no reasonable explanation as to why the Employer requires this information to administer the sick leave program, or to determine the *bona fides* of the illness or injury.

As outlined above with respect to the reasoning in *Health Employer, supra*, at para. 86, allowing the Employer to request this type of information may unnecessarily identify cases of long term or recurring illnesses or disabilities, that are unrelated to the administration of a given sick leave. An employee absent with the flu may also suffer from an ongoing disability that does not cause an absence but requires frequent physician visits.

The rationale provided by the Employer was that if it was aware of

subsequent visits it could ensure if it had further medical requests, the employee could provide these the physician at the time thereby eliminating further visits for this purpose. This would ensure the earlier provision of medical information which could assist with the return to work. In particular, it would enable to the Employer to look into and order devices that may assist the employee's return to work.

In my view while laudable objectives, they fall into the comments noted in *Brandt, supra*, that this kind of information:

..... I have no doubt that it provides much greater administrative convenience and efficiency for the employer to have as much personal medical information as possible as early as possible for the purpose of administering several other employer obligations (i.e. its duty to accommodate, gathering information on the effectiveness or need for Wellness programs etc.), the employer did not demonstrate that this information was reasonably necessary for the administration of sick leave benefits, and in particular determining entitlement to sick leave benefits for all claimants after 5 days of absence. In this respect I note that the union did not deny that additional personal medical information may be necessary in individual cases, particularly in cases of extended absences and in cases where there are reasonable grounds for suspicion of abuse of sick leave. But the arbitral cases are very consistent in holding that enhancement of administrative convenience for other purposes related to dealing with absenteeism management, a safe return to work, or human rights obligations, are not sufficient to demonstrate reasonable necessity for the collection of diagnosis information at the first stage of demonstrating sick leave entitlement (see for example, *Hamilton Health Sciences, supra*, and *Ottawa Citizen, supra*).

I note also this question may disclose illnesses or injuries that may require continued physician visits, and which may be unrelated to the administration of sick leave (*Health Employers, supra*, at para. 143). Accordingly, I conclude this question is not reasonably necessary for the administration of the sick leave plan.

The parties may however wish to consider an optional version of this

question to facilitate the convenience of both parties in gathering the medical information required.

Question 5: Without disclosing the diagnosis, please describe the objective findings that substantiate the nature of the illness or injury: (If more than one illness or injury, please describe each)

The Union submits this question should be omitted in its entirety as the Employer is not entitled to this information. As “objective findings” will require disclosure of perceptible changes in the body or functions which indicate disease or injury on an objective (rather than subjective) basis, as well as test results, this term meets the definition of symptom (*Hamilton, supra*, at para. 30). The October Form already contains questions regarding an employee’s functional limitations, therefore, this question can only be required in order to identify symptoms and test results. This question inappropriately attempt to elicit symptom and diagnosis related medical information.

The Union says although the Employer has attempted to legitimize this question by prefacing it with a request that physicians not disclose diagnosis, the fact is that a physician could not provide a reasonable response without providing diagnosis related information. Where “objective findings” are produced, (i.e. low white blood cell count; or brain tumour), the disclosure of diagnosis is virtually inevitable, as it is these objective findings on which diagnoses are based. This roundabout way of seeking to obtain an employee’s diagnosis is impermissible under the case law which prohibits employers from requiring that employees identify diagnoses in order to obtain sick leave: (*Korbin Award, supra*, at para. 58; *Taylor Award, supra*, at para. 44; *Victoria, supra*, at p. 20; and *Society of Energy Profs, supra*, at para. 97). Furthermore, the collective agreement does not in any way, permit the Employer to inquire into the objective findings substantiating an employee’s illnesses or injuries.

The Employer says objective findings are necessary in order to

substantiate the nature and extent of injury under Article 17.12(a). This it says includes having knowledge of the objective findings rather than self-reported subjective symptoms.. The Employer can compare the objective and subjective findings reported to substantiate the nature and extent of injury. It maintains the evidence is clear about the value and purpose of this with respect to the administration of the sick leave plan.

I do not find the disclosure of this information to relate to, nor is it necessary for the administration of the sick leave plan in question. Rather in my view this does to a great extent lead into areas that may disclose a diagnosis. Indeed, to a certain extent that is the effect of what the Employer says is the utility of the information, i.e., comparing the subjective and the objective findings to substantiate the nature and extent of injury. That leads very likely into a diagnosis. As noted in *Hamilton Heath Services, supra* "nature of the illness" suggests a general statement of a person's illness or injury in plain language without any technical medical details, including diagnosis or symptoms. It noted as an example:

... a statement that a person has a cardiac or abdominal condition or that she has undergone surgery in that respect records the essence of the situation without revealing a diagnosis" [at para 30]

Further, as the Union points out the revised October form contains questions regarding an employee's functional limitations which certainly can be utilized in ascertaining the nature and particularly the extent of the injury. Accordingly this question is not reasonably necessary as part of a first line of inquiry in a short term illness. If any real doubt persists as to the nature and extent of injury, the Employer is not precluded from follow-up requests for further medical information.

Question 6: Without disclosing the diagnosis, please describe the extent of your patient's illness or injury (if more than one illness, please describe the extent of each)

The parties have agreed to rephrase the question as: "Without disclosing the diagnosis, please describe the extent of your patient's illness or injury as it relates to their current absence," (if more than one illness or injury related to the current absence, please describe the extent of each).

Question 10: Has your patient been prescribed a course of treatment for the medical condition(s) rendering him/her unable to attend work? And

Question 11: If no course of treatment has been prescribed, has a course of treatment been recommended for this person to follow related to the medical condition rendering him/her unable to attend work? And

Question 12: If a course of treatment has been prescribed or recommended, has your patient followed the prescribed or recommended course of treatment? yes/no

The Union submits these questions regarding treatment disclose private medical information that the Employer is prohibited by the collective agreement from routinely requesting and which the Employer has no legitimate basis for requiring for the purposes of substantiating short term sick leave. The Union further submits these questions should be excluded from the Form, or ought to be rephrased to ask simply, "Has a course of treatment been prescribed or recommended for your patient for the illness/injury that has caused the absence?" and "Is your patient following the treatment recommendations? yes/no".

The Union points out in terms of determining the context in which questions 10-12 are posed, other questions on the form include whether any surgery, investigative procedure or other therapy has been scheduled for the future; along with the dates of such procedures; whether the patient has been referred to a specialist; whether the condition is improving; when the employee will be able to return to work; whether complete recovery is expected; follow-up appointment dates; and whether the physician has relevant additional comments

(questions 8, 9, 13, 14, 15, 20, 22 and 23). These questions provide the Employer with ample information regarding the prognosis for the employee's return to work. It maintains in this context, the Employer's insistence on the inclusion of questions 10-12 is unjustified.

The Union says although arbitrators have previously accepted some questions regarding treatment, those cases involved extended or partial sick leave and a lack of specific contractual language (*Korbin Award, supra*, at para. 59; *Taylor Award, supra*, at para. 58-59; and *Surrey School District No. 36 v. Canadian Union of Public Employees, Local 728* [2006] BCCAAA No. 47 (*Lanyon Award*) at para. 118).

Even if acceptable in cases involving significant absences and no specific contractual language (*Korbin Award, supra*, at para. 59; *Taylor Award, supra*, at para. 45), it is the Union's position in the alternative, that the acceptance of these questions as phrased in those cases is not determinative in the present case which only involves a short term absence and an explicit restriction in the collective agreement. Thus, these questions ought to be omitted, or alternatively, re-phrased to limit the scope of these questions in order to best reflect the minor absences at issue, the other information available to the Employer and the restrictive contractual language. This is in line with the resistance arbitrators have expressed even in cases involving broader disclosure of medical information in allowing questions that elicit information about the nature of the treatment (*Korbin Award, supra*, at para. 59; *Taylor Award, supra*, at para. 45).

Questions 10-11 may elicit whether the treatment itself, rather than the illness or injury, is causing the absence. There is no legitimate purpose in inquiring into whether it is the treatment rather than the illness or injury that is causing the absence.

The Union says Question 12 raises another concern, in that it inappropriately focuses on whether the employee has followed treatment, rather than on whether the employee is following treatment (i.e. Is your patient following the treatment recommended?) This causes unnecessary confusion if a treatment has been prescribed or recommended but a patient has not yet had an opportunity to follow it. Since this question is required for such short durations of absence, such as after the third day or in absences of even less duration where there are frequent absences, in many cases it is unreasonable to expect that an employee has had the time to obtain or undergo treatment. The question is inappropriate in this context.

The Employer says there is very little difference between the parties on some of the changes suggested by the Union. The questions do not seek details of the plan and have been accepted in the Trilogy of medical cases and subsequently in *School District No. 36 (Surrey), supra*.

I have carefully considered this and note first the jurisprudence has approved those questions in the context of decisions which deal with extended medical leaves, as reflected in *School District No. 36 (Surrey), supra* and *BCPSEA, School District Nos. 5 and 59, supra*. While the latter also included a consideration of partial medical leave the Arbitrator noted in that case:

...requests for partial and extended leave present unique circumstances which require the Employer to consider a broader spectre of medical information than may be required for standard cases of sick leave.

(at p. 24)

The *BCPSEA (Taylor Award), supra* similarly dealt with extended and partial medical leave in similar circumstances to the above. Indeed, in *BCPSEA (Korbin Award) supra*, the arbitrator specifically noted with respect to partial medical leave:

The evidence in these cases reveals that determinations in the case of partial medical leaves have been difficult to make because of insufficient supporting medical information...

(at p. 27)

I note also the sanctioning of these questions in the latest award referenced above, *School District No 36 (Surrey), (Lanyon Award) supra* was in the context of extended medical leave and similar previous industry awards.

As argued by the Union in the case at hand, the Employer seeks to obtain this information in all cases upon the third day of absence, for standard sick leave which merits “the lowest end of disclosure along that continuum” (*Brant Community, supra*, at para. 24). In *Brant Community, supra*, the arbitrator found an employer’s routine request for “current treatment” information at the first stage of absence was inappropriate:

It may be that at some point in an absence it would be appropriate for the Hospital to be informed of the treatment modality. I cannot envision circumstances when it would be appropriate for an employer to engage in a discussion of what treatment by a licensed physician is appropriate as a condition of the continuation of benefits...Treatment modalities are a matter for the doctor and the patient...In any event, it would be unreasonable for such concerns to arise on the third day of absence...It is not objectively reasonable to require that information at first instance.

(*Brant Community, supra*, at para. 29)

This passage in my view captures the applicable concerns about whether questions about treatment are appropriate at this initial stage of inquiry. While the questions at issue do not inquire into the nature of the treatment, I conclude they are not reasonably necessary in the context of the initial inquiry for a short term illness.

I note further questions preceding that related to scheduled surgery and questions as to whether a complete recovery is expected are sufficient for the purposes intended. The Employer can make further inquiries in specific situations as they arise. While I agree with the Employer as noted earlier that the collective agreement recognizes the right of the Employer to a variety of medical information, as part of a first line of inquiry for a short-term illness, I find these questions overreaching in this context.

Finally, I note the collective agreement has differentiated in article 17.12 between "diagnosis treatment and recovery" and "nature extent and duration of illness". While this has not driven my conclusion on this question, I note this conclusion is supported by that demarcation, certainly as part of the line of first inquiry. Ultimately, I conclude in the context of a standard form for short-term illness these questions overreach and are not reasonably necessary as part of the standard form.

Question 23: Speciality of Physician

The Union points out the parties have agreed that the purpose of having the physician's phone number, fax number and e-mail address is limited to identification of the physician, and to expedite employee requests for the form to be sent directly to their physician. It is understood that the Employer will not initiate direct contact with an employee's physician absent obtaining proper and appropriate consent (consent which the Employer is not entitled to require). This is in line with the clear arbitral authority that an employer cannot require an employee to authorize the employer to contact the employee's physician directly (*Korbin Award, supra*, at para. 51; *Taylor Award, supra*, at para. 54; and *Health Employers, supra*, at para. 149-157).

As a result, the Union submits the only outstanding issue in regards to this

question is the requirement for the disclosure of the physician's speciality. It is the Union's position that the Employer has no legitimate basis in requiring such information, especially considering the presence of other questions in the October Form, and this part only serves as an unreasonable intrusion into the employee's privacy.

Arbitral law is clear that although questions may be asked as to whether a person has been referred to a medical specialist, it must go no further to ensure the nature of the treatment and diagnosis is not inadvertently disclosed. In the *Taylor Award, supra*, Arbitrator Taylor permitted a question that asked whether an employee was referred to a specialist on the basis that it was merely inquiring into a step of the treatment process, in that it followed "from the proceeding inquiries about the course of treatment," and did not elicit a diagnosis as a result of its yes or no format (para. 79).

The Union says the same cannot be said in the present case. Question 23 does not occur in the context of the treatment questions. The exact question allowed by the *Taylor Award, supra*, is already asked as Question 13 under the treatment section, and is not disputed by the Union. Question 23 also is not in a yes or no format, but clearly asks for the physician to articulate his/her specialty. This is exactly the type of question that does elicit a diagnosis. As outlined above, questions disclosing an employee's diagnosis, as opposed to the nature of the illness or injury, are consistently held to be inappropriate and not reasonably necessary for the purpose of administering sick leave.

The Employer maintains this question is necessary for the administration of the collective agreement. It points out objective medical findings may indicate a specialist is needed. If the employee does not have one, the Employer can assist by providing or facilitating the provision of the services of a specialist. In addition, the Employer noted that information is in the public domain so it is superfluous not to have it on the form.

I have concluded Questions 23 is not necessary to determine the nature, extent and duration of the illness and to determine if further inquiries are necessary. As noted by the Union, Question 13 which is not disputed by the Union asks if the patient has been referred to a medical specialist. Medical information that discloses technical medical detail about an employee's illness or injury such as their physician's specialty falls under the kind of information related to diagnoses as opposed to the nature of the illness or injury. The example as noted by the Union where a physician filled out their specialty as "oncology" immediately discloses the diagnosis of an employee's illness.

Accordingly I conclude this question is not reasonably necessary for the administration of short-term leave and should be deleted.

In summary, I conclude:

- 1) The Employer is not precluded from making alterations to the HR 187 – Short Term Disability form.
- 2) In doing so, the Employer changes must be consistent with the collective agreement and "reasonably necessary" for the administration of a short term sick leave plan (see *School District No. 36 (Lanyon Award) supra*).
- 3) With respect to the specific questions at issue:
 - a) Questions 1 and 3 are modified to reference "date of current absence".
 - b) Question 4 and Question 5 describing date of subsequent visits and objective findings are not reasonably necessary for the administration of the short term sick leave plan and are precluded from the standard form.

c) Questions 10, 11 and 12 concerning treatment are not reasonably necessary for the administration of the short term sick leave plan and are precluded from the standard form.

d) Question 23 requesting the specialty of the physician is not reasonably necessary for the administration of the short term sick leave plan and is precluded from the standard form.

I retain jurisdiction as necessary with respect to the clarification and implementation of this award.

Dated at Vancouver, British Columbia this 31st day of January, 2010.

“Emily Burke”

EMILY M. BURKE
ARBITRATOR