

IN THE MATTER OF AN ARBITRATION

BETWEEN:

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS'
ASSOCIATION - SCHOOL DISTRICT NO. 36
(SURREY)

("Employer")

AND:

BRITISH COLUMBIA TEACHERS' FEDERATION
(SURREY TEACHERS' ASSOCIATION)

("Union")

RE:

JOHN WYNDHAM (PARTIAL MEDICAL LEAVE)
PROVINCIAL MATTERS GRIEVANCE

COUNSEL:

FOR THE EMPLOYER: Peter A. Csiszar

FOR THE UNION: John Rogers

DATE OF HEARING: March 6, April 27,
June 7 and 13, 2006
Vancouver, BC

COLIN TAYLOR, Q.C.
Arbitrator

I

[1] This arbitration arises out of a grievance filed by the Union on November 24, 2004 on behalf of Mr. John Wyndham, a long-time elementary school teacher. The nature of the grievance is best described by the Union's grievance letter which in material part reads as follows:

The Association is filing a grievance on behalf of John Wyndham, a teacher at A.J. McLellan Elementary School. The Board denied Mr. Wyndham's application for a partial medical leave. We are grieving the fact that Mr. Wyndham's application was denied despite the fact that he provided to the Board a medical certificate as required by the Collective Agreement. Additionally, the Association is grieving the fact that the Board's Medical Certificate, as well as the questions the Board asks as additional information, are contrary to the Collective Agreement.

When Mr. Wyndham applied for a partial medical leave his doctor completed the Board's Medical Certificate. It is our position that the information Mr. Wyndham supplied was sufficient and that his application should have been approved. The Board requested further information in the form of a list of questions. When Mr. Wyndham declined to submit the questions to his doctor the Board halted the application process. It is the Association's position that the questions are not allowed and that the Board is not entitled to the information it would have obtained had the questions been answered.

The question of what information an employer may request in a medical certificate has been answered by three arbitrators, Munroe in 2000, Korbin in 2002 and Taylor in 2004. The Board's Medical Certificate violates the Collective Agreement, and the decisions of the three aforementioned arbitrators, by asking for information to which the employer is not entitled. Similarly, the Board's request for additional information asks questions that are not allowed. Examples include questions about medication, courses of treatment and diagnoses.

The grievance is based upon, but not limited to, Articles 4 and 39 of the Collective Agreement as well as the above-referenced arbitration awards.

At the commencement of the arbitration, the Union withdrew its challenge to the form of the Medical Certificate.

[2] Article 39.90 of the collective agreement provides for partial medical leaves:

39.90 PARTIAL MEDICAL LEAVE

39.91 *Where a full-time employee produces a medical certificate stating that the employee, while medically unable to work full-time, is capable of working part-time, the employee's assignment may be reduced or the employee may be reassigned to another position where it is practical to do so. In either case, the change will be to a percentage of full-time that the employee is capable of working.*

- 39.92 Where a change in assignment or reassignment is made in accordance with Article 39.91, such change or reassignment will be for a fixed period of not less than one (1) month and will be effective as of the beginning of a term or semester.
- 39.93 An employee on partial medical leave will earn sick leave credits in accordance with Article 39.322.
- 39.94 An employee on partial medical leave will go on full sick leave, with or without pay depending on the extent of the employee's accumulated sick leave credits, if the employee proves incapable of meeting the requirement of the reduced or changed assignment.
- 39.95 Before an employee exhausts sick leave credits under this Article, the Board will advise the employee to contact the BCTF Salary Indemnity Plan administrator.

[3] In an arbitration between these same parties, Arbitrator Munroe said:

... in the circumstances contemplated by Article 39.90, a full-time teacher may be allowed for a period of time to work part time, and to use accumulated sick leave credits (until exhausted) so as to remain on full pay. I think it can be said that provisions like Article 39.90 are not commonly found in collective agreements. However, it has been a feature of these parties' collective agreement for some years, and can be found in other teacher collective agreements as well: British Columbia Public

School Employers' Association (School District No. 36) and British Columbia Teachers' Federation (Surrey), 2000, unreported, at p.5 (hereafter referred to as the "Munroe award".

[4] Pursuant to Article 39.90, the Grievor applied for a partial medical leave commencing September 2004. The application requested a 40% reduction in his full-time teaching schedule, that is to say, a reduction from 5 days per week to 3 days per week. In support of that application, the Grievor submitted a "District Medical Certificate" (the "Certificate"), a form prescribed by the Employer as the threshold requirement for its consideration of applications for partial leaves. As has been noted, the Union does not challenge the form of the Certificate.

[5] The Certificate did not provide a date for return to full duty. It provided for a commencement of leave in September 2004 and a "review" in December 2004. The document was completed by Dr. Peter T. Kyne, a psychiatrist, who certified that the Grievor required the partial leave due to "chronic depression, anxiety disorder and diabetes mellitus".

[6] The Employer sent the Certificate to its "medical consultant", Ms. Linda Hemmaway, at Standard Life Assurance Company for review. On September 20, 2004, Ms. Hemmaway wrote, in part, as follows:

Our medical consultant and myself have reviewed the above member's request for partial medical leave. Here are our findings:

1. Is this a bone[sic]-fide illness-injury from contractual/occupational health standards (not prevention)?

On the medical certificate dated August 31st, 2004 Dr. Kyne has indicated that Mr. Wyndham was requesting 60% reduction in work time due to chronic depression, anxiety and diabetes. Dr. Kyne indicated that all of these conditions are chronic since March 27th, 2002 and the only symptoms listed are lack of energy and anxiety. Dr. Kyne indicated that Mr. Wyndham is receiving medications and psychotherapy.

There is not enough information provided to make a determination if this is a bone[sic]-fide illness or if this is a chronic condition for which Mr. Wyndham is requesting leave to prevent any exacerbation of symptoms.

We will require the following additional supportive information:

- Name of medications, dosages and length of time used.
- Details regarding the psychotherapy - the frequency, who is providing the therapy and the length of time.
- Details of Mr. Wyndham's current symptoms.
- What are the current restrictions and limitations.

[7] The Employer notified the Grievor that the questions put by Ms. Hemmaway would have to be answered in order "for advice to be given to the School Board

... Should you wish to proceed with your requested leave, the completed questions may either be returned confidentially ... or they may be returned directly to Standard Life."

[8] The Grievor objected to providing the additional information requested and questioned the authority of the Employer to demand information additional to that provided by the Certificate.

[9] By letter dated October 21, 2004, the Employer told the Grievor that its advice was "... that there is not sufficient information provided to make a determination if this is a bone[sic]-fide illness or if this is a chronic condition and the leave is requested to prevent any exacerbation of symptoms ... In order to make a determination of your request we will require the previously sent questions to be answered by your doctor and sent to Standard Life." The Employer went on to ask the Grievor if he intended to proceed with the partial leave application. If not, then he was expected to continue with his full-time teaching assignment; however the Employer would approve a personal leave. A personal leave would be without pay.

[10] The Grievor again objected to the Employer's request for the additional medical information taking the position that he had complied with Article 39.90 and the Employer had no warrant to seek more information.

[11] On November 8, 2004, Dr. Kyne wrote to Standard Life Assurance Company stating that he had been instructed not to provide information on the first three of the four questions put to the Grievor. He was authorized to respond to the fourth question dealing with current restrictions and limitations. He said:

Essentially I am in agreement that this man for medical reasons is not able to manage a full teaching load at this time, and the 40% reduction in workload was decided after discussion between myself and the patient as a reasonable balance under the circumstances.

[12] Standard Life said that since the additional information it had requested had not been provided "... a determination if this is a bone{sic}-fide illness or if this is a chronic condition for which Mr. Wyndham is requesting leave to prevent any exacerbation of symptoms can not be determined."

[13] On November 16, 2004, the Employer received a second Certificate from the Grievor requesting a partial medical leave (40%) from September 1, 2004 to "not yet known". This Certificate was completed by Dr. Gerry Scott, a family physician, and is dated October 28, 2004. It refers to the Grievor being under the care of "consultant psychiatrist Dr. Peter Kyne ..." and that the Grievor had been referred to an internal medicine/endocrinologist. Dr. Scott wrote that the date

for return to the Grievor's teaching assignment was "not yet known".

[14] The second Certificate answered all of the questions asked on the form except number 6 which asks "What medical follow-ups, if any, are occurring related to this illness/injury". The answer provided was "See attached". Whatever that referred to was not attached to the Certificate.

[15] On November 26, 2004, the Employer notified the Grievor that it was unable to approve his leave as requested:

We are advised that given the absence of new or additional medical information requested, determination cannot be made if this is a bona-fide illness or if this is a chronic condition.

[16] On December 7, 2005, the Grievor again applied for a 40% partial medical leave from January 1, 2006 to "indefinite". A Certificate was completed by Dr. Kyne describing the Grievor's illnesses as "chronic anxiety, depression, diabetes mellitus". He said it was "unknown" when the Grievor would be able to return to his full teaching assignment. At this time, the Employer had retained a different medical consultant, namely Ms. Elayne Preston, an Occupational Health and Safety Consultant. Ms. Preston is a Registered Nurse

with an Occupational Health and Safety Diploma. She is not a medical doctor.

[17] Ms. Preston was provided with the three Certificates which have been described and told that the leave request for the period commencing September 1, 2004 had been denied "based on medical information received ... Employee did not supply additional medical information we requested."

[18] Ms. Preston submitted her report to the Employer on January 4, 2006. In part, it reads as follows:

Recommendations

The medical certificate dated Dec. 7/05 does not provide sufficient information to support ongoing disability requiring a permanent work schedule accommodation. It appears to have been completed by a family physician and not a specialist, although I note specialists have been involved in his care in the past.

Further information is required to assess the nature of the disability resulting from the varied medical conditions and how it precludes this employee from ever returning to his regular work schedule. I would suggest that a report from his psychiatrist and/or internist would be appropriate - depending upon which condition is producing the current disability.

Ms. Preston then posited six questions as "information that would be useful."

[19] By letter dated January 6, 2006, the Employer notified the Grievor that it was unable to make a determination on his leave request without additional information. The additional information requested was that set out by Ms. Preston in her report to the Employer:

- 1 Please describe the diagnosis using DSM-IV full axial format
Axis I
Axis II
Axis III
Axis IV
Axis V - GAF score
- 2 Please describe current symptoms impacting the ability to work full time
- 3 Functional limitations and how they preclude the employee from working full time
- 4 How would a permanent part-time schedule accommodate this disability
- 5 Prognosis - Are the functional limitations expected to resolve over time? If so, within what timeframe?
- 6 Any further comments to assist us in understanding the need for accommodation of a permanent disability.

The questions were not answered and this grievance came on for hearing on March 6, 2006.

II

[20] The Union's position is that Article 39.90 required the Grievor to produce a Certificate in order to obtain a partial medical leave. The Certificate required was completed by Dr. Kyne and therefore the provisions of the collective agreement have been met. The only exception to this proposition, contended the Union, lies in the Employer establishing a reasonable basis to claim that the Grievor's request for a partial medical leave, supported by the Certificate and the collective agreement, was not for a *bona fide* sickness or disability.

[21] The Union argued that the Employer had failed to establish that the Grievor's illness was not *bona fide* and therefore had no right to demand further medical information. It follows, said the Union, that the Grievor, a full-time employee, submitted a Certificate stating that he was medically unable to work full-time but capable of working part-time and thereby met the requirements of Article 39.91 entitling him to a partial medical leave. In the absence of the Employer establishing that the illness was not *bona fide*, that, asserted the Union, ended the matter.

[22] The Employer disagreed with the underlying premise of the manner in which the Union framed the issue. The Employer's position is that the Grievor failed to

provide sufficient information for it to determine his entitlement to the partial leave. The Employer did not challenge the *bona fides* of the Grievor's illnesses. It did not claim that the information provided in the Certificates was inaccurate. It did challenge the sufficiency of the information provided. The Employer asserted that the Grievor's failure to provide the additional information reasonably requested put the Employer in the position of being unable to properly evaluate the application for a partial medical leave and it was therefore unable to process the application.

III

[23] I turn next to a review of the relevant authorities. Both parties placed considerable emphasis on the Munroe award, *supra*, which dealt expressly with the terms of Article 39.90 and partial medical leaves. The Employer submitted that its actions were justified by that decision.

[24] Arbitrator Munroe considered a policy grievance against the introduction of a medical certificate. Teachers were required to submit the medical certificate in support of applications for partial leave.

[25] At p.7, Arbitrator Munroe commented upon the nature of partial medical leaves:

For the most part, applications for partial medical leaves by teachers who are now working full time are made some months in advance for the period for which the partial leave is sought; and in practically all such cases the application for partial medical leave is for the entirety of the school year next following. Thus, one commonly finds such applications being made prospectively in May or June of a school year for the full school year commencing the following September (one such prospective application was made in March).

[26] It must be kept in mind that the issue before me arises from an individual grievance whereas Arbitrator Munroe was dealing with a policy grievance:

It must be understood that the grievance before me is a policy grievance on which the parties have joined issue in general principle. I do not have any individual grievances before me alleging that the School Board's denial of a particular application for a partial medical leave was in violation of the collective agreement, and seeking individual redress. (p.11)

[27] The Munroe award went on to find that the School Board could not compel teachers to authorize disclosure of information by their doctors to the School Board's physician. The collective agreement did not, however, preclude the use of a standard form medical certificate

to be used for all applications for partial medical leave. Arbitrator Munroe set out the permissible content of such a certificate which formed the basis of the Certificate completed by the Grievor in the present case:

... I do not understand the union to object to the School Board prescribing a standard form of "medical certificate" for purposes of Article 39.90. In any event, I am of the view that, in and of itself, the prescribing by the School Board of a standard form "medical certificate", to be used for all applications for partial medical leaves under Article 39.90, is not offensive to the collective agreement and is entirely reasonable. (p.30)

[28] In the present case, the Employer asserts the right to go beyond the Certificate and seek additional medical information on the basis that the information provided by the Certificate was insufficient to determine entitlement to a partial medical leave. The Employer relied upon the following passage from the Munroe award:

I trust it is clear that the submission by a teacher of a proper "medical certificate" does not preclude the School Board from further investigation where circumstances warrant. Whether further investigation is warranted, and the proper nature and degree of such investigation, including the degree of medical intrusion, can only be determined case by case. As I have indicated more than once, this arbitration proceeding arises from a policy grievance on which the parties have

joined issue as earlier described; it does not arise from any disputes about the application of the collective agreement in individual circumstances. The content of this award must be understood in that light. (pp.31-32)

[29] Dealing with that statement by Mr. Munroe, the Union took the following position:

That is, Arbitrator Munroe concluded that in certain circumstances, the School Board might be entitled to engage in further investigation beyond the completion of the medical certificate. At page 30 of the award, Arbitrator Munroe described those circumstances as follows:

It is important, I think, to draw the distinction drawn by arbitrator McLaren in City of Windsor, as quoted by Mr. Hope in Victoria Times-Colonist, between the general right of an employer to investigate the bona fides of individually-suspicious cases, on the one hand, and the system of filing certificates to claim sick-leave pay from an accumulated sick-leave account, on the other hand.

[30] Based upon that reading of the Munroe award, the Union submitted that the Employer was not justified in seeking additional medical information from the Grievor because, said the Union, "the right to additional information is based on 'the general right of an employer to investigate the bona fides of individually-suspicious cases'." Here, the Employer does not say

that the Grievor's illnesses were not real or genuine or in any way misrepresented.

[31] In my view, the Union's interpretation of the Munroe award, as well as the other authorities on which it relied, is incorrect. First, the quotation in the preceding paragraph 29 from p.30 of Mr. Munroe's award omits a critical concluding sentence. The full passage reads:

It is important, I think, to draw the distinction drawn by arbitrator McLaren in City of Windsor, as quoted by Mr. Hope in Victoria Times-Colonist, between the general right of an employer to investigate the bona fides of individually-suspicious cases, on the one hand, and the system of filing certificates to claim sick-leave pay from an accumulated sick-leave account, on the other hand. But as regards the latter, the employer is entitled to the filing of a "medical certificate" which is reasonable in relation to the request that the certificate is intended to support and the benefit sought.
(emphasis added)

[32] Mr. Munroe's clear statement at pp.31-32, *supra* para.28, that the Employer is not precluded from further investigation where circumstances warrant, is not limited to the "bona fides of individually-suspicious cases". The Employer's submission is that the Grievor did not file a Certificate which was reasonable in relation to the request for a partial

medical leave and that it was therefore justified in seeking additional information. The fact that the Employer does not impugn the *bona fides* of the illnesses described in the Certificate does not of itself preclude the Employer from making further inquiries.

[33] Mr. Munroe observed at p.12 of his award that the union did not take issue with the proposition that there may be cases which require information beyond the Certificate:

The union does not deny that cases may arise where a medical certificate submitted in support of an application for a partial medical leave may be inadequate; accordingly, where the School Board may be entitled on reasonable grounds to require additional or supplementary medical certification. Indeed, the union acknowledges the possibility of individual cases arising where the probing of an application for a partial medical leave might properly be quite intrusive.

There is no suggestion in that passage of a limitation to the "*bona fides* of individually-suspicious cases."

[34] In *British Columbia Teachers' Federation and British Columbia Public School Employers' Association*, 2004, unreported (Taylor) which concerned the permissible content of medical certificates, the following passage is found at para.98:

It bears repeating that employers have other means of requiring employees to account for their absences where the information in hand is, reasonably speaking, insufficient. They may particularize their concerns to the employee and request that his or her physician respond or they may ask the physician to complete a supplementary report.

That statement, in my view, is consistent with the Munroe award and the other relevant authorities which do not limit such inquiries to the "bona fides of individually-suspicious cases."

[35] Arbitrator Munroe makes the following relevant observations at pp.29-30:

... I do agree with the proposition implicit in the School Board's argument that a "medical certificate" satisfactory for one purpose may not be adequate for another purpose; that is to say, that where a "medical certificate" is required by the collective agreement to be submitted by an employee as part of the initial application for a particular benefit, the content of the "medical certificate" must be reasonable in the sense of being commensurate with the nature and extent of the benefit which it is intended to support.

.....

I refer as well to the fact that many applications for partial medical leaves are made well in advance of the period for which leave is sought, and for full school years. Especially in that circumstance, the School Board is entitled to expect that a "medical

certificate" filed in support of the application contains enough information for an informed decision to be made: both as to the leave itself and the duration thereof.

[36] In this case, the Grievor sought a 40% medical leave for an indefinite period. The Employer contends that the Certificate filed in support of that application did not contain enough information for an informed decision to be made or, in the words of Arbitrator Munroe, was not "commensurate with the nature and extent of the benefit which it is intended to support." If the Employer is correct in that assertion, then the Munroe decision, on which both parties relied, clearly supports its right to make further inquiries.

[37] The Union also placed reliance on the oft-quoted decision of Arbitrator Hope in *Victoria Times-Colonist and Victoria Newspaper Guild, Local 223, 1985*, unreported. There, the collective agreement provided that "Sick leave with full pay for up to 40 weeks shall be granted to all employees for the duration of each illness or incapacity ...". The dispute arose out of the union's instruction to its members to refuse to fill in sick leave forms required by the employer.

[38] At p.8 of the award, Arbitrator Hope noted the distinction between an employer soliciting medical information "and an employer compelling employees to deliver such information by imposing discipline on

employees who take sick leave without providing it or by making it a condition precedent to the receipt of sick pay." Arbitrator Hope went on to say:

There is no question that an employer has a continuing right to enquire into any absence from work and that an employee has a continuing obligation to account for any absence, including an absence alleged to be due to sickness. (p.8)

[39] Mr. Hope then referred to *Re Corporation of the City of Windsor and Ontario Nurses' Association*, (1985), 19 L.A.C. (3d) 1 (McLaren) with respect to the obligation of an employee to account for absences due to illness quite apart from any questions of sick pay. At p.9, he referred to the following passage from *City of Windsor*:

In such circumstances [where abuse is suspected] an employer has a right to attempt to determine if an employee is not bona fide ill when a claim for absence on that grounds is made. That is a separate and independent right of an employer from a system of filing certificates to claim sick-leave pay from an accumulative sick-leave account.

[40] As I observed earlier in this award, the distinction drawn by Arbitrator McLaren in *City of Windsor* was noted in the Munroe award at p.30 but with the observation that:

... as regards the latter [the system of filing certificates to claim sick pay from an accumulative sick leave account] the employer is entitled to the filing of a "medical certificate" which is reasonable in relation to the request that the certificate is intended to support and the benefit sought.

[41] The quotation from *City of Windsor* must be read in its proper context. The employer introduced a visiting nurse program for all full-time employees who called in sick. It had previously been used only in circumstances where the employer suspected abuse of sick leave. The union objected to the universal implementation of the visiting nurse program arguing that the collective agreement was a comprehensive code with respect to sick pay and the monitoring of abuses and it did not provide for the visiting nurse program. The collective agreement required the submission of a sick leave certificate with a right in the employer to require evidence of sickness. Arbitrator McLaren defined the issue as being whether the collective agreement provided a complete code for the validation of sick leave claims.

[42] At p.7, Arbitrator McLaren disagreed with the notion of a "complete code" because that:

... confuses the process of validating sick leave pay from an accumulated account with the process of determining if an employee is bona fide ill when the employee claims to be absent for that reason. In the former case

all that occurs is denial of sick-leave pay either because of lack of credits or lack of legitimate sickness; in the latter situation the likely result is discipline for cause.

[43] Arbitrator McLaren said that by setting up a system for validation of sick leave pay, the employer cannot be taken to have foregone its management rights to determine the legitimacy of absences for purposes of discipline. Thus, on the theory of a comprehensive code, an exception would have to be carved out:

The fallacy of the logic is the genuine suspect of abuse. In such circumstances an employer has a right to attempt to determine if an employee is not bona fide ill when a claim for absence on that ground is made. That is a separate and independent right of an employer from a system of filing certificates to claim sick leave pay from an accumulative sick-leave account. (p.7)

The arbitrator went on to find that there was no comprehensive code relating to the validation of sick leave claims but, even if there were, "that is a separate and distinct issue from determining the legitimacy of employees' absences for the reasons given by an employee."

[44] The *City of Windsor* case does not stand for the proposition that an employer may not reasonably inquire into a request for sick leave except to investigate the *bona fides* of individually-suspicious cases. It stands

for the proposition that collective agreements which contain comprehensive codes relating to the validation of sick leave claims do not preclude the employer from determining the legitimacy of employees' absences for the reasons given by the employee.

[45] The Munroe award recognizes the importance of the distinction drawn in *City of Windsor* between the general right of an employer to investigate the *bona fides* of individually-suspicious cases, on the one hand, and the system of filing certificates to claim sick-leave pay from an accumulated sick leave account, on the other hand. But Mr. Munroe does not say that with respect to the latter, the employer is precluded from making reasonable inquiry. He says the employer "is entitled" to the filing of a medical certificate which is reasonable in relation to the requested leave and the benefit sought.

[46] Nor can *Victoria Times-Colonist* be read as supporting the restriction which the Union here seeks to impose upon the Employer's asserted right of inquiry. Beginning at p.10, Arbitrator Hope said:

... I repeat that an employer has a continuing right to require an employee to account for any absence, including an absence which purports to be an exercise of a right to take sick leave. In addition an employer has a right to refuse to pay sick benefits to employees unless they are able to establish

their entitlement to the benefits within the context of the collective agreement. But the question of whether an employer can request information of an employee is quite separate and apart from that of the entitlement of the employer to compel an employee to provide information as a condition of receiving sick pay or upon threat of discipline.

.....

It is necessary to stress again that an employer is perfectly entitled to respond to particular circumstances with a demand for further information where the question raised is whether the employee has given adequate explanation to support an absence due to illness or to obtain sick leave benefits ... I repeat that an employee is under a continuing obligation to account for all absences from work ... That obligation clearly extends to absences attributed to sickness. In *St. Jean De Brebeuf Hospital and CUPE, Local 1101 (1977) 16 L.A.C. (2d)* (Swan), Prof. Swan said as follows on p.203:

There is no doubt that, in a case such as this, an obligation rests on the grievor to make out a case to support her statement that she was ill and thus entitled to the sick pay benefits under the collective agreement. This is so not only because of the general rule that a party alleging a fact may be put to the proof of it, but also because the medical state of an individual is a matter clearly within the sole knowledge of that individual except in the rare case where external signs of illness identifiable even to the lay person may be observed.

Nor is there any doubt that an employer is not required to accept an explanation as

adequate. An employer has a right to compel sufficient information to permit it to determine if the absence is bona fide. The employer can, in appropriate circumstances, reject a medical certificate as inadequate. In *Ford Motor Co. of Canada Ltd. and UAW, Local 1520* (1975) 8 L.A.C. (2d) 149 (Palmer), the arbitrator said as follows on p.152:

Having considered the above arguments it is my view that this grievance must be dismissed. In coming to this conclusion, I would first note that I cannot accept the bare position of the union that certification by a doctor is sufficient reason for an employee to absent himself from work. Clearly such decisions can be in error, either as a result of error on the part of the doctor, the patient or both.

To those comments I can add that a medical certificate may be deficient in that it does not contain sufficient information to establish that the employee was unable to work. In that circumstance, an employer has a wide range of responses available to it to challenge particular absences. In the exercise of that right of enquiry, an employer can withhold payment of sick pay until it has been satisfied that the circumstances justify the payment of sick pay. The Employer in this dispute has all of those rights, despite the fact that they are not set out in express language in the collective agreement.

But in exercising those rights, the Employer, on the arbitral authorities, must act reasonably. I repeat that the Employer has no inherent management right to compel an employee to provide confidential and personal medical information. If that right is to be found, it must be found in the language of

the collective agreement or in the particular circumstances to which the Employer responds ... Here there is no procedure set out in the collective agreement but, as stated, there is a requirement on an employee to account for an absence said to be due to illness and to provide reasonable information in support of that explanation. Whether the employer can compel the delivery of further information to the point of initiating disciplinary penalties or withholding sick pay will be a function of the particular facts. (pp.10-18)

[47] At issue in *District of Kitimat*, (1998), 74 L.A.C. (4th) 351 (Kinzie) was the employer's requirement that employees sign a "Patient's Authorization" for release by their physicians of "any information [the employer] request[s] of this disability" as a condition of receiving sick leave. The collective agreement permitted the employer to request proof to its satisfaction of inability to work.

[48] At p.365 of the award, Arbitrator Kinzie said the employer was "entitled to be satisfied that an employee claiming sick leave payments under the plan is absent from work due to one of the disabling conditions ... i.e. that his claim is legitimate. This right has been recognized by arbitrators ..." Mr. Kinzie went on to say:

... an employer may not be satisfied with an employee's accounting for his absence in a particular case. In those circumstances, it may require that more information be provided. Again, arbitrators have recognized

an employer's right to request such additional information where it has reasonable grounds for rejecting the accounting provided. See *Victoria Times-Colonist, supra*, where the arbitrator observed that:

It is necessary to stress again that an employer is perfectly entitled to respond to particular circumstances with a demand for further information where the question raised is whether the employee has given adequate explanation to support an absence due to illness or to obtain sick leave benefits. (at 14)

[49] Arbitrator Kinzie concluded that the employee authorization contravened the collective agreement since it permitted direct contact with the physician:

The Employer has other means of requiring an employee to account further for his absence where it is not satisfied with the information supplied to that point in time. It may request that a further Physician's Report be completed by the employee's physician. It may particularize its concerns in a letter to the employee and ask him to have his physician address them in a reply letter. (p.370)

[50] The Union's submission is that entitlement to a partial medical leave is governed by Article 39.90 and that the Grievor met those requirements by producing a Certificate. That is the "complete code" argument advanced and rejected in *City of Windsor* and in *British Columbia School District No. 9 (Castlegar)* and

Castlegar District Teachers' Assn. (Dudley Grievance), 1996, unreported, (Sanderson), (application for review dismissed BCLRB B303/97). The production of a Certificate is the threshold requirement for a teacher to be considered for eligibility for a partial medical leave: Munroe award, p.6. The Employer asserts that the Certificate is inadequate for the purposes for which it is intended and for the benefit sought. The authorities make it clear that, subject always to the provisions of the collective agreement, an employer is entitled to request additional information where the issue is whether the employee has provided sufficient information to support application for the benefit. In such circumstances, the question will be whether the employer's request is reasonable.

[51] In *School District No. 9 (Castlegar)*, *supra*, Arbitrator Sanderson considered a grievance alleging wrongful denial of a partial medical leave. The collective agreement provided that the employer could request a medical certificate "if deemed necessary to validate any sick leave." The union argued that the parties had thereby agreed "what the ground rules are when an employer deems it necessary to ask for proof of illness." (para.14) The grievor, it was argued, had complied with the proof required by the collective agreement by the production of a medical certificate and that ended the matter. The employer's position was that the information provided was inadequate and the

grievor was required to supply sufficient evidence to justify the leave request.

[52] Relying upon *Victoria Times-Colonist*, Arbitrator Sanderson was not persuaded:

... that the union's contention that an employer cannot go behind a medical certificate and make further inquiries is correct, even where language such as this appears in the relevant collective agreement. To my mind, that contention is unduly narrow, in view of the myriad of medical circumstances that may be involved in the treatment of persons under the collective agreement. In addition that position is not supported by a majority of the arbitral authorities ... It is neither necessary nor appropriate to attempt to provide a definitive category of items that must be in a document to qualify it as an adequate medical certificate under this collective agreement. In each case, as Arbitrator Hope has said, that must be decided on the particular merits of the individual matter. In addition the document itself must also be considered and evaluated in the context of other events and circumstances that have a bearing on the central question, which is whether the particular person is entitled to sick leave under the agreement. (paras.26-27)

[53] In dismissing the grievance and finding that the employer was justified in seeking more information from the grievor and his doctor, Arbitrator Sanderson said "The key is that the benefit is paid only for absences that properly qualify."

[54] Arbitrator Sanderson's decision was appealed to the Labour Relations Board (B303/97) where the union argued "that the collective agreement requires a medical certificate, one was provided, and that ends the matter." (para.11) The Board dismissed the union's application for review.

[55] In *Capital Health Authority and Alberta Union of Provincial Employees, Local 054*, (2005), C.L.A.S.J., 7847 (Smith), the collective agreement provided that an employee "may be required to provide acceptable proof of illness for absences in excess of two (2) days ...". A doctor's note was deemed insufficient by the employer which sought additional information. At p.10, the Board said:

A doctor's note is not conclusive nor does it establish that an employee is not able to work. The Employer can deny sick pay unless and until sufficient information is provided to establish the existence of an illness which prevents attendance at work. A medical certificate that simply contains a statement that the employee was absent for medical reasons and says nothing more to address the critical issue of why the employee is unable to work is not sufficient.

[56] I do not agree, and the authorities do not support, the Union's submission that the requirements of Article 39.90 are necessarily fulfilled by the production of a Certificate. Article 39.90 contemplates a Certificate which provides sufficient information for

the Employer to determine the entitlement to a partial medical leave. The Employer can, in appropriate circumstances, reject a Certificate as inadequate. The position of the Employer is that the information it sought of the Grievor was, in all of the circumstances, reasonable and necessary for it to determine the Grievor's entitlement to the leave sought and I turn next to that issue.

IV

[57] The first Certificate is dated August 31, 2004. It contains eight questions, answers for all of which were provided by Dr. Peter T. Kyne, a psychiatrist. The Employer did not suggest that the Certificate as completed by Dr. Kyne was inaccurate. It did not and does not question that the Grievor's illnesses as described in the Certificate were real and genuine. The Employer does say that the Certificate on its face does not reasonably establish that the Grievor was medically unable to work full time and was therefore entitled to a partial medical leave. It is the contractual entitlement to the benefit which the Employer questioned, not the *bona fides* of the illnesses which the Certificate described.

[58] What was the basis for the Employer's conclusion that the Certificate was insufficient to support the

benefit claimed, a reduction from full-time teaching to three days per week for an indefinite period (the Certificate provided for reassessment in December 2004 making the initial leave period a duration of four months)? For this, the Employer relied upon the advice of its external medical consultant, Standard Life Assurance Company.

[59] The Union was highly critical of the Employer's use of a non-medical external consultant. There are circumstances in which that criticism might well be justified. It depends upon the advice sought. If, for example, advice is sought from a non-medical consultant with respect to medical diagnosis and treatment, the advice provided is likely to be open to challenge. If, on the other hand, advice is sought as to the sufficiency of information to establish entitlement to a benefit, then a medically trained person might not be the most appropriate person to provide that advice. It will depend upon the circumstances of each case. Here, the Employer did not challenge the *bona fides* of the diagnosis and treatment.

[60] On September 20, 2004, Ms. Linda Hemmaway, "Consultant, Disability Management Group Claims, Western Canada" for Standard Life Assurance Company, responded to the Employer's request for advice on the Certificate completed by Dr. Kyne. Ms. Hemmaway began her reply with "Our medical consultant and myself have reviewed [the Grievor's] request for partial medical

leave". There is no evidence as to whether "our medical consultant" refers to a physician. There is evidence to suggest that Ms. Hemmaway is not a physician. Ms. Hemmaway then provides "our findings", *supra* para.6.

[61] Ms. Hemmaway concluded that the Certificate was inadequate to support the request for a partial medical leave. Why?

There is not enough information provided to make a determination if this is a bone[sic]-fide illness or if this is a chronic condition for which Mr. Wyndham is requesting leave to prevent any exacerbation of symptoms.

[62] Ms. Hemmaway then goes on to list required "additional supportive information", presumably to confirm whether or not the Grievor was suffering from a *bona fide* illness or a chronic condition for which he was requesting leave to prevent exacerbation of symptoms.

[63] The Employer accepted the advice of its external medical consultant and advised the Grievor that it was unable to determine his leave request without the additional information set out by Ms. Hemmaway. Later, the Employer confirmed its acceptance of Ms. Hemmaway's conclusion that the additional information was required "to make a determination if this is a *bone[sic]-fide* illness or if this is a chronic condition and the leave

is requested to prevent any exacerbation of symptoms."
(exhibit 2(7))

[64] The Grievor took exception to the request for additional information and instructed Dr. Kyne to respond to only one of the four questions. Dr. Kyne advised Ms. Hemmaway that the Grievor "for medical reasons is not able to manage a full teaching load at this time ..." and he considered a 40% reduction in workload to be "a reasonable balance under the circumstances."

[65] Following receipt of that additional information from Dr. Kyne, Ms. Hemmaway provided the following advice to the Employer:

... as there is no new or additional medical evidence provided, a determination if this is a bone[sic]-fide illness or if this is a chronic condition for which Mr. Wyndham is requesting leave to prevent any exacerbation of symptoms can not be determined.

[66] The Employer accepted its external consultant's advice and notified the Grievor that it was unable to approve the requested leave:

We are advised that given the absence of new or additional medical information requested, determination cannot be made if this is a bona-fide illness or if this is a chronic condition.

[67] The additional information requested of the Grievor was deemed necessary by the Employer (on the advice of its external consultant) because it could not determine if he had a *bona fide* illness or a chronic condition. That is not only unreasonable; it makes no sense. First, there was no reasonable basis to conclude that the Grievor was not suffering from a *bona fide* illness for which he was receiving regular treatment from a psychiatrist (in addition to the other illnesses for which he was under the treatment of his family doctor). Second, the Employer in these proceedings has not challenged the *bona fides* of the Grievor's illnesses or questioned the accuracy of the information provided by the Certificate. The Employer's case is that the information provided was insufficient for it to determine if the Grievor was entitled to the benefit provided by the collective agreement. Yet, the alleged deficiency on which the Employer relied to deny the Grievor's claim was because it could not determine if the Grievor suffered from a *bona fide* illness or a chronic condition. Third, there is a serious doubt as to whether Ms. Hemmaway has the qualifications to challenge the diagnosis of a qualified psychiatrist. It follows that there is no reasonable basis to suggest the Grievor did not have a *bona fide* illness.

[68] Sense can not be made of the attempt to distinguish between a *bona fide* illness and a chronic condition. A chronic disease is one which is lingering

or lasting: *Concise Oxford Dictionary*, 6th ed. Is a chronic disease something other than a *bona fide* illness? Was the Employer saying that if it was one but not the other, a partial medical leave would be justified? Would a chronic disease for which a psychiatrist recommended a reduced workload be, in and of itself, a sufficient basis to deny a medical leave?

[69] Then there are the questions asked by way of additional information. Why does the Employer need to know medications, dosages and length of time used? The Certificate told the Employer that the Grievor was seeing Dr. Kyne every three weeks. The second Certificate completed by Dr. Scott and received by the Employer on November 16, 2004, provided additional information with respect to the illness suffered (Q.2); course of treatment (Q.3); reasons for being unable to work a full assignment (Q.4). The second Certificate must be seen as supplemental to the first Certificate since it was received by the Employer before it made the decision to deny the Grievor's claim. The second Certificate does not stand as a fresh application for partial medical leave since it was incomplete (Q.6).

[70] The sole basis for denying the leave was and continued to be based on the conclusion of Ms. Hemmaway that she was unable to determine if the Grievor suffered from a *bona fide* illness or a chronic condition for which Mr. Wyndham was requesting leave to prevent any exacerbation of the symptoms. There may

well have been a reasonable basis to seek additional medical information but that was not it. I therefore conclude that the basis on which the Employer denied the Grievor's application for partial medical leave arising out of the Certificate dated August 31, 2004 was not reasonable.

V

[71] The Grievor again sought partial medical leave on December 8, 2005 when Dr. Kyne completed a Certificate requesting leave beginning January 1, 2006 for an "indefinite" period. As to the date for the Grievor to return to his full assignment, Dr. Kyne stated "unknown". In this case, the Certificate was referred to Ms. Elayne Preston for review. Ms. Preston is an Occupational Health and Safety Consultant. She is not a medical doctor. Ms. Preston is a Registered Nurse and has an Occupational Health and Safety Diploma.

[72] It is convenient to again set out Ms. Preston's recommendations:

Recommendations:

The medical certificate dated Dec 7/05 does not provide sufficient information to support ongoing disability requiring a permanent work schedule accommodation. It appears to have been completed by a family physician and not a specialist, although I note specialists have been involved in his care in the past.

Further information is required to assess the nature of the disability resulting from the varied medical conditions and how it precludes this employee from ever returning to his regular work schedule. I would suggest that a report from his psychiatrist and/or internist would be appropriate - depending upon which condition is producing the current disability.

Information that would be useful:

- 1. Please provide diagnosis using DSM-IV full axial format:
Axis I -
Axis II -
Axis III -
Axis IV -
Axis V - GAF score*
- 2. Symptoms impacting the ability to work full time*
- 3. Functional limitations and how they preclude the employee from working full time*
- 4. How would a permanent part-time schedule accommodate this disability*
- 5. Prognosis - Are the functional limitations expected to resolve over time? If so, within what time frame?*
- 6. Any further comments to assist us in understanding the need for accommodation of a permanent disability*

[73] On January 6, 2006, the Employer notified the Grievor that it was "unable to make a determination with the information that has been provided by your doctor. The Board's medical consultant has advised that they would require the following questions to be answered by your doctor in order for advice to be given

to the School Board". The questions were those set out in Ms. Preston's report, *supra* para.72.

[74] Ms. Preston testified that she spent between 15 and 30 minutes reviewing the Grievor's Certificate.

[75] Ms. Preston said the Certificate did not provide sufficient information to support ongoing disability requiring a "permanent work schedule accommodation". In fact, the Grievor was not seeking a permanent work schedule accommodation. He sought a 40% partial medical leave of indefinite duration. Ms. Preston asserted that "indefinite" meant "permanent", a dubious proposition in the context of the Certificate as a whole. There is no suggestion that the Grievor's illnesses were such as to constitute a permanent disability. The Grievor's return to full duty status was not fixed or unchangeable. It was "unknown". In the context of disability, there is a significant difference between "indefinite" and "permanent".

[76] Ms. Preston said the Certificate "appears to have been completed by a family physician and not a specialist, although I note specialists have been involved in his care in the past." In fact, the Certificate was completed by Dr. Kyne, a psychiatrist. Ms. Preston's explanation for that error was that Dr. Kyne did not list his credentials on the Certificate. The difficulty with that explanation is that the course of treatment on the first Certificate (Ms. Preston was

provided all three Certificates) refers to "medication management plus psychotherapy" and Ms. Preston's knowledge that the Grievor had seen specialists was obtained by reading paragraph 3(a) of the October 28, 2004 Certificate, completed by the Grievor's family physician, which expressly states "sees consultant psychiatrist Dr. Peter Kyne at Peace Arch Hospital."

[77] Although Ms. Preston's recommendations were clearly influenced by her understanding that the Certificate was completed by a family physician and not a specialist, she testified that the fact that Dr. Kyne is a specialist made no difference in her recommendations. That is an astonishing conclusion.

[78] In the second paragraph of her recommendations, Ms. Preston said "further information is required to assess the nature of the disability ... and how it precludes this employee from ever returning to his regular work schedule." (emphasis added) The Certificate could not reasonably be read as meaning that the Grievor would never return to his full duties. The Certificate is in support of an application for a partial leave. It does not seek a permanent reduction in work assignment and a careful reading of the Certificate does not lead to the conclusion that the Grievor would never return to full duty. Read in context, "indefinite" and "unknown" do not reasonably lead to the erroneous conclusions drawn by Ms. Preston.

[79] The recommendations go on to suggest that a report from the Grievor's psychiatrist and/or internist would be appropriate. The Certificate was completed by a psychiatrist yet Ms. Preston said that made no difference to her recommendations.

[80] Ms. Preston's report then goes on to list information that would be useful, a list which was adopted by the Employer in its response to the Grievor's application. Point number one calls for a specific diagnosis utilizing a specific psychiatric test method. This is clearly a response to the mistaken premise that the Certificate was completed by a family physician and not a psychiatrist. Ms. Preston testified that this diagnosis would provide information with respect to the primary psychiatric disorder. She also thought it appropriate to know actual symptoms and functional limitations. Such information would be unduly intrusive and contrary to the so-called "trilogy" of awards dealing with the permissible content of the Certificate: *Munroe award, supra; BC Public School Employers Association/School District No. 5 (Southeast Kootenay) and School District No. 59 (Peace River South) and British Columbia Teachers' Federation/Cranbrook Teachers' Association and Peace River South Teachers' Association, (2002), unreported (Korbin); British Columbia Teachers' Federation and British Columbia Public School Employers' Association, supra.*

[81] Points 4 and 6 of Ms. Preston's list of useful information again misconceive the nature of the application; it requests a partial medical leave.

[82] The Munroe award makes the following observation at p.29:

A sizeable proportion of applications for partial medical leaves are based on stress or stress-related issues, not on illnesses which are physical in origin. At least some of these might be capable of being addressed in ways other than a reduction from a full-time teaching load to a part-time teaching load. Indeed, Article 39.91 itself contemplates that the medical difficulty prompting the application for a partial medical leave might effectively be addressed by reassignment rather than reduced teaching load. By contract that is an option the School Board is entitled to consider.

[83] In that context, one might make an argument for the remaining points in Ms. Preston's list of useful information although I note that the Grievor suffered as well from illnesses "physical in origin". As with the first Certificate, there may well have been a reasonable basis to seek certain additional information. However, the entire premise of Ms. Preston's report is flawed and her recommendations on which the Employer based its decision to deny the leave are unreliable.

[84] I observe that in her testimony, Ms. Preston did not challenge the *bona fides* of the illness or the psychiatrist's assessment. She agreed in cross-examination that depression is a serious illness and acknowledged that a reduction in workload can be an appropriate treatment for depression.

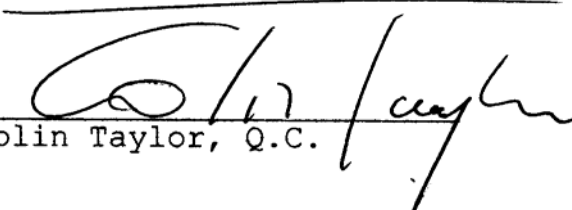
[85] Finally, I wish to point out that I have not overlooked the Employer's argument that the Grievor's general absence record from September to December 2004 changed following denial of the partial leave application. Thereafter, the Grievor, for the most part, fulfilled his full-time teaching assignment, the inference being, said the Employer, that the Grievor's illnesses did not prevent him from working his full assignment. That, however, does not mean that the Certificates were in error and that the Grievor should, medically speaking, have been working his full assignment. I also observe that the Grievor rejected the Employer's offer of an unpaid personal leave on economic grounds (Exhibit 2(21)). Moreover, this matter falls to be decided on the Employer's unreasonable responses to the applications for partial medical leaves. The flawed responses on which the Employer can not rely for its denial of the Grievor's applications are not curable by the inference which the Employer seeks to draw from the pattern of absences.

[86] The Grievor, a full-time employee, made two applications for partial medical leave. Pursuant to the

collective agreement, he produced the required Certificate stating that he was medically unable to work full-time but capable of working part-time, thus establishing a *prima facie* claim to the leave. The Employer was entitled to respond to the specific circumstances disclosed by the Certificates and demand additional information if it believed, acting reasonably, that the Certificates failed to disclose sufficient information to establish the Grievor's entitlement to the leave sought and the benefit claimed. For all of the foregoing reasons, I am compelled to conclude that, on both occasions, the Employer's requests for additional information were, in all of the circumstances, unreasonable and the necessary arbitral declarations to that effect are hereby made.

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

DATED at Vancouver, British Columbia, this 15th day of August, 2006.


Colin Taylor, Q.C.