

ARBITRATION

BETWEEN:

HAY RIVER HEALTH AND SOCIAL SERVICES AUTHORITY

- and -

PUBLIC SERVICE ALLIANCE OF CANADA

Concerning the grievances of Bill Dalton

A W A R D

BEFORE:

Andrew C.L. Sims, Q.C. Arbitrator

**REPRESENTATIVE OF HAY RIVER HEALTH AND SOCIAL SERVICES
AUTHORITY**

Glenn Tait Counsel
Nicole MacNeil..... Counsel
Jean Locke..... Advisor

REPRESENTATIVE FOR PUBLIC SERVICE ALLIANCE OF CANADA

Debra Seaboyer PSAC Representative
Regina Brennan..... PSAC Representative
Bill Dalton..... Grievor

HEARD in Hay River, NWT on July 27 to 31, 2009

AWARD ISSUED on February 23, 2010

AWARD

This case involves several grievances arising out of a dispute and ultimately the termination of Mr. Bill Dalton from his position as an LPN at the Woodland Manor Long Term Care Facility in Hay River. In April 2007 Mr. Dalton reported, and the Employer accepted, that he was suffering from a disability. Disputes arose over the Employer's willingness to accommodate that disability and Mr. Dalton's willingness or ability to provide supporting medical documentation.

The parties agreed on a substantial set of facts and related exhibits. The agreement include five paragraphs which are followed by a chronology of events.

1. At all relevant times, the Hay River Health and Social Services Authority ("HRHSSA") and the Public Service Alliance of Canada (the "Union") were parties to a Collective Agreement which was in effect from November 16, 2006 to March 31, 2009. [Exhibit 1]
2. The grievances have been referred to arbitration in compliance with the Collective Agreement. The Arbitration Board has been properly constituted. The Arbitration Board has the jurisdiction to hear and determine the grievances.
3. The Grievor, Bill Dalton ("Dalton"), was employed as a Licensed Practical Nurse (LPN) within the Employer's Long Term Care Department at the Woodland Manor facility. A description of the Grievor's position is attached. [Exhibit 2]
4. Woodland Manor is a multiple level care residence located in Hay River. It is a 15 bed locked long-term care facility where residents are usually long-term geriatric dementia patients that have chronic illness or disability resulting in physical frailty or cognitive impairment requiring a secured locked setting.
5. The following is a chronological timeline of events leading to the Grievor's termination of employment with HRHSSA on September 3, 2008.

Rather than provide a separate narrative, the Agreed Statement of Facts is set out in full, annotated with extracts from the exhibits, and the evidence given orally during the hearing. The agreed facts are numbered and in italics. The principal people involved are:

Mr. Bill Dalton, the Grievor

Mr. Paul Rosebush, the CEO of the Hay River Health and Social Services Authority from October 2007 until December 2008

Ms. Jean Locke, the Authority's Manager, Human Resources

Ms. Sheryl Courtoreille, RN – The Authority's Manager of Acute and Ambulatory Care Services

Ms. Janice Leask, RN – The Authority's Manager of Long Term Care Services, responsible for the Woodlands Manor unit, from 2005 until August 2008

Ms. Evelyn Hempel, a co-worker of Mr. Dalton's at the Woodland Manor

Dr. Nottebrook, a physician

Dr. David V. Smith – a physician

Dr. Burrell – a specialist physician

Dr. Derek Younge – an Orthopedic Specialist in Yellowknife

Dr. John G. Cinats, an Orthopedic and Sports Medicine Specialist in Edmonton

Dr. Alex Hoechsmann, a physician who conducted an Independent Medical Examination on Mr. Dalton in Yellowknife

Ms. Marian Helton, an Occupational Therapist with Life Care Planning Ltd. of Yellowknife who conducted a Functional Capacity Evaluation on Mr. Dalton

Ms. Donna Hakansson, a Physical Therapist, who Mr. Dalton saw as a patient who works for the Authority in Hay River

Ms. Kate Gregor, the Union Vice-President and Shop Steward

Mr. Robb Ross, a PSAC Shop Steward

Chronology of Events

Mr. Dalton says he began experiencing pain in his leg in early 2007 and went to see a doctor. After his second appointment, and a referral, he decided to tell the Employer.

***April 19, 2007:** Dalton sent an email to the Manager Long-Term Care, Janice Leask ("Leask"), indicating he had visited the doctor that day and had an appointment with the "Ortho Specialist" on April 25 regarding a leg condition. [Exhibit 3]*

Mr. Dalton's email advised that he had an inflamed leg. He said specifically:

I discussed the situation regarding work and he is aware of my type of work, he said that maybe my work could be modified somehow, he told me that squatting, heavy lifting etc. will aggravate it. (As if I didn't know). Regarding my three nights, I cannot say right now that I won't be in, I recently walked down to the clinic and back (a) my leg is bothering me quite a bit, in any event I will give plenty of notice if at all possible.

This is significant because, right from the outset, it indicated to the Employer that certain tasks Mr. Dalton might be expected to perform in his work, such as squatting and heavy lifting, might aggravate his condition.

His job description includes, within the list of main functions "lift and transfer with the use of good body mechanics" and under Working Conditions – Physical Demands.

This incumbent is required to bend, lift, carry pull, push, stand for long periods of time, stretching and twisting during their working hours. Transferring patients in and out of bed, transferring to the hospital for activities, stripping/bed making, raising/lowering beds, moving of heavy equipment (beds, wheelchairs) and standing for long periods to deliver care and provide the supper meal. All of these activities the incumbent does in moderate for the length of the shift. The frequency of

these activities makes up the majority of their work. These activities may lead to back, neck and extremity strain and injury.

The incumbent is required to work in limited and restrictive space, like the resident's washroom. This awkward bending or twisting may promote poor posture and can lead to injury.

April 21, and 22 Dalton was off work with a leg condition.

April 25 and 26 Dalton off work with painful leg and submitted a physician's note to Manager Acute & Ambulatory Care Services Sheryl Courtoreille ("Courtoreille"). Courtoreille was acting as the LTC during a period when Leask was on leave.

Specialist Physician note stipulated: "Unable to stand or work for more than 2 hours at a stretch. Can work with 1 hour off sitting between stretches of standing until investigations complete (i.e. 2-4 months)". [Exhibit 4].

Mr. Dalton says that the specialist had examined and assessed both of his legs and then referred him for an MRI test.

April 25 Courtoreille sent a letter [Exhibit 5] to Dalton requesting information from the Specialist regarding timeframes, limitations, accommodation needs, and an OT/PT referral in order to determine what activities could be done and not done safely.

That letter read, in part:

This note requires detail re: your limited mobility and work requirements:

1. Specific dates re: "investigations completed." Please return to the physician who wrote this note, and have them write a specific time frame so we may have this information for our records. For example, this patient requires time off until May 16, 2007, at which time a reassessment will be conducted of the patient's current condition.
2. Please have the physician specify what they mean by "can work with 1 hour of sitting between stretches ..." During your 1 hour off, can you get up to help turn a resident, and then return to sitting? The physician needs to be specific with their recommendations.
3. What exactly is expected of you when you are sitting? Do you need any special aids or equipment?
4. When you see the physician, please ask for a PT and OT referral. They will look at your special needs physically and also review your job description and outline what you can do and not do safely.

In an undated response [Exhibit 6], Dr. Burrell wrote comments beside the Manager's questions.

Mr. Dalton says he had no part in these responses. These comments were:

1. Sorry, unable to obtain crystal ball.
2. Sitting means exactly that.
3. No
4. If you want this feel free to order.

Ms. Locke's evidence is that this did not provide the facility with the medical information they felt they needed. She felt more was necessary to make sure that the grievor would be performing his duties in a manner that was safe for himself and for the residents under his care. Specifically she was looking for information on limitations and restrictions that might relate to these safety issues. She felt that they also needed to know whether he required reduced hours. When pressed in cross-examination as to what more was expected, Ms. Locke replied that she felt his report was deficient and that she has had other information in a return to work situation. She emphasized her concern with whether Mr. Dalton and patients would be safe at nights, but did not explain how his experience of pain lead to these safety concerns or the conclusion that he would be unable to respond to an emergency.

April 30 *At Dalton's request, meeting held between Dalton, Manager of AAC, and Resident Care Coordinator, Becky Fawcett to discuss leg pain and Specialist's response to inquiries. Dalton declines to see a physiotherapist or occupational therapist, after Courtoreille specifically advised him that he had a choice of whether or not to see the PT/OT.*

May 1 *Follow up meeting with Dalton, Courtoreille and RC Coordinator.*

May 2 *Jean Locke, Manager Human Resources ("Locke") contacted Courtoreille and Locke was advised about the meeting on May 1.*

Dalton saw Dr. Voros at walk in clinic and was referred to OT/PT.

May 8 *Dalton speaks to Courtoreille and advises that he's been referred to OT. Courtoreille advises she has already spoken with OT.*

May 10 to June 5 *Dalton on vacation leave.*

June 4 *Leask returned from leave.*

June 8 *Dalton attends Physiotherapy (PT) assessment with physiotherapist, Donna Hakansson and Andrea Pittmann.*

July 5 *Dalton sends fax to Dr. Smith confirming discussion with Leask and accommodation of 8 hour shifts with ordered breaks. Requests written medical support for accommodation from physician. [Exhibit 7]*

Mr. Dalton's fax is headed "Important" and the message reads:

Re: My appt yesterday – RT Leg/MRI

Janice & I discussed the accommodation aspect. For now I will work 8 hr shifts with the ordered breaks as per usual. 12 hr nights may work out good when time comes to do same.

*Janice requires something in writing to support this accommodation.

*ASAP please call Janice at your earliest convenience.

July 6 *Note received from General Practitioner stating: "Please note that the above mentioned patient is confined to 8 hr shifts during the day with possible 12 hour shifts during the night. He needs to rest his leg (elevation) at EVERY available opportunity. Please let me know if this works for the patient, or else we should try something else." [Exhibit 8]*

July 10 Leask spoke with Dalton regarding accommodation. General Practitioner's note states he had to have his leg elevated at every available opportunity. Tried to clarify what Dalton could do. Discussed staff input re his sitting in the staff room with the door closed. They felt uncomfortable using washroom. Explored alternate areas for him to sit: Manager asked if he considered taking time off on Medical EI as he was still experiencing pain.

Ms. Locke testified that this new restriction, to an 8 hour shift, was implemented in addition to the restrictions already in place, based on Dr. Burrell's information.

July 11 Email from Dalton to Leask regarding discussion on July 10. [Exhibit 9]

Mr. Dalton's e-mail raised several concerns. He expressed concern over hearing that there was opposition from co-workers to the accommodation to which he felt entitled by law. The lounge, he felt, was the most appropriate place for him to sit. Sitting at the nursing desk would be uncomfortable and generally unsatisfactory. As to the staff feeling uncomfortable about coming into the lounge and using the washroom, he pointed out that there was more than one bathroom and that perhaps the radio could be used to provide a measure of privacy. He said at one point:

... as the one being accommodated for a physical injury, I should not be expected to be under stress due to fulfilling doctor's orders and accessing the human rights law. Upon (sic) until yesterday I was not feeling bad, I felt that significant others knew and understood the accommodation process.

I was most surprised yesterday when you suggested that I go on E.I. benefits, I really was: I won't read into it at this point of time.

I felt it necessary to follow-up in regards to our meeting given the news of "opposition to my accommodation". I will be saving a copy of this email for the "Human Rights Commission" as I have a gut feeling that this is not the end of it, I hope I am incorrect.

Mr. Dalton elaborated in his evidence, on the difficulties he experienced resting his leg anywhere but in the lounge area, where he had often taken his breaks in the past.

July 16 Leask received a medical certificate faxed from Stanton Territorial Health Authority from the Physician Specialist, dated July 9, stipulating: "Bill still needs the same work restrictions as previously noted. In addition, his work shifts should not be longer than 8 hours". [Exhibit 10]

Ms. Locke and Ms. Leask both say this additional work restriction was then accommodated.

July 24 Leask received email from Dalton asking whether he will be paid for 12 hours while doing 8 hour shift given the accommodation process. Dalton further states that "I had great success with the Night 8 shift and it is my preference that I continue with the Night 8 until further notice, thank you." [Exhibit 11]

Ms. Locke's reaction was that they had no directions from a physician to say that the grievor needed to be accommodated by working only nights. Her initial reaction to the request for 12 hours pay was that they only paid for hours worked.

July 25 Leask replies to email from Dalton stating she will be, "consulting with Human Resources regarding present and ongoing accommodation arrangements" and that in the interim, he "will

continue to be accommodated on the 8 hour shifts for both day and nights shifts in accordance with the medical information provided by Dr. Burrell. While being accommodated you will be paid for all hours worked and are eligible for sick leave for the balance of the 12 hour shift.” [Exhibit 12]

Dalton sends reply email to Manager of LTC and request that “...I be Accommodated on the night shift until I see the Ortho Doctor in August...I expect to be accommodated appropriately and properly; otherwise I will consider the employer’s refusal to accommodate given the new information (night shift-8 hr.) Discrimination against an employee with a Disability.”

Leask sends reply to email from Dalton stating, “In the absence of physician advice to contrary the 8 hour shifts are not restricted to nights only.” [Exhibit 13]

Ms. Locke testified that Ms. Leask consulted with her before sending this reply. In her view they were accommodating properly, on both day and night shifts, using the information they had from the physicians as to what was necessary.

Ms. Locke understood that Mr. Dalton wanted to work 8 hour night shifts, rather than the regular 12 hours. Her view was that they had no direction from a physician to say that an accommodation on solely night shifts was necessary nor saying that accommodation could not be achieved on days. As to the question of pay, while her initial view was that they only paid for hours worked, on a reflection the collective agreement did provide that, when employees took a short portion of the day off on sick leave, but had worked the rest of the day, they would not be deducted sick time for the hours they took off. They apparently had not realized that initially, but realized it later on, notwithstanding that a further issue arose later as to whether this provision would be applicable for a short shift when the grievor did not start until 4 hours into the 12 hour shift.

July 26 *Dalton sends email reply to Manager of LTC stating that suggestion that he work 8 hours and take 4 hours of Sick Leave is “unacceptable”. [Exhibit 14]*

This email goes on to describe Mr. Dalton’s view that, when being accommodated, he was entitled to expect that he not lose any money. He says he continued to work as a team member, doing his usual work, except when he had to take his rest periods. His e-mail reads in part:

Regarding your suggestion that I work 8 hours and take 4 hours as Sick Leave, this is unacceptable, according to the Human Rights the employer is obligated to accommodate me and I already brought to your attention re: increasing the number of 8 hour shifts to make up for the 4 hours lost. I am not expected to lose any monetary benefits, the Human Rights Duty to Accommodate – Employer’s guide makes this matter very clear. In the event that the employer will not increase the number of 8 hour shift and contends that I take 4 hours sick leave as a make up, then I need to know the employer’s rationale, I need to know why they won’t accommodate me. There was no mention of a date that you will be consulting with HR. I need to know the answer to the question(s) just raised, I need to know this because it will affect the time limits to filing a grievance.

July 27 Manager of LTC replies to Dalton's email of July 26 and states, "You will be paid for 12 hours of the scheduled shift and the matter will be discussed further when we meet" and requests a meeting with Dalton on July 31. [see Exhibit 14]

July 31 Meeting held with Dalton, Leask, Locke, Mary Davies (Union representative) and Shawna Ward (Union observer). Manager Human Resources, Locke, reviews roles in accommodation process and current accommodation and medical restrictions provided by physicians' notes. In response to Dalton's request for nights, Locke advised that there is no medical information provided requiring this accommodation.

In preparation for the July 31 meeting, Ms. Locke typed out what she understood to be an appropriate practice for dealing with accommodations, detailing roles and responsibilities for everyone involved. It was headed "Goal is return the ill or injured worker to safe and productive work as soon as medically possible. It is a team effort." Ms. Locke later provided this same outline to others in management to assist them in carrying out their roles. As noted below, this document is drawn up as if a duty to accommodate a disability and the return to work process following an illness or injury are the same thing, which is not always the case.

The same document prepared for the meeting outlined what had been done to date and the medical restrictions, as the employer interpreted them, from those physicians Mr. Dalton had seen to date. At the meeting, they once again discussed whether the grievor was entitled to 12 hours pay or 8 hours pay when he worked only an 8 hour shift and how this might work with the collective agreement provision for an employee who leaves after completing most of the shift. They further discussed the grievor's request to work only nights.

Ms. Locke's notes show that the Employer expressed the view that there was no medical requirement for such an accommodation and pointed out that it was an added cost to the employer as another staff member had to be brought in for that same shift. Ms. Locke's notes further show that they discussed the fact that, if Mr. Dalton worked nights, he would have to be treated as a supernumerary employee because an additional employee would have to be available to cover the work. Mr. Dalton advocated for night work because it was easier for him to take his 1 hour rests during the night. Mr. Dalton apparently discussed the problems that had arisen on day shift, which included the difficulty of sitting at the nursing desk or in the small lounge, both of which were inappropriate in terms of resting his leg. Ms. Locke indicated that it had been difficult for everyone because they did not have enough direction and they did not want to risk injury to Mr. Dalton.

It was agreed that Ms. Locke would prepare a letter to Mr. Dalton summarizing the meeting and would provide him with a letter to take to the specialist outlining the information they felt they needed. At Mr. Dalton's request, this letter was to be provided to him so that he could fax it to the specialist in advance of their meeting [See Exhibit 125]. Ms. Locke says the tone of the meeting

was conciliatory and cooperative and that everybody there was more than willing to cooperate in a successful accommodation.

Aug. 1 Dalton attends OT/PT session. Physiotherapist, Hakansson, advises Leask via email that, "...He has improved some from his initial assessment, so restrictions from my point of view are: No heavy lifting, No prolonged walking or standing. He should be able to gradually stand/walk for longer periods as tolerated. We will discuss length of rest periods once I have had him doing some heavier workouts in the physio dept. and evaluated his tolerance." [Exhibit 15]

Ms. Hakansson's role was as Mr. Dalton's physiotherapist; a practitioner-patient relationship rather than as an advisor to the Employer. Ms. Locke took it that Ms. Hakansson would need a couple of visits in order to evaluate Mr. Dalton's capacities.

Aug. 7 Email from Dalton to Locke requesting (a) clarification the Locke's intervention with the Physiotherapist and Occupational Therapist and (b) a timeframe for responses to salary enquiries. A chain of emails follows. [Exhibit 16]

Aug. 10 Locke sends Dalton an email confirming that the CEO has approved a recommendation of his pay adjustment on a without precedent or prejudice basis. [Exhibit 17]

Ms. Locke testified that she had had some discussions with the CEO with regard to his being paid for 12 hours. It was the CEO's view that, on a without precedent basis, they would pay the 12 hours; 8 hours wages and 4 hours from sick time, whether Mr. Dalton worked the first 8 hours or the last 8 hours of the shift. About the same time, Ms. Locke obtained information from Ms. Leask about the costs of accommodating Mr. Dalton. Ms. Leask advised that they were having to bring in an extra staff member for either 8 or 12 hour shifts. Six such shifts cost an additional \$2,548. Two other shifts were covered by a long term care attendant at a cost \$648. There would be similar costs in the future, although Ms. Leask advised that, on at least one shift, she would not be able to bring in an extra person, but that Mr. Dalton felt he could handle things on the night shift with the long term care attendant.

Aug. 16 In a letter to Dalton Locke summarized the accommodation process to date and requested that Dalton obtain further direction on limitations from the specialist he was scheduled to visit. A letter to the specialist, and a copy of Dalton's job description, was provided to Dalton for this purpose. [Exhibit 18]

Locke met with Dalton to discuss both letters and Dalton agreed to provide the letter to Dr. Younge.

Ms. Locke testified that what she wanted from Dr. Younge were details in terms of the duties that Mr. Dalton could or could not perform, including duties on day shifts and duties on night shifts. She says her concern was to ensure safety for Mr. Dalton in terms of not aggravating his condition and in terms of safety for the patients in his care. She also hoped to have an indication of the timing of his development. She described, earlier that year, having participated in a Lancaster House teleconference on workplace accommodation. As part of that experience she

obtained a lot of materials which she found helpful. She relied particularly on the Alberta decision in *Schram (infra)* which, she felt, gave very clear direction on the extent of an Employer's right to information.

Aug. 23 Dalton attends appointment with Dr. Younge.

Sept. 7 Response from Dr. Younge, dated August 23, and received September 7 advised:

- a referral to a sports medicine specialist;
- work standing for 1 ½ to 2 ½ hours - Dalton the best judge
- thinks nights might be more conducive to healing as they are less demanding
- stay on 8 hour shifts, therefore "he should work the night shift for eight hours"
- difficult to determine temporary or permanent nature of the condition
- continue physical therapy
- should be able to know more about problem and prognosis in 3 months [Exhibit 19]

Dalton was cc'd on a different report from Dr. Younge dated August 23, which was addressed to HRCHB Clinic [Exhibit 20]

Ms. Locke says she found Dr. Younge's letter "quite disappointing". His letter, in full, reads:

I have seen this man today, and he still has pain in his right leg. He had rupture of his tibialis anterior muscle spontaneously several months ago but is still have symptoms with this. He is not able to stand for long periods or walk very far. I think he should see a sports medicine specialist in Edmonton to have measurement of his anterior tibial compartment or perhaps the lateral compartment of his leg.

In the meantime, in response to your questions:

1. With regards to limitations and restrictions of the duties of his position, the two-hour threshold for sitting could be relaxed a little bit (ie. it could be two and a half or one and a half hours), and I think Mr. Dalton would be the best judge of this. The rationale for this would be that the patient is best himself to monitor how long he can remain standing.
2. I think nights would be more conducive to healing his leg, as they are less demanding. He should also stay on eight-hour shifts until we are able to clear him. Therefore, he should work the night shift for eight hours.
3. Hopefully, Mr. Dalton could continue to be a permanent employee and be accommodated accordingly as per current practices considering the above notes.
4. It is very difficult for me to determine the temporary or permanent nature of his condition for the rupture of the muscle, which clinically seems to be evident and is confirmed by MRI. It is possible that the pain will go away within the next six months. If he has a chronic compartment syndrome then this may need decompression surgery and this may possibly be necessary. I think the lateral compartment and even the anterior compartment should be measured, and we will try and arrange to do this.
5. I think he should continue physical therapy.

I think within the next three months we should be able to know what this man has as far as his definitive problem and will know more about the prognosis.

Ms. Locke says she had expected a specialist to be able to give the employer some direction on the actual duties the employee could or could not handle. Her experience with requests from other physicians was that they had been much more precise in their reference to a person's ability to perform duties. For example, they might say the person can only work for 4 to 6 hours or similar limitations with respect to specific duties. In respect to paragraph 2, the recommendation as to nights, she felt what was needed from the specialist was some reference to why the night shift was more appropriate than the day shift and what it was about the day shift that the grievor could not do. The employer had some ability to readjust the day shift and wanted some justification for allocating the grievor solely to nights. Ms. Locke did not see Dr. Younge's second report or even know of its existence until later on.

Sept 10 *Email from Dalton to Locke requesting meeting to review doctor's report.*

Sept. 12 *Dalton attends appointment with Physiotherapist.*

After appointment, Locke met with Dalton to discuss response from Dr. Younge. Dalton advises he had decided to try compression stockings and that they had helped. Dalton advises that he is looking at increasing hours and doing a 12 hour shift the following weekend and that Physiotherapist will send email confirming.

Email from the Physiotherapist indicating that Dalton is ready to start to increase his hours and states, "I would suggest that Bill try one 12 hour shift this weekend and that he decrease his rest periods from 1 hour to 45 minutes for all shifts". [Exhibit 21]

Ms. Locke described Mr. Dalton coming in to speak to her after his visit to Dr. Younge. He indicated he was feeling much better. He tried the compression stockings and they were helping. They had talked before about putting him on a 37.5 hour straight day schedule rather than a 12 hour rotation and at this point he felt this would not be necessary. He indicated to her that they would likely be getting a request to increase his number of hours. Ms. Locke's notes in preparation for and of the meeting [Ex. 127] indicate she was inquiring, and discussed with Mr. Dalton, whether his need for accommodation was temporary or permanent. Those same notes list her concerns over undue hardship issues such as costs, staff morale and so on.

Sept. 13 *Locke met with Physiotherapist Donna Hakansson to discuss and provide her with the current internal practice with regard to accommodation and the respective roles of those involved [Exhibit 22]*

Sept. 14 *Locke emailed Dalton regarding her meeting with Physiotherapist on Sept. 13 and setting a time for the Physiotherapist to meet with Dalton, Locke, and Leask. A chain of emails followed [Exhibit 23].*

Mr. Dalton's reply of September 15 left Ms. Locke quite surprised. Her e-mail to him following up on her meeting with Donna Hakansson was not meant to raise any concerns. He raised four points. First he was, in his view, already coordinating his breaks with the workload. Second, she felt his concern about the CEO being concerned over paying 8 hours or 12 was unfounded since

he had in fact approved those payments. Third, she felt surprised that he was saying his input was not being treated seriously. Fourthly, it was not until this point that she appreciated that there were in fact two reports from Dr. Younge rather than one.

Sept. 25 *Meeting with Dalton, Physiotherapist, Locke and Leask.*

- *Dalton still waiting for appointment with Specialist in sports medicine.*
- *Dalton indicated problem doing meds as it's 2 hours solid standing; physiotherapist indicated Dalton was tolerating it so that was OK*
- *Question of temporary or permanent nature still not known. Physiotherapist indicated that the condition may not be permanent as it is improving. If further testing indicates the condition is permanent we'll have to reassess*
- *Dalton was to work 2 consecutive shifts the following weekend. If that went well, he would plan on working October 3 and 4 as 2 consecutive 12 hour shifts.*
- *Physiotherapist to be away until October 17 and will suggest a further meeting date on her return.*
- *Dalton advised by Physiotherapist not to work 2 consecutive 12 hour shifts until she assesses him further on return from leave.*
- *Dalton requests to reduce all breaks from 45 minutes to 30 minutes.*

On October 19 Ms. Leask phoned Ms. Locke, concerned over the short notice Mr. Dalton was giving as to which shifts he would be able to work 8 or 12 hours. A colleague had him called on October 16 and asked which was a 12 hour shift so she could arrange times and he simply replied "I don't know, I will let you know." This was causing difficulties for co-workers. It appeared to Ms. Locke that Mr. Dalton was simply beginning to self-schedule himself.

Oct. 22 *Email from the Physiotherapist to Leask, Locke, and Dalton (the "RTW Group") indicating that she had spoken with Dalton that morning, and he was "ready to try 2-12 hour shifts in a row and should be able to do nights independently". [Exhibit 24]*

Oct. 25 *Dalton emails HR Manager requesting a meeting with herself, the CEO, and a Union representative. Dalton states that the meeting would be "in respect of the Accommodation process, which by the way I feel is going pretty good with the following exception. My concern though is that the Employer through the HR office is: In my opinion- too aggressive in requesting personal medical information which is not required, I believe is an abuse of management's rights and an unreasonable encroachment into my privacy."*

Locke replies to email on October 26. [Exhibit 25]

Ms. Locke says she was again surprised by this e-mail and did not know, prior to that, that there were any concerns about the requests for medical information.

Oct. 26 *Meeting of the RTW Group.*

- *Dalton was advised that reasonable notice was required concerning which shifts were to be 12 hours.*
- *Dalton going to do 2-12 hour days back to back.*
- *Dalton to be working days for the next 3 weeks. Two weeks of Wednesday Thursday and one of Friday, Saturday, Sunday.*
- *Dalton indicated that he can do dinner medication because can be done sitting*

- *Leask indicated preferable to have one person do meds while on shift for consistency purposes.*
- *For the first 2 – 12 hours Dalton will not do meds*
- *Physiotherapist indicated on the following 2 -12 hours shifts Dalton will do 1 day of meds.*

Ms. Locke's impression, following this meeting, was that everybody was very much working together as a team in developing the accommodation and no animosities were expressed.

During October, Mr. Rosebush was appointed as the Authority's new CEO.

Nov. 16 *Email from Physiotherapist to Leask advising that she had spoken with Dalton and he is "ready to try doing the 3-12 hr shifts in a row but should avoid the prolonged standing of handing out meds for at least the first set of 3." [Exhibit 26]*

Nov. 22 *Email from Dalton re meeting to discuss concerns outlined in email of October 25. [Exhibit 27]*

Nov. 23 *Meeting of the RTW Group. Locke Meeting notes sent to the group via email [Exhibit 28]. Email states:*

"Summary notes from our meeting today as promised:

- *Bill has 5 shifts remaining prior to proceeding on vacation. A set of 3 consecutive days and another of 2 consecutive days*
- *As a means of building and testing endurance, Bill will complete the 3-12 hour consecutive shifts without doing meds*
- *On the consecutive 2-12 hour shifts Bill will do all but the morning meds*
- *Bill is presently taking routine/normal rest breaks, however it is recognized that additional rest periods may be required from time to time*
- *Until all meds can be done Dalton will be scheduled for days only*
- *Bill returns from vacation to 2-12 hour day shifts on December 31 and January 1*
- *Donna suggested that Bill try and do all meds on December 31 and January 1, indicating that this may cause some soreness and discomfort, however it will not do any damage*
- *Bill will not be eligible for overtime shifts until he has returned to full duties without accommodation*
- *Further accommodation meeting to be set in mid-January"*

Nov. 26 *Locke replies to Dalton's email of November 22 and sets meeting with CEO for November 27. [Exhibit 29]*

Nov. 27 *Meeting with Dalton, Chief Shop Steward Robb Ross, Locke and CEO. Meeting was requested by Dalton to discuss his concern "that the employer, through the HR office is: In my opinion – too aggressive in requesting personal medical information which is not required, I believe it is an abuse of management's rights and an unreasonable encroachment into my privacy...relates to the questions prepared for the Doctor – August 07..."*

Chief Shop Steward provided written correspondence regarding "Summarization of objections". [Exhibit 30]. Concerns were discussed.

Ms. Locke's evidence is that the meeting involved a very open discussion. The Union and Mr. Dalton expressed concerns about the nature of the questions that were being put to Dr. Younge. Mr. Rosebush replied that such questions were not new to him and he used similar questions in the past. The upshot of the meeting was that Mr. Rosebush suggested to the Union that they work together towards developing a common template and the Union agreed that that might be possible. From Ms. Locke's perspective Mr. Rosebush seemed quite supportive of the questions

she used and they discussed the rationale for each of the questions. They left the meeting intending to have dialogue on these issues in the future.

Mr. Rosebush says the meeting involved a good exchange, with expectations being laid out on both sides. The Union expressed concerns over Mr. Dalton being required to provide medical information to the Employer. Mr. Rosebush replied that it was necessary, both to assess the request for accommodation and to ensure the safety of the facility's clients. Mr. Rosebush agrees Ms. Locke's earlier letters were discussed and he had no problem with her approach to the matter.

Nov. 29 *Email from Dalton to Locke asking if she had issue with him posting Locke's email of November 23 for all to see at Woodland Manor. [Exhibit 31]*

Mr. Dalton felt it would be a good idea to post this notice so staff would know of his needs for accommodation and he could come to work relaxed.

Nov. 30 *Locke advised Dalton, by phone on November 30, that she did not think that would be wise. Rather appropriate notations could be made in the communication book regarding the current status of the accommodation [see Locke's hand-written notes on Exhibit 31]*

Dec. 10-12 *Dalton emails Locke seeking clarification regarding who is responsible for informing colleagues regarding status of accommodation i.e. Dalton's ability to do meds. Locke replies to Dalton's inquiry on Dec. 12. [Exhibit 32]*

The reply said basically Mr. Dalton and his supervisor should work collaboratively to tell co-workers what they needed to know about the approved accommodation measures, and might use the communication book where appropriate.

Dec. 11 *Dalton attends MRI appointment.*

2008

Jan. 8-14: *Dalton sends email to Leask advising that he did complete meds on 2 consecutive 12 hour shifts, but not without "significant complications" and that he has scheduled himself to do meds of one of his upcoming consecutive 12 hour shifts due to the "negative experience" he recently had.*

Dalton further advises of his appointment with the Specialist, Dr. Cinats, on January 21 indicating he was "hoping this meeting was more productive than the previous one, I intend to ask a lot of questions this time. Please arrange a meeting with the Usual group for late Jan or early Feb to discuss my next step and my appt with Dr. Cinats..."

Locke responded on Jan. 11, regarding changing nights to days per past practice, and suggesting a further meeting of the RTW [Return to Work] Group on January 24.

Reply from Dalton, on Jan. 11, regarding his ability to meet on the 24 and advising that he had been "discharged from PT".

Reply from Locke on Jan. 13 indicating that pending Dalton's discussion with the specialist on Jan. 21, she would like to have the physiotherapist available to attend the next meeting. Reply from Leask re schedule change on Jan. 14. Reply from Dalton on Jan. 14. [Exhibit 33]

Jan. 17: *Dalton emails Leask advising that he: "had called the Manor tonight to make certain that there was another LPN on in the A.M., because I did not want to administer medication during the next two days as I am having complications related to medical administration". [Exhibit 34]*

At some point in January, Mr. Dalton faxed Dr. Cinats a note about 12 hour shifts. He concedes in his evidence that "he was making a pitch" for a twelve hour shift. The note says, in part:

As you are aware my difficulty arises from standing in one area too long. During the day shift (12) I have to administer the medication quite frequently – 5 times/day – each time I do this; it triggers my foot problem; the 12 hours on my feet doesn't help either. There is an answer to this problem.

Night shift (12 hr)

Commence work at 7 PM – 7 AM. Administer medication at 7:30 – 8:00 – some discomfort during this period, which usually subsides by 8:30 or so.

I have to administer medication only once. The night shift provides me the opportunity to rest my leg/foot quite frequently as the demand from the patients are next to none, change out rounds, security checks.

My request is as follows:

It seems that the employer is not content in accepting my opinion only re permanent nights until further notice.

Would you please contact my employer...

Please provide the direction that night shift – 12 hrs is more therapeutic for me; than the day 12 hrs. It just makes sense to place me on permanent nights until further notice.

I can see this working as opposed to day 12 hrs. Thanking you in advance for your anticipated preparation.

Jan. 21 *Dalton attends medical appointment with Dr. Cinats.*

Jan. 25 *Meeting of the RTW Group held.*

Ms. Locke felt Mr. Dalton's account of Dr. Cinats' advice; that is to refuse to do work with which he was uncomfortable, simply gave him *carte blanche* to do what he liked. She felt it left the Employer without any real medical direction.

Jan. 29 *Locke sends email to Dalton in follow-up up to accommodation meeting of January 25 and indicates a letter has been sent to him in internal mail. Letter sent to "confirm the information required in support of the on-going accommodation" Letter states that HRHSSA "requires that specific directions on limitations and restrictions be provided by medical practitioner" and ask for direction from the specialist regarding the maximum period of standing required due to the medical condition. Locke encloses copy of job description and advises that any medical fees associated with the request can be submitted for reimbursement. [Exhibit 35]*

Mr. Rosebush's evidence is that Ms. Locke "kept him in the loop" throughout January as to how this matter was progressing and that he supported her in the positions being taken. He was aware of, and concurred in, the letter to be sent to Mr. Dalton.

Jan. 30 Dalton faxes a copy of Locke's January 29 letter to Dr. Cinats with hand-written notes by Dalton which states: "Comments from Bill: For the purpose of clarity- The sentence in quotation marks where the sentence refers to 12 hour shifts (nights). I was not permitted to do nights. My scheduled nights were always changed to days by my supervisor- not at my request".

Dalton provides Locke copy of this faxed correspondence with post-it note on January 29 letter with hand-written note which states: "Jean Comments below are intended for clarification purpose. I have faxed your letter. Will keep you informed. Bill" [Exhibit 36]

In his fax cover sheet Mr. Dalton told Dr. Cinats that Ms. Locke was looking for direction on the maximum standing period. He did not attach the job description. Ms. Locke clearly felt that, by adding comments to her letter, and by underlining just one sentence, Mr. Dalton was detracting from the message she wanted conveyed to Dr. Cinats.

Jan. 30-31 Dalton emails Leask to advise that he just completed 2- 12 hour night shifts and they were "the best two shifts since April of Last year in terms of pain/discomfort."...I am very pleased and as a result and I respectfully request that in the spirit of accommodation and because it is a healthier alternative for me, due to the fact that nights are positive for me, and days are negative. I am requesting that I be placed on permanent nights until further notice."

Mr. Dalton confirmed in evidence that he indeed experienced less pain on the night shift.

On Jan. 31, Locke replies to Dalton's email and advises that "Pending medical direction on limitations your shifts will remain as scheduled." [Exhibit 37]

Ms. Locke says her reply was prepared in consultation with the CEO. While they were sympathetic to his situation, the Employer was looking for a medical justification for switching to straight nights, with some objective medical support, not just Mr. Dalton's subjective comments. She did not reply by letter since they intended meeting together soon anyway. Ms. Leask's view at this time was that Mr. Dalton seemed to be very demanding, trying to control the situation. Ms. Locke says that putting Mr. Dalton on straight nights would have "a pretty significant impact" on staff. She had already heard from Shop Steward Mary Davies on behalf of other staff members expressing concerns that staff were losing the \$2.00 night shift differential. They were also having problems with their own shifts being changed, disrupting their lives. She noted that people who work on a 24-7 shift arrangements tend to "live by their schedules", having to plan all their other living activities around when they will be required to work.

Feb. 1 Meeting was held between Dalton and CEO to discuss accommodation.

CEO sent follow-up email to Dalton advising that HR had been informed of the information to be forthcoming from the specialist. [Exhibit 38]

Mr. Rosebush says he met with Mr. Dalton to get more information to assess his request to be accommodated with permanent night time assignments. He says he repeated the Employer's concern over Mr. Dalton's safety and the safety of the residents. He told Mr. Dalton, and Mr. Dalton clearly understood, that he could not authorize a permanent accommodation, on night shifts, until they received the information they needed. He says Mr. Dalton was going to continue in his efforts to get that information. He says Mr. Dalton was agitated in the meeting, but "they got through it". While he sensed that Mr. Dalton did not want to cooperate in pursuing the Employer's expressed concerns, he did not anticipate a grievance.

Feb. 7 Dalton sends email to Locke attaching December 5, 2007 report from Dr. Cinats to Dr. Burrell. Dalton states in email: "Good Morning Jean, I am not certain as to whether or not I gave you a report from D. Cinats; in case I forgot, I am forwarding page 1 and 2 separately, thanks Bill." [Exhibit 39]

Ms. Locke says that the information received from Dr. Cinats was not much help, because it contained no new information on modified duties or restrictions.

Dalton sends email to CEO regarding his disappointment with Employer's response to his request for accommodation solely on night shift and indicating that grievance will be filed. [Exhibit 40]

By way of explaining his position for what became his grievance, the email said:

The night shift has been something I requested before and have conveyed my comments on same. The night shift has the support of Dr. Younge all be it 8 hour shift, never the less he recommends nights, the employer already has supportive medical document(s) on this issue. I can only reiterate my feelings and opinions from our meeting, practically the nights just seem right; health wise the nights seem right; less discomfort and pain is a good thing. Days represents more discomfort and pain, days are negative; nights are positive.

Feb. 11 Grievance 01-08-144, dated February 8, 2008 filed at the First Level by email to Locke from Dalton. Request that grievance proceed to Level 2 immediately. Details of grievance states:

"That on January 31, 2008, Jean Locke, Human Resource Manager of HRHSSA, denied Mr. Dalton his request to be accommodated to night shift (12 hours). Mr. Dalton met with Mr. Paul Rosebush, CEO of HRHSSA on February 1, 2008, where Mr. Rosebush confirmed that Mr. Dalton would not be accommodated on night shift (12 hours)." [Exhibit 41]

As remedies, the grievance sought:

- a) That Mr. Dalton be placed on permanent night shift (1900 hours to 0700 hours) until such time that Mr. Dalton's physician confirms that Mr. Dalton is able to return to the regular schedule at Woodland Manor;
- b) That the Employer cease and desist from requesting diagnostic and or treatment information from Mr. Dalton's health care provider;
- c) That Mr. Dalton will not suffer harassment, discrimination or coercion for acting on his right to grieve;

d) That Mr. Dalton be made whole.

Ms. Locke described the employer's reply to these allegations. They felt they did not have the information to support his being scheduled strictly on nights and were holding any consideration of that until they received that information. She feels they never wanted nor did they request any diagnostic information and the only treatment information they wanted was to the extent it touched upon accommodation measures, for example, his having to attend appointments. In her view, the only reference to treatment, in her letter to Dr. Younge, related specifically to Mr. Dalton's ability to perform the job.

Feb. 13 Dalton sends email to the Locke advising that he had been to see the general practitioner, Dr. Smith, and medical information would be delivered, and asking for a copy. [Exhibit 42]

Report from Dr. Smith received by Locke. Report states:

"...It appears that Bill has a problem with standing for long periods at a time. There is no doubt that night work would be far more beneficial to him than day work, the latter which forces him to stand for longer periods at a time.

This is both the advice of the Prof. of Orthopedic Surgery as well as myself, and I would very much appreciate it if arrangements could be made for him to be changed to night shifts alone." [Exhibit 43]

Ms. Locke's reaction to this medical report was that it contained more of the same. Mr. Rosebush described it as vague and inconclusive and "completely missing the information the authority sought as an employer." The Employer was prepared to continue accommodating Mr. Dalton's standing restrictions on the day shift and the letter provided no justification for a restriction to nights alone.

Dalton sends email to Locke stating, "In light of the new information which I understand you may or may not have as of yet, I am requesting once again to be accommodated on the night shift as per medical information supplied..." [Exhibit 44]

Feb 14 Email from Locke to Dalton acknowledging receipt of the information from the general practitioner and advising that the request would be given due consideration. Reference made to the matter as now a subject of grievance. [Exhibit 45]

Meeting is held between CEO and Dalton.

Mr. Rosebush says the two met alone, and had a frank exchange that ended reasonably although Mr. Dalton was not happy at Mr. Rosebush's response.

Feb. 15 CEO sends email to Dalton confirming discussions which took place on Feb 14 in the CEO's office. CEO indicates:

- Due to scheduling Dalton could not be accommodated on nights on Feb. 17 or 18 and would be provided with sufficient rest periods and support to assist him during the day shift
- Dalton would be placed on nights commencing Feb. 22 until the end of the current shift schedule on March 27
- Employer wants to ensure not to aggravate Dalton's condition, or create an unsafe situation for Dalton or the residents
- Employer's need for guidance from a specialist physician on the following:
 - Are you able to complete the essential duties of your job?
 - Are there any specific functional limitations present that apply to your employment and if so to what extent?
 - Is the accommodation sought of a temporary or permanent nature and if of a temporary nature how long?
- A response was requested by March 27. [Exhibit 46]

Mr. Rosebush says they decided to put Mr. Dalton on straight nights for a seven week period to try to be cooperative and provide him with the time he needed to get the medical information they still sought. This seven weeks took things up to the preparation of the next shift schedule. Ms. Locke says that their thinking, at this point, was that they still needed medical documentation, but that they would continue to accommodate Mr. Dalton, subject to some specified time limits. This, she says, was followed by some improvement in Mr. Dalton's position, but there was subsequent backsliding.

Feb. 17 Dalton sends email marked "Without Prejudice" to CEO in reply to his email of February 15. Dalton states that the employer has "had ample time to accept my suggestions around accommodating my disability without incurring additional expenses for the night shift start February 18th & 19th 2008" and "ample time and opportunity" to "accommodate my disability". He further states that documentation on the 3 questions posed by the CEO "is on file". He advises that although he is available to work the day shift on the 18th and 19th, he has "repeatedly made the employer aware of the pain and discomfort experienced by me during the regular day shift". His understanding is that the employer "has conditionally agreed to accommodate my request as per Article 3:02 and 3:03, for permanent night shift beginning February 22nd 2008 for a seven (7) week rotation. Dalton further states he looks forward to a response to the grievance. [Exhibit 47]

Mr. Dalton says that, by this point, and even though he had just been given 7 weeks of straight nights, he had lost faith in Mr. Rosebush. He felt "he didn't have my best interests at heart." Mr. Dalton felt Dr. Younge had already answered these three questions. In contrast, Ms. Locke says there were no real responses to their three questions and Mr. Rosebush says Mr. Dalton's reply was inaccurate insofar as it said the necessary information was on file.

Feb. 18 Dalton sends email to CEO requesting to leave early due to discomfort which was approved by CEO same day. [Exhibit 48]

Mar. 6 Dalton sends email to Leask requesting time off to attend a medical appointment in Edmonton. [Exhibit 49].

March 7 Grievance Meeting proceeded.

March 10 Employer's Level 2 response to Grievance 01-08-144 was delivered to Kate Gregor, Shop Steward. [Exhibit 50]

Authored by Mr. Rosebush and Ms. Locke together, that reply denies any discrimination. Rather than a denial of accommodation, it maintained that Mr. Dalton had been accommodated “on both day and night shifts.” It maintained the Employer could not assess his need for accommodation further without additional information, which it described. It said further:

(a) The employer will not place Mr. Dalton on permanent night shifts until clear details are provided regarding his ability to perform the essential duties of the position of a LPN on both days and nights, including any limitations which may prevent him from safely performing the duties ...

(b) The employer is not interested in obtaining diagnostic or treatment information pertaining to Mr. Dalton. The employer is however, entitled to receive information from a suitable medical authority regarding the limitations and restrictions pertaining to the employee's medical condition in order to fully assess the most effective way to accommodate the employee.

To date the employer, after repeated requests, has still not received clear and current information that address the present abilities of the employee to perform the job duties; a clear statement on restrictions and limitations; or a clear time line regarding the temporary or permanent nature of the medical condition, including the time frame for improvement, if anticipated.

The letter also offered to arrange a function demands assessment over the necessary demands of the job. Ms. Locke says there was no response to this offer.

At about this time, and in anticipation of his appointment with Dr. Cinats on March 24, 2008, Mr. Dalton faxed another note to Dr. Cinats urging him to write to the Employer supporting his request for permanent 12 hour nights. The tone of the note is much like that sent in January. It read, in part:

Dr. Cinats; first of all; will you please help me to obtain accommodation to permanent nights until cleared by physician(s)?

Nights vs. Days

I can fulfill my duties on the night shift; with pain and discomfort lasting for one – one & one half hours. On the day shift the majority of the day shift (12) causes me pain and discomfort. Days cannot be compared to nights.

On a scale of 1-10 in terms of comfort, with 10 being the highest in comfort; on nights it is 8.5 – 10; on days it is 2-5. Quite the difference.

March 17 Dalton delivers medical certificate from Dr. Nottebrook to Human Resource office which states: “Does not need to miss work. Should continue with regular nite shifts. NO risk to self or patients by continuing to work.” [Exhibit 51]

Locke emails Dalton acknowledging receipt of a medical certificate dropped off at HR and advising Dalton of the results of a subsequent discussion between the HR Manager and the CEO on the matter.

Locke summarizes her understanding of the meeting between Dalton and the CEO on February 14 and the emails of February 15 and February 17 on the matter. Locke stated:

- additional information had not yet been provided per the letter of January 29 to the employer, which Dalton had faxed to the specialist
- current information on these questions is not on file
- medical certificate of March 17 does not meet the current information needs of the employer
- Shift schedule to March 27 had been determined by the CEO and future responsibilities and scheduling will be established by the CEO

Locke also referenced Dalton's appointment with the specialist scheduled for later in the month and the expectation of more detailed information being available to the employer following that appointment. [Exhibit 52]

March 18 Email from the CEO to Dalton referencing the March 17 email from the HR Manager and advising that Dalton would be scheduled to work nights through to March 30th, but requirement to provide requested information by March 27 stands. [Exhibit 53]

March 25 Union provides reply, dated March 24, to the Employer's Level 2 grievance response to Grievance 01-08-144. [Exhibit 54]

Dalton provide medical certificate, dated March 24, from Dr. Cinats to HR office. The certificate states: "This man can only do nights for at least 6 months."

A note from Dalton attached to certificate states: "I am providing medical information (Part 1) related to my accommodation. (Part 2) will be a direct response to the CEO's three questions as indicated in your email (most recent). Dr. C..... is very much aware of the time constraint. He will be notifying me; I will then present it to your office." [Exhibit 55]

Mr. Rosebush says the promised "second part" never came.

March 27 Locke emails Dalton acknowledging receipt of a medical certificate and note from Dalton dropped off at HR office. Locke noted that Leask had advised that Dalton had traded shifts with a co-worker for April 2, 3, 7 and 8; and that any decision on future appointment to nights would be held pending receipt of Part 2 of the medical information. Further Locke stated; "...please understand the employer is seeking details of the restrictions and limitations to your duties and working conditions that prevent you from working days and requiring that you work nights." [Exhibit 56]

Dalton sends reply email to Locke to which Locke replies regarding the trading of shifts. [Exhibit 57]

March 31 Dalton delivers a copy of a fax to the HR Office. The fax was sent by Dalton to Dr. Cinats on March 30, and states: "March 24th 08, you saw me once again re: my Rt leg and Right from the beginning I expressed concern Re: 'BEING ACCOMMODATED TO THE NIGHT SHIFT, WHICH YOU TOOK CARE OF PARTIALLY BY PROVIDING A NOTE FOR NIGHTS FOR 6 MONTHS. HOWEVER, YOU DID ASSURE ME THAT YOU WOULD SUPPLY THE OTHER MEDICAL INFORMATION IN RESPONSE TO THE 3 QUESTIONS REQUIRED TO BE ANSWERED FROM MY EMPLOYER. I CANNOT STRESS THE IMPORTANCE OF YOU FOLLOWING-UP AS PER OUR DISCUSSION; MY WORK LIFE IS ON THE LINE HERE AS I SEE IT.' I am enclosing cc of my Job Description in case you require it. I commenced nights on Feb 22nd (the night accommodation is conditional (March 27th 08) pending your medical information) and after a month later of doing nights, I continue to say it is working great for me medically speaking. I apologize for placing pressure on you; I too am under tremendous pressure from my employer." [Exhibit 58]

Ms. Locke says she does not know why Mr. Dalton was saying his job was on the line and denies that he was "under tremendous pressure." From her point of view, they were still accommodating him on nights and were simply still trying to get the medical information they felt they needed. Mr.

Rosebush expressed the same view. Mr. Dalton's opinion is that these ongoing requests, in the face of information he felt had already been provided, indicated that his job would soon be on the line. He felt he was doing his best to get the information but it was always held to be insufficient.

Mr. Dalton says that by this time he had done all he could to get Dr. Cinats to send the answers the employer was seeking. He had raised this with him personally, phoned and faxed his office; "everything except get down on his knees and beg." He says he told the Employer that Dr. Cinats had suggested they call him in person and that he [Mr. Dalton] had given a release to allow that to happen.

April 2 Dalton delivers a copy of a letter from Dr. Cinats to the HR Office. The letter, dated March 26 states: "...You are currently undergoing further investigation and, because of disability associated with your right lower leg, can only work nights for at least the next six months while you are undergoing further investigation and treatment for your right lower leg. At that time, you will be re-evaluated to determine whether or not the disability will require you to continue working night shift or whether or not you will be able to return to working day/evening shift." [Exhibit 59]

Mr. Rosebush says he was surprised by Dr. Cinats' lack of responsiveness to them in his reply. He was accustomed to clearer reporting.

April 4 Locke emails Dalton confirming receipt of the March 31 fax and April 2 letter from Dr. Cinats and advising that the additional information has yet to be provided. [Exhibit 60]

A second email from Locke was sent to Dalton advising that the balance of days scheduled for days in April would be changed to nights to allow sufficient time to obtain the required information regarding the restrictions and limitations to duties and working conditions that prevent Dalton from working days and requiring that he work nights.

Locke also advised Dalton that if he was having difficulty employer would be pleased to discuss assisting him through a Functional Capacity Evaluation of other form of independent medical. [Exhibit 61]

Union refers Grievance 01-08-144 to arbitration [Exhibit 62]

Mr. Rosebush says he once again extended the night shift assignment in a further effort to be cooperative.

April 9 Dalton dropped by HR Office to leave his latest medical travel claim and Locke was the only staff member in the office.

Mr. Dalton and Ms. Locke had a discussion at this time and repeated their respective positions with him saying they had the information they needed and Ms. Locke saying it was insufficient. Mr. Dalton, she says, was a bit flustered by this and said they should not be discussing the matter because it was the subject of a grievance.

April 11 Locke is contacted by the NWT Human Rights Commission regarding a complaint filed by Dalton alleging discrimination on the basis of disability.

Fax of Human Rights Complaint, File #07-081, received by Locke. Complaint form completed March 6; detailed complaint dated March 20, 2008. [Exhibit 63]

April 16 Labour Management Committee meeting held.

April 28 CEO writes letter to Dalton summarizing Employer's understanding of accommodation process from April 25, 2007 to date and to clarify Employer's current position with respect to the medical information required in support of further accommodation. CEO advised that if required medical information is not provided by May 30, 2008 accommodation will cease and Dalton will return to his normal shift rotation. CEO offered to provide assistance in arranging a Functional Assessment. [Exhibit 64]

Mr. Rosebush says by this letter he wanted to set a deadline and bring this issue to a conclusion. It would end the nights only accommodation, but the employer was still intending to continue the accommodation on days. Ms. Locke says there was no uptake from Mr. Dalton or the Union on this suggestion for a FME or FCE.

May 7 Dalton sends email reply to CEO's letter of April 28. Dalton states, "Thank-you for your multiple page documentation regarding my accommodation; on the surface I disagree with it as there are inaccuracies; I have forwarded it along to PSAC Regional Office with the instructions that it be forwarded to the union's legal department for their review." [Exhibit 65]

May 23 Grievance # 01-08-149 dated May 22 received by HR office. Grievance filed at 2nd level. Details of grievance include statement in CEO's letter of April 28 advising that accommodation would cease as of May 30, 2008. [Exhibit 66]

The grievance also alleged:

- Continuing to discriminate against Mr. Dalton on the basis of Disability despite valid medical direction provided; the Union contends that valid medical information has been provided by qualified medical professionals;
- Harassing/Coercing Mr. Dalton to continually obtain additional medical information while the Employer knows that Mr. Dalton made serious efforts to accommodate the Employer with the requested information; when ultimately it comes down to the decision of the Medical professional(s) to provide such information and Mr. Dalton can't be held responsible for the lack of willingness or tardiness from the medical professionals;
- The Union contends that the Employer's continued request for additional medical information is without reasonable and probable cause; as Mr. Dalton has demonstrated clearly that he presented no risk to himself or significant others. Mr. Dalton has been on Accommodation since February 23, 2008 without incident or complications.

Dalton emails CEO regarding CEO's concerns raised at April 16 Labour Management Committee meeting that Dalton may be in a conflict of interest. [Exhibit 67]

The Employer received no other response, beyond the grievance, to Mr. Rosebush's letter, nor any fuller explanation of the alleged inaccuracies in Mr. Rosebush's letter. Mr. Dalton gave evidence that the use of the word "might" in relation to nights being more conducive to his condition was inaccurate. He says he felt threatened by the suggestion he might be in a conflict

of interest as Union President. He felt Mr. Rosebush was just trying to get him out of the way to curtail the flow of grievances he was initiating. Mr. Dalton's e-mail denies that his role as Local Union President puts him in a conflict in respect to his own grievance or human rights complaint.

Mr. Rosebush denies Mr. Dalton was ever harassed, coerced or discriminated against. He feels that, by this point they had still not obtained the medical information they needed to assess his request for a permanent accommodation or to get a clear picture of the risks associated with his performing certain work. Mr. Rosebush says that about this time he became aware of issues Mr. Dalton's accommodation was causing for other staff. The Employer did not pursue further the conflict of interest with Mr. Dalton handling his own grievances. In fact, Mr. Rosebush says however, despite his e-mail reply on the issue, Mr. Dalton then started to miss labour/management meetings and stopped meeting with Mr. Rosebush directly.

May 30-June 12 Dalton is on vacation.

June 10 Employer's response to Grievance #01-08-149, suggesting #01-08-149 and #-1-08-144 be heard by the same arbitrator at the same time. [Exhibit 68]

June 16 Dalton delivers letter from Dalton to Dr. Cinats, dated June 13, 2008 to the HR office. [Exhibit 69]

Mr. Dalton's letter both urges Dr. Cinats to provide the Employer with the specific information it seeks, but at the same time to support his continued assignment solely to night shifts. It is much like his earlier two notes from January and March. He says, in part:

... it is imperative that I make another effort to satisfy the Employer in respect to the questions asked in a previous correspondence back in March of this year related to my restrictions and limitations. I am grateful for the information you provided in reference to working the night shift for 6 months then to be reassessed. Working those nights is making a difference to me in a positive way in relation to my overall disability.

June 16 Dalton attends follow-up appointment with Dr. Cinats.

Mr. Dalton says, during this appointment, Dr. Cinats did a lot of manual assessment and palpitations, he examined his walking and standing, he aspirated the lump in the scar on his right knee and tried to find anything pathological there. He examined the MRI and the ENG nerve condition tests.

June 17 Amended Human Rights Complaint, File #07-08, received by HR Office. Complaint form completed June 4; detailed additional complaint dated June 9, 2008. [Exhibit 70]

The additional complaints are in essence that the Employer's continued requests for further medical information are harassing and invasive. The Employer had asked that the Human Rights matter be deferred until after the pending arbitration, which Mr. Dalton opposed.

Email from Dalton to Locke regarding medical appointment with Dr. Cinats and suggestion that Employer contact Dr. Cinats directly. [Exhibit 71]

In his e-mail, Mr. Dalton clearly asks the Employer to contact Dr. Cinats directly (subject to certain conditions), tells the Employer that Dr. Cinats has suggested that the Employer contact him directly, and tells the Employer he has signed an authorization to release medical information. He produced a copy of this signed authorization, which is unconditional. Ms. Locke confirms that she was not willing to contact Dr. Cinats directly. Mr. Rosebush agrees he supported Ms. Locke in that decision because of concerns over privacy issues. He noted that, while Mr. Dalton asked that they contact Dr. Cinats directly, he believed Mr. Dalton also placed conditions on their doing so. He was not aware Mr. Dalton had signed an authorization. Rather than do so, the Employer again wrote to Mr. Dalton setting out what it wanted from Dr. Cinats.

***June 19** Letter faxed to Dalton from Locke in response to June 17 email. Employer asks Dalton to provide copy of letter and job description to Dr. Cinats. Employer states that if Dr. Cinats is unable to assist in answering questions posed, the Employer will arrange and fund a functional assessment for Dalton. [Exhibit 72]*

Dalton emails Locke confirming receipt of letter and that he faxed same to Dr. Cinats. [Exhibit 73]

***June 20** A copy of fax cover sheet from Dalton to Dr. Cinats dated June 19, 2009 is received by HR office. [Exhibit 74]*

Mr. Dalton's cover sheet to Dr. Cinats' assistant reads, in part:

Please ensure that Dr. Cinats reads the letter addressed to me from Jean Locke H.R. Manager HRHSSA. As per my discussion Dr. Cinats agreed to respond to my employer's concerns (esp. the 3 questions) as highlighted. It's imperative that Dr. Cinats respond to these questions before Friday, June 27, 08.

***June 27** Email from Locke to Dalton advising that it will require time to review any information to be received from Dr. Cinats. Locke further advised that, "Accommodation to night shift will cease with the commencement of your regular shift rotation to days on Monday June 30. While on the day shift the employer will reinstate the previous accommodations of not requiring that you do medication administration and also allow/support periods of sitting to rest your leg from time to time if necessary. The manager of Long Term Care Services will inform staff of the accommodation."*

Mr. Rosebush was away from Hay River at the time but confirms this e-mail accurately set out their position and that Ms. Locke was in regular touch with him throughout the process. Mr. Rosebush says as of June 30th Mr. Dalton would be provided with the accommodation necessary, but on the regular day and night shift rotation. Mr. Dalton says that by this time his situation was

beginning to affect his mental health. He felt co-workers were not being properly told of his need for accommodation and he was suffering some backlash as a result. He was having difficulty focusing his mind, and started suffering from serious depression and from panic attacks. As a result he went to see a physician.

Dalton replies to Locke's email. [Exhibit 75]

Dalton sends fax to Locke enclosing letter dated June 26th from Dr. Cinats. Dr. Cinats states, "When I saw him on June 16, 2008 he advised me he was working night shifts as an LPN and was able to perform the full duties required. I advised Mr. Dalton to carry on working doing only night shifts on an indefinite basis. I feel this should be a permanent posting for him. While he is doing night shifts he is able to do the full duties of his occupation with no risk to him or patients." [Exhibit 76]

Again, Mr. Rosebush felt Dr. Cinats' information was vague and unduly based on Mr. Dalton's own self-reporting.

Locke receives a telephone call from Kate Gregor, Union Vice-President, inquiring whether there was a change in the Employer's position regarding Dalton's accommodation. Locke advised that she received the letter from Dr. Cinats and would have to consult with the CEO and that Employer's position had not changed.

June 27 *Grievance 01-08-155 faxed to HR Manager. Grieving being placed on day shift with accommodation effective June 30, 2008. [Exhibit 77]*

The grievance alleges the following:

The Union contends that Mr. Dalton is being discriminated against on a continuous basis in respect to his disability and accommodation contrary to the collective agreement, the NWT Human Rights Act and other relevant legislation;

The Union contends that the employer failed to accommodate Mr. Dalton's disability contrary to the provisions of the Collective Agreement, the NWT Human Rights Act and other relevant legislation.

That Union contends that the employer's unilateral action to prohibit Mr. Dalton from following his physician's medical recommendations and is causing undue physical and emotional stress for Mr. Dalton;

The Union contends that the Employer is continuing to discriminate against Mr. Dalton due to his union involvement as President of DCL NT001.

June 29 *Dalton calls in sick at 23:30 hrs for shift on June 30 and July 1.*

July 3 *Dalton provides a medical note to the Leask stating he will be absent from June 30, 2008 to July 14, 2008 and that "PT is awaiting specialist appointment". [Exhibit 78]*

Mr. Dalton never returned to the workplace for work after this date.

Employer's response to Grievance 01-08-155, requesting that it be heard together with grievances 01-08-144 and 149. [Exhibit 79]

July 9 *Dalton emails Locke regarding letter from Dr. Cinats and follow-up. [Exhibit 80]*

That email also told Ms. Locke:

This whole issue has caused me anxiety, panic attacks, depression and other mental and physical problems.

July 10 Dalton provides a medical certificate stating he will be absent from work from July 10, 2008 to July 24, 2008. [Exhibit 81]

Ms. Locke says she had further discussions with CEO Rosebush at this time. They decided to demand at IME and FCE to get the information they felt they still needed and to underscore the seriousness of the situation they did not at this point discuss the issue with Mr. Dalton as he had already turned down an independent medical examination.

July 15 CEO sends letter, including enclosures, to Dalton advising that Employer has not received the required medical information to properly assess the nature of accommodation required due to medically required limitations and restrictions to his job duties. The CEO states that Dalton is directed to undergo an Independent Medical Examination and Functional Capacities Evaluation on July 22, 2008. CEO advises that failure to comply with direction will result in suspension without pay. [Exhibit 82]

Mr. Rosebush says they decided to require an independent medical examination because of their need for more concrete information. The threat of a suspension was to ensure the tests were taken and, after 1 ½ years, to bring the matter to a head. Mr. Dalton never told the employer the substance of his anxiety over taking the tests, or why he said he was doing so under duress. Mr. Dalton says he was in a bad state when he received the letter and did not read it fully. He did read the reference to suspension without pay and took it as the first step towards his termination. Mr. Dalton says he gave the letter to Dr. Hoechsmann to read, which he did.

This letter enclosed a letter to Dr. Hoechsmann of Yellowknife asking the same questions as the Employer had posed to Dr. Cinats before. It also enclosed a letter to Life Care Planning asking for a functional capacity evaluation, along with related questions and worksheets.

July 18 Grievance 01-08-157 is faxed to HR Manager. Grieving direction to undergo IME and FCA and threat of disciplinary action. [Exhibit 83]

The grievance alleges:

On July 15th, Mr. Dalton received correspondence from the Employer directing him to attend for an independent medical evaluation and functional capacity assessment on July 22, 2008. Mr. Dalton was not consulted prior to the Employer making arrangements for the above noted assessments and was threatened by the Employer with disciplinary action should Mr. Dalton not attend for these assessments on July 22, 2008.

The Employer has indicated that Mr. Dalton has refused to provide medical information as requested however evidence on file indicates that Mr. Dalton has repeatedly forwarded medical information to the Employer.

In June of 2008, Mr. Dalton gave written permission to Dr. Cinats to release medical information to the Employer relating to three specific questions relating to accommodation. This was subsequent to Dr. Cinats requesting that Mr. Dalton ask the Employer to contact his office directly. Mr. Dalton made that information available to the Employer however to Mr. Dalton's knowledge, the Employer has failed to contact Dr. Cinats to date.

This grievance also objected to the Employer's failure to contact Dr. Cinats directly. Ms. Locke says she is unaware of any threat of disciplinary action.

July 21 Dalton sends letter to CEO advising that he will attend the FCA and IME "under duress with concern and fear of further injury and reinjury." [Exhibit 84]

Mr. Dalton says his concern over the tests stem from similar tests he took in 2006 which had involved an extreme physical workout. He was particularly concerned it might aggravate his knee.

July 22 Dalton attends IME and FCA in Yellowknife.

Employer's response to Grievance 01-08-157 requesting that grievance 157 be heard at same time as 144, 149, 155. [Exhibit 86]

July 30 Dalton emails Locke advising that he has a "sick note from Doctor which indicates that I am off- Ongoing, to reassessed in 6 weeks". Dalton further advises that he will be inquiring into short term disability and will require assistance from HR staff. [Exhibit 87]

Mr. Dalton says he blanked out the diagnosis on Dr. Nottebrook's medical note because it contained a private personal medical diagnosis to which he felt the employer was not entitled.

Dalton delivers letter dated July 22nd from Dr. Cinats to HR office, addressed to Dalton stating, "If you feel mentally and physically you are unable to do a functional capacity evaluation then I feel you should not be forced to do so." [Exhibit 88]

Dalton delivers letter dated July 22nd from Dr. Cinats to HR office, addressed to Dalton stating, "As stated in my previous letter dated June 26, 2008, Mr. Dalton is able to complete the essential duties of his job as an LPN as long as he works night shifts on a permanent basis." [Exhibit 89]

Ms. Locke described this letter as "of no assistance."

July 31 Dalton faxes medical certificate dated July 30 to HR office which states Dalton will be absent from work for 6 weeks. [Exhibit 90]

This medical slip was from Dr. Nottebrook.

Locke send reply email to Dalton's email of July 30. Locke advises that she has letters from Dr. Cinats which Dalton dropped off the previous day and the fax from today. HR Manager advises that Employer does not have STD benefits but that Dalton may apply for Unemployment Insurance

due to illness and further advises that the qualifying period for LTD is 24 weeks. Locke advises Dalton to contact HR staff member for further information. [Exhibit 91]

August 6 *Dalton and Locke receive email from Marion Hutton, LCP, attaching FCE and IME reports. [Exhibit 92]*

Dr. Hoechsmann provided a comprehensive report on Mr. Dalton's medical history and conditions. The FTE gave a detailed description of Mr. Dalton's mobility issues. These reports are discussed in more detail below, along with Dr. Hoechsmann and Ms. Hutton's evidence.

Ms. Locke says the reports were of assistance and in her view provided the type of medical information they required to assess his ability to do modified duties, on both days and nights.

Mr. Rosebush felt that some of Dr. Hoechsmann's report was unduly based on Mr. Dalton's own self reporting. He concluded that he was not currently in a position to return to work, that his return to work would need to be gradual and some accommodation would still be necessary.

August 7 *The CEO emails Dalton to advise that it has "come to my attention that although you have been absent on sick leave, and that you will be absent for a continuing period, that you are presenting on a frequent basis at your place of work." The CEO states, "Regrettably these actions while you are on sick leave have had an adverse affect upon your colleagues and as such you are directed not to return to the workplace until such time that you are considered fit to return to work." The CEO advises that if he is required to attend Woodland Manor, he is to contact Mr. Charles Taylor who will review the requirements. [Exhibit 93]*

This letter, according to Ms. Leask, was a response to a concern brought to management's attention by a member of staff. This employee, purporting to speak on behalf of herself and colleagues, expressed concern over Mr. Dalton's frequent visits to the facility while he was off on sick leave. She described this as disruption. She complained that she and others were having to work long hours because of his absence yet he appeared well and was able to visit the facility. They felt some hesitation in bringing the matter forward because of his role as Union President. She also raised a concern at what she felt was a pattern of conduct on Mr. Dalton's part, in that he had not worked a summer in five years and had only worked one Christmas period. She complained about his only working nights. She also complained that he was deliberately uncommunicative to some staff, and this made them uncomfortable in the staff room.

While he was off, she and her co-workers were having to work overtime. He did not appear injured to her and this was upsetting to her. She expressed the view that "we were always picking up his slack". She says he was in the facility 2 or 3 times a week and "people felt like they were stepping on egg shells." She also spoke of issues that had arisen while Mr. Dalton was working such as his presence in the staffroom and its proximity to the washroom and the loss to others of the \$2.00 per hour night shift pay (amounting to about \$200 per month).

Mr. Rosebush described the same meeting, getting the feeling that, when Mr. Dalton went to the Manor, he was flaunting his circumstances, was being disruptive and causing other employees to feel threatened. Mr. Dalton, he says was never barred, he simply had to go through Mr. Taylor, who was never contacted. No investigative follow-up was undertaken over the co-workers' allegations. Corroborative notes were kept of this meeting.

August 11 Jennifer Croucher, Compensation/Human Resource Officer emails Dalton regarding benefits during leave of absence. [Exhibit 94]

August 13 Dalton files an Harassment Complaint against the CEO pursuant to the Employer's Anti-Harassment/Conflict Resolution Policy [Exhibit 95] with Gregory Cummings, the Deputy Minister of Health and Public Administrator. [Exhibit 96]

August 14 CEO sends letter to Dalton regarding the IME and FCA reports. CEO advises that the "employer is prepared to accommodate you as recommended in the reports as soon as you are able to return to work. A meeting will be arranged in advance of your return to discuss the nature of the accommodations to be made on your regular shift rotation, allowing for the suggested gradual return to full time hours...Please be advised that your absence from the workplace is creating undue pressure and hardship on you colleagues as well as significant operational difficulties for the employer...The employer requires further medical information in support of your present and potentially lengthy absence from the work place in order to plan for and meet operational requirements. Please provide further more detailed information from a licensed physician on the temporary or permanent nature of the condition and an estimate of the time frame for your return to work including any limitations and restrictions, and accommodation requirements. This information is required by August 29, 2008." [Exhibit 97]

Mr. Rosebush says the August 29th deadline was necessary because Mr. Dalton's continuing absence was having a disruptive effect on their ability to schedule other shifts. He says they were facing undue hardship because of the difficulty keeping co-worker's schedules in line with the collective agreement's requirements. He says they did not receive the extra medical information they sought by their deadline.

August 18 Dalton faxes letter dated August 16 to Gregory Cummings, Deputy Minister of Health and Public Administrator enclosing August 14 letter from CEO. [Exhibit 98]

August 25 Dalton delivers medical certificate, dated August 19, stating he will be absent from work on an "ongoing" basis "pending specialist consultation F/p 6 weeks mid October." [Exhibit 99]

Ms. Locke maintains that, at this point, neither she nor the employer generally were aware of any of the difficulties or medical conditions that provided a reason for Mr. Dalton's absence from work.

HR office receives letter from Gregory Cummings, Public Administrator, addressed to Dalton in response to his letter of August 13 and 16 concerning a complaint of harassment. He advises that the information has been forwarded to Locke. [Exhibit 100]

Mr. Cummings had been appointed administrator somewhat before this when the government dissolved the Health Region's Board.

August 26 Locke sends a letter to Dalton in response to Harassment Complaint advising that complaints have been forwarded to the Designated Anti-Harassment Coordinator in accordance with section 4.3 of the Anti-Harassment/Conflict Resolution Policy. [Exhibit 101]

August 27 Locke emails Dalton regarding receipt of medical certificate and completion of leave form. Emails between Dalton and Locke follow regarding leave forms. [Exhibit 102]

August 28 Grievance 01-08-161, dated August 27, filed at First Level. Grieving Employer's decision "Barring me from the workplace". [Exhibit 103]

As far as Ms. Locke is aware, Mr. Dalton never contacted Mr. Taylor for authorization to attend at the facility, for Union business or otherwise.

Sept. 2 Letter from CEO to Dalton advising that he is to attend a disciplinary meeting on September 3 at 3:00pm and is entitled to have Union representation accompany. [Exhibit 104]

Manager Acute & Long Term Care Services provides Employer's First Level response to Grievance 01-08-161 denying that Dalton has been "barred" from the workplace. Grievance is denied. [Exhibit 105]

Sept. 3 Dalton attends disciplinary meeting with CEO.

During meeting, CEO delivers letter of termination of employment which states: "You have failed to return to work in accordance with the findings of the IME and FCE despite the employer's willingness to support your return with accommodation. You have further chosen not to provide the employer with the requested information in support of your current absence. Given your failure to return to work and your failure to cooperate in the accommodation process, it has become evident that there is no reasonable prospect that you will return to work in the foreseeable future." [Exhibit 106]

Mr. Rosebush says he read Mr. Dalton the letter but that there was little response either from Mr. Dalton or his Union representative, although the opportunity was offered. In particular, Mr. Rosebush says he provided no information as to his medical issues. Mr. Rosebush agrees that he never warned Mr. Dalton that, unless he returned to work he would be fired.

CEO provides letter to Dalton regarding contact information for the President and Vice President PSAC Local NT 001 and recognizing Dalton's continuing status as union representative under article 11.01 of the collective agreement. The CEO advises that Dalton will be granted reasonable access to the HRSSA premises with prior permission to conduct union business. [Exhibit 107]

Sept. 5 Grievance 01-08-161 advanced to Second Level. [Exhibit 108]

Sept. 6 Grievance 01-08-163 is filed by fax and dated, September 4. Grieving dismissal. [Exhibit 109]

Sept. 18 Employer's Second Level Response to Grievance 01-08-163 denying grievance and requesting it be heard with 144, 155, 157, 159. [Exhibit 110]

Sept. 19 Director, Client Services, Charles Taylor provides Employer's Second Level response to Grievance 01-08-161 denying that Dalton has been "barred" from the workplace nor did he receive any request to enter workplace from Dalton. Grievance is denied. [Exhibit 111]

Oct. 6 Amended Human Rights Complaint, File #07-08, received. Complaint form completed September 24; detailed additional complaint dated September 26, 2008. [Exhibit 112]

Oct. 6-Nov. 28 Dalton's complaints of harassment pursuant to the Anti-Harassment/Conflict Resolution Policy are investigated by outside third party, Colin Taylor, Q.C.

Oct. 15 Grievance #01-08-161 and 163 referral to arbitration received by HR office and agreement to join grievances with 144 and 149 and all other grievances filed on behalf of Dalton. [Exhibit 113]

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Feb. 3 Public Administrator Dana Heide provides Dalton with copy of the portion of the Taylor Report dealing with his complaints of harassment, and omitting portion dealing with Kate Gregor. [Exhibit 114]

Mr. Taylor's conclusions were that Mr. Dalton's allegations of harassment against Mr. Rosebush were unfounded. He divided Mr. Dalton's complaints into four parts (at p. 6):

The first part relates to an Employer-directed Independent Medical Examination ("IME") and Functional Capacities Evaluation ("FCE"). The second part relates to alleged denial of access to WLM. The third part relates to a general claim of abuse of authority. The fourth part relates to a general claim of poisoned workplace.

In respect to the first point, Mr. Taylor set out the facts, then stated:

32. The Policy does not call for the Investigator to draw legal conclusions or make recommendations. It requires the Investigator to submit a report of the facts and summary of evidence gathered through the investigation.

As to the second point, after relating the information he obtained from the parties and three witnesses from the workplace, he concluded:

43. I conclude that there is no merit to this aspect of Mr. Dalton's complaint. Mr. Rosebush acted in an appropriate and reasonable manner to the events with which he was confronted at WLM. He did not bar Mr. Dalton's entry to WLM. Mr. Dalton was required to contact Mr. Taylor and arrange for entry. In the circumstances and in the interests of a workplace free from undue disruption, this was a reasonable and prudent step.

He concluded at para. 52 that:

"these were not facts which purport to demonstrate "intention, threats, blackmail and or coercion [point 3] again Mr. Dalton."

As to point 4, he concluded firstly at para. 53:

53. There is no evidence in support of the general allegation of a “poisoned environment” or “toxic work place ... of system[ic] proportion” as it relates to Mr. Dalton.

Thus, at para. 54, he finds no evidence to support the other allegations against Mr. Rosebush. This does not purport to cover the IME issue.

Lastly, Mr. Dalton had complained of Mr. Rosebush’s letter of August 14 which said, in part:

Please be advised that your absence from the workplace is creating undue pressure and hardship on you [sic] colleagues as well as a significant operational difficulties for the employer.

Of this, Mr. Taylor said “the statement that causes Mr. Dalton concern is the self-evident presentation of the effects of his absence.” He rejected any suggestion that this was a form of mental abuse or harassment.

March 3 Dalton writes letter to Public Administrator Dana Heide Re: Taylor Report and request for identity of witnesses and access to minutes of meeting(s) related to me. [Exhibit 115]

March 26 Public Administrator, Dana Heide replies to Dalton’s letter of March 3. [Exhibit 116]

The Independent Medical and Functional Capacity Evaluations

The Employer, under this collective agreement, has a negotiated right to require an employee to undergo an Independent Medical Examination. Article 40.06 provides:

40.06 (a) Where the Employer requires an employee to undergo a specific medical, hearing or vision examination by a designated qualified medical practitioner, the examination will be conducted at no expense to the employee. The employee shall, upon written request, be able to obtain results of all specific medical, hearing or vision examinations conducted.

(b) Employees shall authorize that the requested specific medical, hearing, or vision examination information be supplied to the Employer with the understanding that such information shall be maintained in a confidential manner in the Human Resource Section of the applicable Department, Board, Agency or Region. Employees shall not refuse to take such medical, hearing, or vision examinations.

Given this contractual right, it is somewhat surprising that the parties remained at loggerheads over the sufficiency of medical information for almost 18 months. Clearly, Mr. Dalton was unhappy at being required to take an IME, and only did so “under protest.” However, that is why such contractual provisions are negotiated; to bring some independent evaluation to difficult issues about the need for consent and about a person’s limitation or capacities.

Dr. Hoeschsmann is a family practitioner with a special interest in Muscular-Skeletal disorders. He confirmed that the report he prepared at the request of the Employer and, after examining Mr. Dalton, was his medical opinion. The Employer's letter asked him to address three questions. Dr. Hoeschsmann was unable to recall the letter specifically, but Mr. Dalton says he gave it to him and that Dr. Hoeschsmann read the letter. Dr. Hoeschsmann's report, like those from Mr. Dalton's physicians, does not give specific and direct answers to the Employer's three questions:

The employer is seeking answers to the following questions:

1. Is Mr. Dalton able to complete the essential duties of his job?
2. Are there any specific functional limitations present that apply to Mr. Dalton's employment as an LPN, and if so to what extent?
3. Is the accommodation sought of a temporary or permanent nature and if of a temporary nature how long?

Your assistance in providing direction regarding Mr. Dalton's ability to perform the duties of his position in terms of the medically required limitations and restrictions associated with his condition would be appreciated.

In part, this is explained by the fact an FCE was performed at the same time and was more likely, and more able, to address some of these issues.

In his evidence, Dr. Hoeschsmann described how, when conducting an Independent Medical Examination, he would assess the presence of pain or the need for work restrictions. He described the diagnostic process of listening to the client's story and assessing it against the diagnostic possibilities. Possibilities would be tested or ruled out with diagnostic tests, in this case through the MRI that was available.

He testified that it was not his role, as a physician, to be following people on the job, but that other specialists practitioners are available to do so. As to validating the experience of pain, he testified that, unlike bleeding or swelling, pain was not something you could observe directly. Mr. Dalton in any event did not report experiencing pain during the examination. He described over use syndrome and the symptoms and stresses that result when a part of the body experiences more activity than it would like. This can include inflammation and pain.

In order to treat this, he tries to isolate and reduce the aggravating action. He agreed that over use syndrome is a very broad classification and says he would have liked to narrow things down to some more specific cause. However, until they could figure out what was causing the pain, this would be difficult. He agreed the condition was chronic and not dependent in itself on the time of day. He said that it is the diagnosis that gives physicians the ability to give a prognosis. Without a specific diagnosis, no reliable prognosis is possible. He would not be comfortable in

saying Mr. Dalton could stand for 1 ½ hour, 1 hour or 4 hours; and accepted that these questions depended on Mr. Dalton's own experience of pain in the circumstances he encountered.

Dr. Hoeschsmann's report is helpful and significant in respect to several issues about which the parties had differences. The report has particular significance as an Independent Medical Report in that the physician was chosen by the Employer and less susceptible to the accusation that he was merely passing on Mr. Dalton's own wishes. (I do not mean by this that I accept the view that the other physicians succumbed to that tendency, only to suggest that any such suspicion with respect to Dr. Hoeschsmann is even less justified).

In respect of the night shift issue, he said, specifically:

The logic of his request to limit his work hours to night shifts in the hopes of reducing this pain appears sincere and sound. There is more time spent on his feet in a day shift and less on a night shift which means he experiences less pain working at night. Perhaps there is a change that would allow him to spend less time on his feet overall, therefore lessening pain. That could mean a different job entirely. Testing by the occupational therapists in Yellowknife may elucidate other techniques to cope with the condition.

In this conclusion, Dr. Hoeschsmann is expressing the same view as Mr. Dalton's own physicians. Of course, it is based in part on Mr. Dalton's report of when he experiences pain, but it is also based on the fairly self evident proposition in such an industry, where people sleep at night, that there is generally more opportunity to sit at night than on days.

His report continued:

Summary and Recommendations:

Dalton has a chronic pain condition affecting his right foot with an unconfirmed etiology. Currently, he has been having difficulty maintaining normal duties of his job because of this pain condition.

There is no clear diagnosis to explain Dalton's experience of pain and he is currently not able to work day shifts because of this problem. The non-steroidal anti-inflammatory pills he has taken previously do not provide sufficient relief.

Given that he appears to have a slight leg length discrepancy he should have confirmatory testing with a properly calibrated x-ray from his pelvis to his ankles. A corresponding heel lift in his right shoe is also recommended to determine if this is a contributing factor.

In addition, Mr. Dalton would benefit from a consistent medical practitioner to assist with continuity of all aspects of care provision on an ongoing basis.

This summary conclusion, expanded upon in the full report, is significant in that it confirmed what Mr. Dalton's own physicians and specialists had been saying; that his condition was chronic but of unknown cause ("unconfirmed etiology"). Dr. Hoeschsmann agreed that "over use syndrome"

could include a number of conditions or causes. Dr. Hoeschsmann's report identifies and analyzes Mr. Dalton's leg pain. The only indication of functional limitations due to this pain is the reference on page 1 to a weakening in the right calf.

Dr. Hoeschsmann's report also reported clearly on Mr. Dalton's symptoms of depression and anxiety. This paragraph is sufficient, even alone, but particularly when taken alongside Mr. Dalton's own advice and his medical certificates in the last couple of months of his employment, to alert the Employer to the fact that he was suffering from a disability, separate and beyond his leg problem, that was preventing him from attending work.

It was put to Mr. Rosebush that Dr. Hoeschsmann's report gave a clear indication that, in addition to his leg problem, Mr. Dalton was suffering issues related to his mental condition. Dr. Rosebush was somewhat dismissive of this suggestion, characterizing this as symptoms but not a condition. He agrees the employer alone selected the doctor to whom he was referred.

Ms. Locke says she read Dr. Hoeschsmann's report, but only looked for information that was meaningful to her. She says she did not recognize that the prescribed drug mentioned was for depression, but nor did she ask. She says she did not link that paragraph of his report to the reasons for Mr. Dalton's most recent absence. I find Ms. Locke's rather cursory examination of this report rather difficult to reconcile with her very particular insistence on precise medical information up to that point. It suggests that conclusions about Mr. Dalton were perhaps rather firmly entrenched by this time.

The Functional Capacity Evaluation prepared by Ms. Hutton of Life Care Planning Ltd. provided, in part:

Recommendations

Mr. Dalton is currently fit for duties in the medium (20-50 lbs) physical demands level on an occasional basis, with functional tolerances for lifting and prolonged standing.

It is recommended that Mr. Dalton begin a graduated return to work program beginning with 8 hours and increasing over a 4 week period. The return to work should be supervised by an objective third party to provide support, on the job counseling, monitoring and assistance when required. Return to work diaries should be kept for early identification of challenging experiences.

Mr. Dalton reported discomfort during standing tests. It is recommended that a sit/stand stool be utilized to reduce prolonged standing. This should be used when standing at the medication cart in the morning and in the bathroom when prolonged standing is required for bathing residents. During these tests the stool should be positioned so that it can be utilized while carrying out the tasks therefore allowing Mr. Dalton to remain productive. In addition, LCP recommends Mr. Dalton trial wearing 10-20 mmHg compression socks. These assist in reducing swelling and soreness in lower leg during standing activities.

LCP recommended that Mr. Dalton is encouraged to perform stretching and mobilization of the foot. It may also be worthwhile for Mr. Dalton to get a venogram or arteriogram to investigate possible circulation problems.

The tests of Mr. Dalton's physical abilities all show a "yes" match between the work demands and Mr. Dalton's demonstrated abilities, although with some suggested rests and adaptations, mostly directed at pain relief or to avoid aggravating his condition. Overall, the FCE showed Mr. Dalton had the abilities necessary for the job. It made recommendations to lower the risks due to awkward lifting situations, but these appear applicable to most workers and were not due to inabilities on Mr. Dalton's part.

The FCE supports the view that Mr. Dalton suffered pain, but that pain did not itself translate into risk of harm or disability except to the extent over use of his leg aggravated the pain; that is what his physicians had been saying throughout. Given Mr. Dalton's experience with this test, his opposition to taking an FCE and his failure to volunteer for such a test when offered, is hard to understand. His doing so, when it was first suggested, would have provided most of the answers the Employer sought and reduced significantly the areas of conflict and uncertainty.

Similarly however, it is difficult to understand why the Employer did not move much earlier to insist on such a test. It is debatable whether it is covered by Article 40.06 as a "specific medical examination", although I specifically make no ruling on this. However, it would be a perfectly reasonable inquiry to pursue in order to justify an accommodation of the type Mr. Dalton sought. Any refusal to take such a test would put into question his ability to allege discrimination through a failure to accommodate.

Decision

This case demonstrates that accommodation by litigation is a particularly dysfunctional way of ensuring that those with disabilities do not face discrimination. It is adversarial and unduly focused on rights (often who is right and who is wrong). It demonstrates also that formal communication in writing over such issues is less effective than collaborative, face to face, cooperation and direct communication between those involved. In such a process, establishing who is right takes priority over getting the clear information necessary to find an effective solution. Both sides in this case are responsible for letting their own view of the "rights" involved in the situation get in the way of a solution, to both their detriments.

There are six grievances arising from all this.

Grievance 01-08-144 dated February 8, 2008 Denial of accommodation on night shift. Also seeks cessation of requests for diagnostic and treatment information from physician.

Grievance 01-08-149 dated May 22, 2008 Grievor's advised that accommodation will stop on May 30, 2008 unless medical support received.

Grievance 01-08-155 June 27, 2008 Grievor's being placed on day shift effective June 30, 2008.

Grievance 01-08-157 July 18, 2008 Grievor's directed to undergo IME and FCA plus the threat of disciplinary action.

Grievance 01-08-161 dated August 27, 2008 Grievor Dalton's being barred from the workplace.

Grievance 01-08-163 dated September 4, 2008 Grievor Dalton's termination.

The first three all deal with the double barreled issues of accommodating a disability and requests for information about a disability. They are analyzed together. The fourth relates to the direction that the grievor undergo an Independent Medical Examination and a Functional Capacity Examination. The last two grievances raise distinct issues and will be addressed once these accommodation questions are dealt with.

The three accommodation-and medical issue grievances

These grievances, set out more fully above, allege:

01-08-144 – That on February 1, 2008 the Employer denied Mr. Dalton's request to be accommodated on night shifts. The redress sought asked, in part:

- a) That Mr. Dalton be placed on permanent night shift (1900 hours to 0700 hours) until such time that Mr. Dalton's physician confirms that Mr. Dalton is able to return to the regular schedule at Woodland Manor;
- b) That the Employer cease and desist from requesting diagnostic and or treatment information from Mr. Dalton's health care provider;

01-08-149 – That the Employer discriminated against Mr. Dalton by terminating his night shift accommodation without just and reasonable cause, and that it was harassing him by requiring further and unnecessary medical information which he was in any event unable to get his doctors to provide.

01-08-155 – That the Employer discriminated against Mr. Dalton by placing him on day shift as of June 30, 2008.

The Employer argues that the appropriate starting point for the analysis of the accommodation aspects of this case is set out in:

Hutchison v. Canada (Minister of Environment) 2003 FCA 133 (Fed. C.A.) at paras. 74-75

The Court looked at the new framework for the analysis of discrimination set out by the Supreme Court of Canada in *Meiorin* [1999] 3 S.C.R. 3. It went on to say:

74 There is an obvious distinction between this case and *Meiorin* which is that the transaction between the appellant and the respondent was not driven by a pre-existing policy. Instead, we find a course of dealings in which the parties operate from an understanding of their respective rights and obligations. That understanding may have been rooted in rights guaranteed or obligations imposed by the collective agreement, the legislative scheme governing employment in the public service, human rights legislation, health and occupational safety legislation or departmental policies. It would be very difficult to extricate from this matrix a discrete coherent policy which one could subject to an orderly analysis as in *Meiorin*. This is not to say that the *Meiorin* analysis is not relevant to a course of conduct. But it does suggest that the analysis may have a different starting point.

75 In *Meiorin*, the Court's analysis began from a finding that the policy in question distinguished between people adversely on a prohibited ground. Where one is dealing with a course of conduct, the more appropriate question is, does the transaction between the parties, taken as a whole, result in adverse treatment on a prohibited ground? If the transaction taken as a whole does not disclose adverse treatment, then the inquiry is at an end. If adverse treatment on a prohibited ground is shown, one proceeds to the three questions which framed the Supreme Court's analysis.

An Alberta case followed the *Hutchison* (supra) decision. It involved an Employer searching for and finding an alternative job to accommodate the grievor's disability. The grievor rejected the offer, feeling the job was unsuitable for her, after which the Employer suspended her from duty. She alleged discriminatory treatment. On judicial review, the Court held at para. 34:

... a person is not entitled to a job of their own choice so long as the proffered job is one that is sufficiently inclusive to accommodate the complainant. (*Hutchinson v. Canada* [2003] 4 FC 580 par. 76 and 77) In that case, the Federal Court said if some alternatives proposed by the employer were found to be reasonable by the Human Rights Commission, the question of whether the employer has to go to the point of hardship to find a job that would be the Applicant's preferred alternative does not arise.

and further, at para. 39-40 and then 43:

Her ultimate complaint was not her physical inability to do the proffered job but her lack of desire to do it.

[40] The law appears clear once the employer puts forward a job that reasonably accommodates the employees disability the employee has a legal obligation to accept it.

...

[43] While the Applicant may not have liked the position, may have considered it demeaning or less worthwhile, and may have considered she was entitled to a different job entirely, I find the Respondent has satisfied its obligation within the Department and within her classification, skills, experience, training and as well taking into account her moderately limited physical abilities. Had they not found such a position they would have been obliged to search further. They did not search further and I find the decision was correct.

Anderson v. Alberta [2004] ABQB 766 (Hembroff J.)

The statement in paragraph 40 that the employee has a legal obligation to accept a job that sufficiently accommodates an employee's disability perhaps overstates the situation. The employee is not obliged to accept the position, but if they fail to do so, they lose their ability complain that they are being discriminated against. They may also experience consequences as a result of not performing their regular duties.

The Union refers to another case that accepts the *Hutchison* analysis. It found sufficient proof of a *prima facie* case of discrimination in the Employer's failure to accept a work restriction prescribed by the grievor's physician. It held, at para. 54:

[54] I find that Mr. Willoughby has made out a *prima facie* case of discrimination. CP had accommodated his medical restrictions continuously since 1997, including his need to work day shifts. Then, abruptly, in the summer of 2001, CP assigned Mr. Willoughby back to the 3:30 a.m. shift. When CP received medical information in March of 2002 that Mr. Willoughby could work only a day shift, CP kept him on the 3:30 a.m. shift. There can be no question that CP's course of conduct visited an adverse effect on Mr. Willoughby on the basis of his disability: CP's decision was directly contrary to the clear direction of his doctor and caused his medical condition to worsen. I also find that Mr. Willoughby made out a *prima facie* case that he was treated not just adversely, but differentially on the basis of his disability. There is no free-standing right to accommodation under the *CHRA* as was recently observed by this Tribunal in *Moore v. Canada Post* 2007 CHRT 31 (paragraph 86). However, I find that Mr. Willoughby's evidence that his employer received medical direction identifying a work restriction and that the restriction was not accommodated, makes out a prima facie case of differential treatment. I find that Mr. Willoughby has made out a *prima facie* case that he was treated adversely and differentially by CP on the basis of his disabilities. (*emphasis added*)

Guy Willoughby and Canadian Human Rights Commission and Canada Post Corp. [2007] CHRT 45

Mr. Dalton's grievances object to the Employer's seeking diagnostic and treatment information. It is a theme he has reiterated during almost the entire course of his quest for suitable accommodation. The cases indeed place limits on what the Employer may demand by way of medical information, although the determination has to be case specific. For this case, it is not necessary to debate the fine points of the case law. What the Employer sought here was not a diagnosis, and was not direct information about Mr. Dalton's treatment. Rather, what it sought was a clearer description of Mr. Dalton's limitation and restrictions plus some indication of the likely duration of his condition. In particular it asked throughout what is it that make nights essential that cannot also be accommodated on days. The questions posed of Dr. Younge on

August 16, 2007, Dr. Cinats (via Mr. Dalton) on January 29, 2008 and again on April 28, 2007 all avoid diagnostic or treatment issues. For example, on June 19, 2008, repeating the requests for Dr. Cinats, the Employer asked:

In order to determine how best to support your needs over the coming year, and longer, if warranted, the employer needed to receive guidance from a specialist physician on the following:

1. Are you able to complete the essential duties of your job?
2. Are there any specific functional limitations present that apply to your employment and if so to what extent?
3. Is the accommodation sought of a temporary or permanent nature and if of a temporary nature how long?

If there is an objection to the repeated requests for information, it is more the employer's unwillingness to accept that some of these questions were not amenable to a clear answer. It is not that they delved into diagnostic and treatment information.

Throughout, Mr. Dalton has misconceived the extent of the duty to accommodate. He has, throughout, stood on what he views as the Employer's duty to accommodate his disability. He indeed suffered a disability due to the somewhat uncertain but no doubt real problems with his leg. However, the duty to accommodate is not an absolute duty. Nor is it a duty dependent on the medical condition or needs alone. It is at all times subject to the limit of undue hardship. The Supreme Court of Canada has reaffirmed that limit and its meaning in:

McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal [2007] 1 S.C.R. 161

It said, at paragraphs 14 and 15:

The employer must demonstrate that it cannot accommodate the complainant without suffering undue hardship.

15 The factors that will support a finding of undue hardship are not entrenched and must be applied with common sense and flexibility (*Meiorin*, at para. 63; *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525, at p. 546; and *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, at pp. 520-21). For example, the cost of the possible accommodation method, employee morale and mobility, the interchangeability of facilities, and the prospect of interference with other employees' rights or of disruption of the collective agreement may be taken into consideration. Since the right to accommodation is not absolute, consideration of all relevant factors can lead to the conclusion that the impact of the application of a prejudicial standard is legitimate.

The Court continued, at para. 22:

The importance of the individualized nature of the accommodation process cannot be minimized. The scope of the duty to accommodate varies according to the characteristics of each enterprise,

the specific needs of each employee and the specific circumstances in which the decision is to be made. Throughout the employment relationship, the employer must make an effort to accommodate the employee. However, this does not mean that accommodation is necessarily a one-way street. In *O'Malley* (at p. 555) and *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, the Court recognized that, when an employer makes a proposal that is reasonable, it is incumbent on the employee to facilitate its implementation. If the accommodation process fails because the employee does not cooperate, his or her complaint may be dismissed. As Sopinka J. wrote in *Central Okanagan*, "[t]he complainant cannot expect a perfect solution" (p. 995). The obligation of the employer, the union and the employee is to come to a reasonable compromise. Reasonable accommodation is thus incompatible with the mechanical application of a general standard.

Throughout, Mr. Dalton's assertion of his "right to be accommodated" and his description of the Employer's duty to accommodate has focused almost entirely on what he felt was best for his condition which, for the most part, meant that he should only work nights. He demonstrated little recognition, in his initial position or in his testimony, of the need to consider the impact of his chosen solution on co-workers or on the Employer's other legitimate interests.

Mr. Dalton's attitude, that accommodation in his situation meant granting him the permanent assignment to night shifts he sought, can be contrasted to the Supreme Court's fuller statement of the role of the complainant described in the *Central Okanagan* decision referred to above.

This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfill the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in *O'Malley*. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.

As another Court has put it:

There is no duty of instant or perfect accommodation, only reasonable accommodation. The reasonableness of the employer's accommodation must be evaluated considering the knowledge of the employer, together with the cost, complexity and expense of any physical accommodation required, and other similar factors. The test is not subjective, and the employee is not entitled to dictate the accommodation he or she will accept. Nor is the employer required to accept the complainant's own subjective assessment or his or her abilities. (*emphasis added*)

Callan v. Suncor Inc. et al (2006) ABCA 15 (Alta. C.A.)

As part of, and perhaps as a consequence of, his approach to accommodation, Mr. Dalton took as a given that any solution short of the night shifts he demanded, must be a failure to accommodate his needs. This led him to virtually ignore all efforts to see if and how he might be accommodated on the day shifts. It also appears to have blinded him to the possibility that, in an

operation this size, no accommodation might be possible that maintained his pay at its former level. As examples only, I note, as overly strident statements of his right to accommodation:

- Mr. Dalton's dismissal of employee concerns over his use of the lunchroom area.
- Mr. Dalton's reply to Ms. Leask of July 25, 2007 alleging discrimination and his rejection as "unacceptable" his working 8 hours and taking 4 hours sick leave.
- Mr. Dalton's e-mail of February 17, 2008 telling the Employer it "had ample time to accept any suggestion around accommodating my disability ..."
- His assertion in his May 23 and grievance that the issue is primarily dependent on medical information (inferentially to the exclusion of all other considerations).

Several physicians recommended that Mr. Dalton stay off his feet as much as possible. They also said that nights were the best way to achieve that. These physicians, in recommending night duties, had some relevant knowledge of the difference in duties between day and night shifts; from their own experience, from what Mr. Dalton was able to tell them of the operation, and to a degree from the common sense of the situation. However, the Employer is correct that little information or consideration was given to why day shifts with accommodations could not work. The Employer was legitimately suspicious that Mr. Dalton was lobbying unduly for night shift recommendations.

Ms. Locke, for her part, adopted some approaches that I find unduly inflexible and ultimately counterproductive in the circumstances. First, she expected the impossible from the physicians who examined Mr. Dalton. She then held Mr. Dalton to account for what she perceived as their inadequate responses. Even after 18 months of examinations (more if you go back before April 2007) specialists were saying they could not ascertain the cause of Mr. Dalton's leg pain. Without an ascertainable cause, some of Ms. Locke's questions about timing and prognosis simply could not be answered. Sometimes doctors simply cannot predict when or if the condition will worsen, improve or remain static. As Dr. Hoeschsmann put it, you usually cannot give a prognosis until you can establish a diagnosis.

Medicine, much to the frustration of many a patient, and many of their Employers, is not a precise science. Ms. Locke, with the support of Mr. Rosebush, took the position throughout that it was Mr. Dalton's obligation to seek and obtain precise answers to the Employer's question as to Mr. Dalton's limitations, the duration and the prognosis for recovery. Ms. Locke said directly, when cross-examined, that she assumes that a doctor has a means of testing what a person like Mr.

Dalton can or cannot do in the circumstances. She says she proceeded throughout on the assumption that the physicians could give them that information if only they would. She based her views on the Employer's right to this information on lessons she picked up, and cases she was referred to, in a Lancaster House workshop. She was not wrong in terms of what the employee should provide if it is realistically available. However, all such statements as to the employee's duty to provide such information are implicitly subject to the condition that such a degree of information, and precision, is in fact possible. Ms. Locke's position on this put Mr. Dalton in the middle between the Employer and his health care providers.

Ms. Locke's letters clearly agitated a couple of physicians. I note, as just one example, Dr. Burrell's "sorry, unable to obtain crystal ball" comment. By inviting the impossible, Ms. Locke appears to have caused some of the physicians to be overly sympathetic to and supportive of Mr. Dalton's own position. This, in turn, led Ms. Locke and the Employer generally to be unduly dismissive of the medical information they did receive, discounting it too frequently as based on "patient self-reporting." That is too easy a discount to apply; much of medicine must of necessity be based on patient self-reporting. Doctors know that to be the case and apply a good deal of professional expertise to such information; but a prognosis based in part on what the patient told the doctor cannot simply be ignored as unreliable just because of that fact. Not all medical opinions can be backed up by "objective" evidence entirely independent of what the patient details. Employers who insist on such proof in all cases do so at their peril where it is unreasonable in the circumstances of the patient's condition.

Secondly, Ms. Locke adopted the inflexible view that she would not, even when invited to, engage in any direct conversation with Mr. Dalton's medical advisors. By precluding any direct discussions, Ms. Locke was able to avoid facing what, from the doctor's reports, is obvious; some of the precision she was demanding simply was not available.

A consequence of adopting only indirect communication is that it allowed Mr. Dalton to layer his own gloss on all the Employer's communications. Mr. Dalton appears throughout to have tried to lobby his physician for his own point of view. At almost every juncture, rather than leaving it to his physician to provide their own professional judgment and suggest solutions he specifically asked for certain results. He has to take much of the blame for the fact the Employer then discounted as "based on self-reporting" what his physicians gave back.

When Mr. Dalton asked for and got back medical slips saying he had to work nights he was able to maintain that nights were the only available options based on medical evidence. On the Employer's side, they were able to view the doctor's advice as based primarily on what Mr. Dalton

had asked for, side stepping any real analysis of the day shift option. Yet at the same time, the Employer could discount the possibility that perhaps the night shift in fact represented a much superior alternative. My point is not to say one or the other was right, it is just that this essentially pointless correspondence went on for an unduly long time serving to do little more than reinforce each side's view of the other's lack of reasonableness. Much of this could have been avoided by direct or perhaps three way discussions with the physician involved. That, however, would have meant that both sides would have had to deal with the conclusions that resulted and turn their attention to the other important issues in accommodation; the hardships involved and the way a compromise of the medical and the workplace issues might best be accomplished.

The Employer justified its policy of not contacting physicians directly based on privacy concerns, yet Mr. Dalton, despite some prior inconsistent positioning, gave consents to the release of information. Ms. Locke says she was not aware at the time that Mr. Dalton had given a consent to Dr. Cinats to speak with and release information to the employer. Nonetheless she says that even with a consent she did not want to talk to his doctor directly. She maintained that she had heard "too many Union lectures" on the evils of breaches of privacy. She says the possibility of a three way call, involving Mr. Dalton as well, never came up.

Privacy is the employee's right. At times, in accommodation cases, an employee must compromise that right when seeking accommodation. When the employee consents, an Employer that refuses the proffered opportunity for explanation runs the risk of being found to have failed to act reasonably in accommodating a disability when its doing so, to verify the employee's assertions, in effect becomes the barrier to that information. I do not accept the proposition that all medical information must of necessity flow through the employee seeking accommodation in cases where the employee has given consents. Nothing in the *Schram* award upon which Ms. Locke relied, suggests such a conclusion. Indeed, Arbitrator Ponak suggested at paragraph 65:

First, we find this a most unfortunate case. A long serving registered nurse with a blemish free record, working in a highly specialized unit, felt she had no choice but to retire when faced with the requirement to switch to a shift schedule she believed she could not physically handle. That resulted in a personal loss and a loss to our health care system. In the Board's view, this outcome might well have been avoided. The OSH&W department could have been more proactive and creative in giving the Grievor alternatives for providing more medical information and dropped its insistence on the PMWTF. The Union could have explored ways with the Grievor to provide more medical information without abandoning its principles on medical disclosure. The Grievor could have asked more questions, both to the Union and Employer, about medical consent and direct communication between her physicians and the OSH&W department. The Employer could have been more specific as to what medical information it needed, rather than simply saying that what it received was not enough. The Union could have asked the Employer to be more specific in terms of its needs. Any of the people involved, the Grievor included, could have been more persistent in pressing for a meeting of all interested parties. Had even some of these things happened, this case could well have ended happily without a grievance and without arbitration. (*emphasis added*)

Capital Health v. UNA Local 33 (Schram) 87 CLAS 134 (Ponak)

A third concern relates to the Employer's approach to how this disability was to be accommodated. Ms. Locke's views on, and past experience with, accommodation, came from involvement with return to work cases. The guideline she wrote out and used to lead the discussion on July 31st is written from the perspective of dealing with an employee who has been off work due to illness or injury and is returning to work thereafter. It states the goal as follows:

"Goal is return the ill or injured worker to safe and productive work as soon as medically possible. It's a team effort."

Meetings were held of the "Return to Work" group. Accommodating a disability in order to avoid discrimination on the basis of that disability is not the same as a return to work situation, although there are similarities. One big difference is that, when an employee has been off work, there is usually a known reason for the absence and the return to work involves a reintroduction of the employee into the workforce as they recover from a known condition. A disability may not cause an employee to be off work at all. A disability can be a condition, the cause of which may be unknown or unidentifiable. If the disabling condition or symptoms can be identified, it is sufficient to give rise to the need for accommodation even if the cause or diagnosis is unascertainable. Such a disability may also change over time.

A return to work usually requires some rehabilitation process. That is not necessarily so where a disability needs accommodation. There is a danger that forcing an accommodation of this kind into a return to work mould can itself involve discriminatory attitudes. In this case the Employer, with little or no supportive evidence, made the assumption that, since Mr. Dalton experienced pain, he may well be unsafe and unable to carry out his duties without harm to himself or risk to patients. This comes suspiciously close to the type of assumption that plague people with controllable illnesses like epilepsy; that those who suffer from it are inherently unsafe and therefore to be treated differently.

In this case, Mr. Dalton was able to obtain, from one physician, some assurance that he presented no risk to himself or to patients. Other reports, however, failed to answer that question directly. This fact combined with Mr. Dalton's own absolute insistence that he could only work nights gave the employer reasonable cause to question his abilities to perform the job. I note the requirements of the job description and the fact that elderly and infirm patients may well have to depend on Mr. Dalton's abilities in an emergency.

All this, of course, got tied up in the debate surrounding Mr. Dalton's insistence on nights as the only option, his objection to the scope of questions posed and his ignoring of any other undue hardship factor.

Returning to the *Hutchison* analysis, can it be said, of this entire course of dealing, that Mr. Dalton was overall treated adversely? My conclusion is that it cannot. Perhaps the most significant factor is that, right up until the day Mr. Dalton left work, he was in fact accommodated on nights for almost all of the time. This occurred largely because of his difficulty getting medical information, but it nonetheless occurred. Secondly, at no point did the parties ever get to the point where the issues of undue hardship were faced. This is a small facility. What Mr. Dalton was seeking through assignment to nights, involved a significant impact on co-workers and significant additional cost to the Employer. Had things reached that point, the Employer may well have been justified in denying Mr. Dalton the shift he sought on undue hardship grounds notwithstanding whether or not it was the only viable option medically. Third, the Employer, throughout, has maintained it has an ability and a willingness to accommodate Mr. Dalton's needs on the day shift. While I have expressed concerns over the Employer's insistence on medical documentation, I accept at the same time that Mr. Dalton did not then and has not now established the proposition that a day shift accommodation is unworkable. I am not prepared to make that assumption. Consenting to an FCE might have resolved the issue but Mr. Dalton was unprepared to do that. The grievor was really adopting a position much like that alluded to in the judicial review of the *Schram* decision.

There was no information provided that linked the symptoms to the accommodation being requested. Rather, the information provided was simply a reflection of what the Grievor determined was best for her health and she had her physicians mirror her request. Here, the Grievor and her physician attempted to usurp the Respondent's role.

UNA 33 v. Capital Health [2008] ABQB 126 at para. 53

Nights may well have been best solution; but that falls short of saying that days will not work. That may have been so, but days were never put to the test or rejected on the basis of a medical assessment of the available day shift accommodations. Such medical information as there was was generated in large part by Mr. Dalton's own lobbying and by the quite natural and probably correct assumption that nights involve less standing than unaccommodated days. What was missing was any assessment of the suitability of days with accommodating measures.

I have not overlooked the allegation, most directly expressed in 01-08-155, that the Employer's conduct involved discrimination based on Mr. Dalton's involvement as Union President. This point was not pressed strongly in the hearing and argument and I find, while there is some indication that this role generated tensions, there is insufficient evidence that the response to his

disability involved anti-union animus. Such animosity as there was related to Mr. Dalton's over-exuberance in pressing his own view of his right to accommodation on the employer, his co-workers and his physicians.

Given these factors, I find these three grievances are not made out. By May and June the Employer was moving to bring these issues to a head. It advised Mr. Dalton specifically he would still be accommodated on days. Its doing so was not unreasonable, in fact it was overdue.

Grievance 01-08-157

This grievance arose from the Employer's letter of July 15, 2008. The significant parts of that letter read:

Given your refusal to provide the Employer with the information necessary for us to assess the accommodation that is necessary, you are hereby directed to undergo an Independent Medical Examination and Functional Capacities Evaluation in cooperation with and Dr. Alex Hoeschmann and Life Care Planning on July 22, 2008.

...

Failure to comply with this request will result in suspension without pay.

The grievance cites Articles 1.01, 1.02, 3.02, 37 and 48 of the collective agreement. It seeks as redress:

That the Employer contact Dr. Cinats directly for information relating to Mr. Dalton's accommodation as Mr. Dalton gave permission for that to occur in June 2008.

That the Employer respect Mr. Dalton's right to privacy and cease and desist from arranging medical assessment appointments without prior consultation and approval from Mr. Dalton.

That the Employer rescind its directive for Mr. Dalton to attend medical assessments on July 22, 2008 and await the report from Dr. Cinats.

That the Employer cease and desist from threatening preemptive disciplinary action against Mr. Dalton ...

The provisions of Article 40.06 are set out above. That seeks, at least, entitled the Employer to require Mr. Dalton to undergo an Independent Medical Examination. The inclusion of a Functional Capacities Examination requirement, whether or not directly authorized by Article 40.06 was a reasonable requirement given the impasse the parties had reached as to just what Mr. Dalton could or could not do. While I agree the Employer could have contacted Dr. Cinats directly, its refusal to do so does not in my view undermine its right to seek an independent medical examination or some reasonable testing of Mr. Dalton's abilities. The demand for an FTE is particularly justified by Mr. Dalton's insistence on his inability to work days. While an

Employer should not assume an employee with pain is disabled, Mr. Dalton's own assertion raised legitimate questions as to just what of the day shift duties, with accommodation, he could not perform. This, in turn raises legitimate question as to his ability to respond, in the event of an emergency, when working nights.

Mr. Dalton's grievance asks that the Employer be found to have breached the agreement by threatening disciplinary action. Mr. Dalton was legitimately required to attend the IME. In the circumstances, I do not find a warning that he would be suspended if he failed to attend inappropriate.

I have considered the Union's reference to

Via Rail Canada Inc. and C.A.W. (Spatling) (2002) 106 L.A.C. (4th) 110 (Hope)

That case holds that refusing a medical examination does not justify discipline. However, it goes on to say, at p. 128:

Rather, the remedy for an employer in these circumstances is to refuse to return the employee to active employment until the issue has been addressed.

This is essentially what the Employer did in this case. In fact, here the grievor did attend and the issue became academic. This grievance is dismissed.

Grievance 01-08-161

This grievance does not specify a contractual breach, it simply alludes to the grievance procedure. Mr. Dalton grieves the decision "barring from the workplace" and seeks its rescission.

The difficulty with this grievance is that Mr. Dalton was never "barred" from the workplace, he was merely required to contact Mr. Taylor first. Mr. Dalton was off on sick leave at the time. His explanation that his attendances were all necessary was not convincing. Mr. Dalton downplayed the frequency and exaggerated the necessity of his visits. I accept the Employer's evidence that Mr. Dalton's presenting himself at the workplace agitated other staff. It is not necessary to accept everything the staff member who testified on the point said. Mr. Dalton himself reported ongoing concerns over the reaction of other staff to his absences and his needs for accommodation. The requirement to contact Mr. Taylor was not unreasonable in the circumstances and not a breach of the collective agreement. Nothing in the evidence suggests this particular action was directed

towards preventing Mr. Dalton carrying out his duties as Local Union President. Grievance 01-08-161 is dismissed.

Grievance 01-08-163

This grievance alleges wrongful dismissal. The Employer's reasons for termination are set out in its letter of September 3, 2008. After an initial historical summary, the letter reads:

You have failed to return to work in accordance with the findings of the IME and FCE despite the employers' willingness to support your return with accommodation. You have further chosen not to provide the employer with the requested information in support of your current absence. Given your failure to return to work and your failure to cooperate in the accommodation process, it has become evident that there is no reasonable prospect that you will return to work in the foreseeable future.

The letter alludes to the appropriate test for non-culpable termination, described in Brown and Beatty, *Canadian Labour Arbitration*, at para. 7:6100 – Disabled Employees.

Most fundamentally, where it can be established that (i) an employee's record of past absences is excessive and (ii) that there is no reasonable expectation that it will improve in the future then, unless the employer has waived its rights, and so long as it will not deprive those who are handicapped of their rights to sickness, disability and related benefits more than others, nor of their right not to be discriminated against that is guaranteed in both the Constitution and human rights legislation, employers can terminate their services on the grounds of innocent, non-culpable absenteeism.

These requirements are alluded to in the Supreme Court of Canada decisions in:

Lethbridge College v. AUPE [2004] 1 S.C.R. 727

McGill University Health Centre (supra)

The *Lethbridge College* case held that an arbitrator's remedial authority under labour legislation applies equally to such non-culpable penalties, whether called disciplinary or not. An Employer seeking to invoke such a non-culpable discharge must warn the Employee of the possibility that it will do so. This is expressed, again in Brown and Beatty, at para. 7:4416

The failure of an employer to advise an employee that it will not tolerate certain activities or practices, including non-culpable behavior such as inadequate work performance or innocent absenteeism, is considered a mitigating factor if it denies the person the chance to defend himself or herself and show capability of acting in the way the employer requires, and/or lulls the employee into a false sense of security. Indeed, it has been held that not only must an employer apprise its employees of the unacceptable nature of their conduct but, as well, it must inform them of the likely consequences which will result if such behavior persists.

This requirement of a warning goes back to the seminal decision on non-disciplinary dismissal.

Re Edith Cavell Private Hospital and Hospital Employees Union (1982) 6 L.A.C. (3d) 229 at 233 (Hope)

It is recognized in arbitral jurisprudence that poor job performance can be treated as culpable or non-culpable by the employer ... We conclude, having regard to the onus imposed upon the employer, that the assertions with respect to poor job performance are non-culpable and the employer must meet the test applicable to a dismissal on that basis. It is not open to an employer alleging a want of job performance to merely castigate the performance of the employee. It is necessary that specifics be provided. An employer who seeks to dismiss an employee for a non-culpable deficiency in job performance must meet certain criteria:

- (a) The employer must define the level of job performance required.
- (b) The employer must establish that the standard expected was communicated to the employee.
- (c) The employer must show it gave reasonable supervision and instruction to the employee and afforded the employee a reasonable opportunity to meet the standard.
- (d) The employer must establish an inability on the part of the employee to meet the requisite standard to an extent that renders her incapable of performing the job and that reasonable efforts were made to find alternate employment within the competence of the employee.
- (e) The employer must disclose that reasonable warnings were given to the employee that a failure to meet the standard could result in dismissal.

The Employer's decision to terminate Mr. Dalton cannot be upheld. First, Mr. Dalton's absence, which began on June 30th, was not due to his pain in the leg. Rather it was due to the onset of a new condition. Up until then Mr. Dalton had attended work, albeit with accommodation for his leg problem. It was unreasonable for the Employer to conclude, by September 3rd, that there was no reasonable prospect that Mr. Dalton would return to work in the foreseeable future. Mr. Dalton provided a medical note from a nurse practitioner on July 10, 2008. He provided the Employer with another medical slip from Dr. Nottebrook on July 30, 2008 indicating that his inability to work was ongoing, but indicating a follow-up in 6 weeks (i.e. by September 11, one week after the termination).

Mr. Dalton, in an e-mail on July 9th advised Ms. Locke that "this whole issue has caused me anxiety, panic attacks, depression and other mental and physical problems." Most significantly Dr. Hoehsmann's IME makes specific reference to the new medical symptoms Mr. Dalton was experiencing. I cannot accept Mr. Rosebush's explanation that "these were just symptoms" or Ms. Locke's assertion that she did not read about nor understand the impact of Mr. Dalton's new condition. She says she did not know what Celexa was but the report says directly Mr. Dalton had been prescribed "the anti-depressant Celexa". The inescapable conclusion is that Mr. Dalton, with medical advice and support, was off work due to depression.

To draw from this, one week in advance of his seeing a specialist, that he would be unable to return to work in the foreseeable future is neither credible nor reasonable. While there were past absences, the Employer did not present evidence to establish they were of a degree or duration sufficient to justify a non-culpable termination. Mr. Rosebush agrees that Mr. Dalton was not warned that he would be terminated if he did not return to work or failed to provide documentation. The Employer has not met either of the two conditions of the test for non-culpable termination. It did not warn of the consequences. The dismissal grievance is allowed and the termination set aside for lack of just cause. Had there been cause, and if necessary, I would draw on the Canada Labour Code's remedial jurisdiction to mitigate the penalty in any event in these circumstances. I find the Employer knew Mr. Dalton had a new and intervening disability and terminated him in a perfunctory fashion in the face of that knowledge. My conclusion is that the Employer had reached a point of frustration over the accommodation dispute that blinded it to the evidence of a new disability and led it to decide on termination to put the dispute at an end once and for all.

Remedy

The Employer does not want Mr. Dalton back. Mr. Dalton testified that he does not want to return to work in Hay River. Given that fact reinstatement is inappropriate. I will reserve my jurisdiction over an appropriate alternative remedy and invite the parties to attempt to resolve it by agreement. Either party may invoke this reserved jurisdiction within 90 days of this award and if necessary a further remedial order following submissions on the point will be issued.

DATED at Edmonton, Alberta this 23rd day of February, 2010.



ANDREW C.L. SIMS, Q.C.