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IN THE MATTER OF AN ARBITRATION

BETWEEN: PUBLIC SERVICE ALLIANCE OF CANADA (The Union)

AND:

CAMP HILL HOSPITAL (The Employer)



RE: John Garland
Verbal Reprimand - Employee
Absence Report Form Allegedly
Falsified



BEFORE: Innis Christie (Arbitrator)

AT: Halifax, Nova Scotia

Hearing Date: January 28, 1986

For the Union:

Catharine Rogers, Grievance and Adjudication Officer
Mike Tines, Regional Representative
Bill Hicken, President, Local 5, Camp Hill Hospital

For the Employer:

D. A. McKillop, Labour Relations Officer -
Nova Scotia Association of
Health Organizations
H. Meens, Director of Personnel - Camp Hill Hospital

DATE OF DECISION: June 16, 1986

Employee grievance alleging breach of the Collective Agreement between the parties bearing expiry date 31 March, 1986, in that the Employer placed a record of a verbal reprimand on the grievor's file without just cause. On behalf of the grievor the Union requested that the verbal reprimand be removed from his record.

At the outset counsel agreed that I am properly seized of this matter and that I should remain seized, with power to reconvene the hearing should any disagreement arise in the implementation of this award.

## A W A R D

At all relevant times the grievor was a steamfitter employed in maintenance and repair duties at Camp Hill Hospital, working from 8:00 a.m. to 4:00 p.m. five days a week. On Monday, January 28, 1985, he called in sick at about 7:55 a.m. William A. Fisher, the power plant superintendent and the grievor's immediate superior, took the call, and treated it as a normal incident of an employee reporting in sick.

That same day, on his way home from work at about 4:45 p.m. Mr. Fisher saw the grievor driving through the intersection of Windsor Street and Lady Hammond and Kempt Roads, apparently headed for the Bedford Highway, with his wife in the car with him. The next day the grievor reported for his regular shift. After consulting with the Director of Personnel, in the afternoon Mr. Fisher asked the grievor to fill in the Employer's "Employee Absence Report Form", which takes the following form, with the grievor's answers filled in:

PERSONNEL DEPARTMENT

# EMPLOYEE ABSENCE REPORT FORM

E 4

APPENDIX A TO POLICY & PROCEDURE 103.7

COMPLETE THIS FORM IN ITS ENTIRETY IN ORDER TO SUPPORT YOUR CLAIM FOR SICK LEAVE.

1. STATE DAY (OR DATES) THAT YOU WERE SICK. Monday, January 28/85

2. BRIEFLY DESCRIBE YOUR ILLNESS cold, sore throat + diarrhea.

3. DID YOUR SICKNESS ON THAT DAY (OR DAYS)
   A) CONFINE YOU TO YOUR BED? No
   B) CONFINE YOU TO YOUR HOME? yes.

4. DID YOU LEAVE YOUR HOME AND/OR ENGAGE IN ANY OUTSIDE ACTIVITIES ON THAT DAY (OR DAYS)? No

   IF SO, EXPLAIN YOUR REASON AND THE ACTIVITY.

5. DID YOU HAVE A DOCTOR ATTEND YOU? YES___ NO✓ DID YOU VISIT A DOCTOR? YES___ NO✓ IF YES, GIVE DOCTOR'S NAME AND ADDRESS AND HAVE THE DOCTOR COMPLETE THE ATTENDING PHYSICIANS STATEMENT (FORM #8440286)

6. GIVE ANY OTHER FACTS THAT YOU FEEL WILL DETERMINE THE VALIDITY OF YOUR CLAIM

I AFFIRM THAT MY ANSWERS AND STATEMENTS ABOVE ARE TRUE AND MAY BE RELIED UPON IN DETERMINING THE VALIDITY OF MY CLAIM FOR SICK LEAVE

DATE January 30/85 EMPLOYEE'S SIGNATURE John Doe

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The grievor did not immediately fill in the form but asked for time to complete it, to which Mr. Fisher agreed. The grievor then consulted the Shop Steward and, after he was advised that the Employer was entitled to ask him to fill in the form, he filled it in and left it on Mr. Fisher's desk the next day, January 30.

Because in Mr. Fisher's opinion the grievor's answers to Questions 3 and 4 on the "Employee Absence Report Form" were inconsistent with the fact that he had seen the grievor driving with his wife on the day when he reported sick, Mr. Fisher scheduled a disciplinary hearing on Friday, February 1. The hearing was attended by the Director of Personnel and Plant Services, Mr. Roberts, as well as by two Union representatives, Mr. Cirtwell, Plant Engineer and the Shop Steward, and Mr. R. King, the Chief Shop Steward in the Stores Department. Mr. Fisher kept careful notes of the interview which were introduced in evidence in typed form. Neither his cross-examination nor the grievor's evidence cast any doubt on the accuracy of Mr. Fisher's record of the disciplinary hearing.

The hearing began at 10:05 a.m. and lasted about 35 minutes. The important point is that initially the grievor denied that Mr. Fisher had seen him driving with his wife after work on Monday, going to the point of calling Mr. Fisher a liar. Only after some minutes of argument did the grievor admit that he drove his wife to work that day, as was his habit, and also picked her up after work, so that it was perfectly conceivable that Mr. Fisher had seen him at 4:45. Mr. Garland then said in the disciplinary hearing, as he testified at the hearing before me, that although he had been sick all night he had gotten up to drive his wife to work and his young son to school and was back in time to make his sick call

to Mr. Fisher on the morning of the 28th. The grievor further testified that he then stayed in the house until after 4:00 p.m. when he went to pick his wife up from work and his son from the babysitter. Three days after his sick day, in preparation for the disciplinary hearing, the grievor obtained a medical certificate by calling his family doctor.

There is no dispute about the facts which I have just set out and no question was raised with respect to the Employer's right to require that the "Employee Absence Report Form" be filled in. The only issue of fact was posed by the grievor's testimony that he did not understand Questions 3(B) and 4 on the "Employee Absence Report Form" to relate to any time other than the hours between 8:00 a.m. and 4:00 p.m., which were his working hours on that day. His testimony was that because of this understanding he did not intentionally falsify his answer to either question.

The Issues:

1) The first issue is a factual one. Did the grievor intentionally falsify the "Employee Absence Report Form"?

2) Counsel for the Union submitted that regardless of why the grievor answered Questions 3(B) and 4 the way he did, the Employer was not entitled to enquire about the grievor's activities other than during his scheduled working hours and therefore that he was entitled to confine his answers to those hours.

3) If I conclude that the grievor did falsify a legitimate question was the verbal reprimand an appropriate form of discipline?

Decision:

1) Issues of credibility are always difficult to deal with in an arbitration such as this one. It may be that in the time that has passed since late January of 1985 the grievor has convinced himself that he was not attempting to mislead the Employer in the way he filled in the form; that he really did think it related only to his working hours. However, I do not think that is what a plain reading of Questions 3(B) and 4 on the "Employee Absence Report Form" suggest. The questions concern a "day", not a shift or working hours. In addition to that, the much more telling aspect of the evidence against the grievor's version of what happened is the fact that at the disciplinary hearing he quite obviously started out by denying and trying to hide the fact that he had been driving his wife and child around on the 28th. In my opinion that behaviour is not consistent with the reading of the form that he now claims to have made. It is consistent, rather, with an attempt to cover up a wrong-doing. It was not, of itself, a wrong-doing to be out driving on a day that he alleged he was sick, but it was a wrong-doing to say that he had not left his home when in fact he had. On the evidence, therefore, I am forced to the conclusion that the grievor did falsify the "Employee Absence Report Form", and did not at the time understand it in the way that he now says he did.

2) As I have already pointed out, the Union did not dispute the Employer's entitlement to require that the "Employee Absence Report Form" be filled out. Counsel for the Union did, however, submit that if, and insofar as Questions 3(B) and 4 enquired about hours outside the grievor's working day, from 8:00 a.m. to 4:00 p.m., it

was unreasonable in the sense that it unduly invaded his privacy. She put before me three cases in which arbitrators have considered unilaterally imposed employee rules which were claimed to unduly impinge upon the grievor's privacy and therefore not to be legitimate bases for discipline. In Canadian Fram Ltd. (1973), 3 L.A.C. (2d) 94 arbitrator Hinnegan concluded that the company had been "premature in imposing discipline for an employee in not disclosing business and financial interests of members of his family before it is established that his duties have brought him into direct or indirect relationship with an organization in which a member of his family has some connection". (at p.97) On the other hand in Corporation of the City of North York (1984), 17 L.A.C. (3d) 31 arbitrator Solomatenko reached the opposite conclusion with respect to the grievor's refusal to submit "full odometer readings" in support of mileage claims.

The best elaboration of the issues touched upon here is to be found in Bell Canada (1984), 16 L.A.C. (3d) 396 (P.C. Picher, Chairman). Unlike the two cases already mentioned, the Bell award does deal with claims for sick pay benefits. Moreover, I agree with counsel for the Union that what it has to say about the privacy issue is very relevant to that concern here. That case dealt, in fact, with the company's policy of requiring every employee who missed work due to an off-duty accident to attend a special investigation meeting, at which the circumstances of the accident were fully explored and the employee admonished or advised about how to avoid accidents in everyday living. The majority concluded that the employer there had often gone too far,

but recognized that there might well be circumstances, in the context of possible non-disciplinary discharge for example, where a full investigation would be quite justified. The relevant generalizations in the Board's award, at p. 408, are:

> Arbitral jurisprudence uniformly supports the view that except where there is a legitimate, overriding business interest at stake for the employer, employees are entitled to be free of their employer's reach when they leave work and go home. The business interest being raised by the company in this matter, to justify requiring employees to attend the investigation meetings and discuss the causes of accidents that have occurred in their off-duty hours, is that the accidents adversely affect the company both through the resulting absence of its employees and through its contractual requirement to pay sick-leave benefits.
>
> The board is not prepared to conclude that the mere occurrence of an off-duty accident resulting in an employee's absence and entitlement to sickness benefits under the collective agreement automatically justifies the company delving into an employee's private affairs and seeking answers to questions surrounding the cause of an off-duty accident. Given the imperfections of the human condition, it must be accepted that from time to time any and all employees may be subjected to illnesses and accidents. Sick-leave benefits have been negotiated into the collective agreement. They constitute a limited right that has been won for employees at the negotiating table. The employees' utilization of these benefits cannot, in and of itself, justify the company's search into the employees' private affairs.
>
> At all times, though, an employer has a proper business interest in ascertaining the legitimacy of each and every absence of an employee. The employer always has a right, in other words, to make the inquiries necessary to establish that a person's absence is the result of a medical problem or some other acceptable cause. We note that in the instant matter the legitimacy of the absences resulting from the off-duty accidents is not in question. Furthermore, the employer has a valid interest in responding to the frequency

> of an employee's absenteeism. Without a bona fide business reason, however, an employer does not have a legitimate interest, standing on its own, for inquiring into an employee's personal or non-working life.

Within that framework, the question before me is whether the Employer here had "a proper business interest" in asking "Did your sickness on that day...confine you to your home?" and "Did you leave your home and/or engage in any outside activities on that day...?", if day had its normal meaning and was not confined to purely working hours. Put another way, the question is whether this information was "pertinent and germane" to the grievor's sick leave request. In the Nova Scotia Association of Health Organizations (Dartmouth General Hospital) and C.B.R.T. and G.W.U., Local 606 (1980-unreported) the majority of a Board of Arbitration chaired by Bruce Outhouse approved that phrase as it appears in Pacific Press Limited (1977), 15 L.A.C. (2d) 113 (Thompson, Arbitrator) at p. 116:

> There is no doubt that the collective agreement permits the employer to require a certificate from a physician as a condition of paying sick leave. Furthermore, it is inherent in the orderly administration of a normal sick leave plan that the employer may require claimants to supply pertinent and germane information relating to sick leave requests. Forms similar to ex. 3 are commonly used in large organizations to ensure that employees receive the pay to which they are entitled, while protecting the employer against abuses of the right to sick leave.

I have concluded that the short answer to this long question is that the Employer here did have "a proper business interest" in whether the grievor was confined to his home on January 28 and whether he left his home and/or engaged in any outside activities

on that day. In my view that was "pertinent and germane information" to the Employer's administration of its sick pay arrangements. I think the very facts of this case support that conclusion.

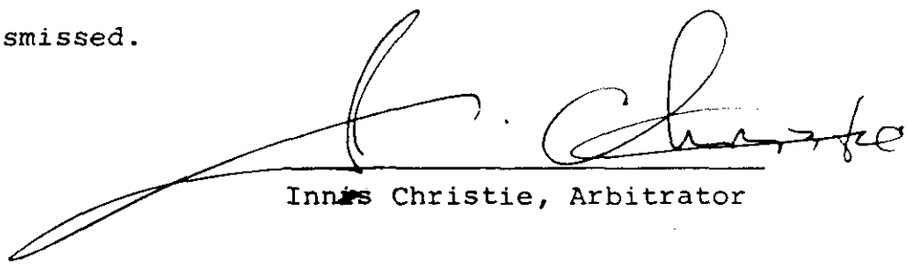
Unlike the Bell case, here when Mr. Fisher gave the grievor the form to fill out the legitimacy of the grievor's absence was in question. Where that is so, it seems to me that an employer has a legitimate interest in whether an employee claims to have been housebound by his or her illness. If the employee claims that such was the case, proof that he or she was elsewhere will raise real doubts, although it will not be conclusive, about the legitimacy of the claim. On the other hand, if the employee admits to not having been housebound the employer may want to investigate the seriousness of the illness further. None of this is to say that an employee, like the grievor here, could not leave his or her home and at the same time in fact have a legitimate claim for sick leave. It is simply to say that in my opinion the facts revealed or denied in response to such an inquiry are "pertinent and germane" to the sick leave claim.

For these reasons I do not accept the submission of counsel for the Union that Questions 3B and 4 on the "Employee Absence Report Form" cannot be read as inquiring beyond the grievor's regular working hours from 8:00 a.m. to 4:00 p.m.

As I have already said, I think the reasonable meaning of the words "that day" on this form is the more extended or normal one, and I am satisfied on the evidence that the more extended or normal reading was the one the grievor himself actually gave

to those words when he filled in the form, falsely.

3) Any verbal reprimand, even one noted on an employee's file, is a minimal form of discipline. Having found that the grievor intentionally falsified the "Employee Absence Report Form", in his responses to questions legitimately asked by the Employer, I have no difficulty whatever in concluding that the verbal reprimand imposed by the Employer was justified, in accordance with Article 39.03 of the Collective Agreement. The grievance is therefore dismissed.



Innis Christie, Arbitrator