

SICK LEAVE, MEDICAL CERTIFICATES, MEDICAL EXAMINATIONS AND RELATED ISSUES

SOME PRINCIPLES

1. An employee's right to privacy must be balanced with the employer's right to ensure entitlement to the benefit being claimed under the collective agreement (such as sick leave with pay) or an employer's obligations under the relevant statute (such as health and safety or human rights legislation). From a current examination of the case law on sick leave, medical certificates and medical examinations, the following principles will serve as a guide.
2. We should begin with the basic premise that the employer has the right to insist on a medical certificate as a condition of granting sick leave. In the case of most collective agreements, the employer's right to impose such a requirement is explicit. Where a collective agreement is silent on this point, the employer could successfully argue that its residual management rights (i.e., all rights not modified by collective agreement language) permit it to require proof of sickness. If a collective agreement specifies (as some do), that the employer could only require a medical certificate after so many days of absence in a given year, then the employer's right would be restricted.
3. To claim an entitlement to sick leave, many collective agreements require an employee to satisfy the employer "... of this condition in such manner and at such time as may be determined by the employer". This establishes an unfettered right of the employer to require certification of any and all sick leave (assuming good faith), unless there is additional language modifying this right under certain conditions. Notwithstanding these broad powers, each application for leave must be considered on its own merits.

4. Many collective agreements contain a provision to the effect that a statement signed by the employee stating that because of illness or injury s/he was unable to perform his/her duties shall be sufficient to satisfy the employer, unless otherwise informed by the employer that other proof or additional information is required. If the employer fails to notify the employee of the requirement for other information, the employer is obliged to accept the statement (unless the signed statement can be proven to be fraudulent).
5. When required, a medical certificate would normally be sufficient to support a request for sick leave with pay. However, a medical certificate does not guarantee an automatic right to the leave, unless the collective agreement is explicit on this point. As it has been stated in numerous cases, especially those involving concerted job action, a medical certificate is not “Holy Writ” because their authors are fallible and can be misled.
6. The usual response of an employer in cases of alleged illegal strike activity is to impose discipline, despite a claim of illness and a request for sick leave with pay. A medical certificate will likely hold little or no weight in these circumstances. If the employer can make a case of illegal strike activity, the onus then shifts to the employee to provide clear and convincing proof of illness. Usually, there is a requirement that the attending physician was informed there was a strike or labour dispute in effect and s/he was able to determine the illness on one or more objective tests, and not solely on the basis of statements made by the employee.
7. The employer’s discretion to reject a medical certificate must be reasonably exercised. The employer may determine that a medical certificate is deficient, incomplete, contains errors, contradicts other evidence or was completed in bad faith and that there is a reasonable connection between the flawed medical certificate and a decision to withhold an entitlement to sick leave.

8. The employer's decision to declare a medical certificate valid for part of a period of leave but invalid for another portion covering the same illness may not be defensible before an arbitrator but will depend on the individual circumstances of each case.
9. Unless the collective agreement indicates otherwise, the employer has the right to require further information to determine an entitlement to sick leave with pay. This is especially so in the case of a provision that speaks of "... satisfying the employer of this condition in such manner and at such time as may be determined by the employer ...". However, such requests for additional information must be timely, practical and reasonable. The employer must make a request at a time that permits a medical practitioner to certify an employee's condition during the period the leave is required, or to provide an employee with sufficient time to comply with the specific request. The employer must specify what kind of proof it requires. The employer must set reasonable limits on the type of information required so an employee's privacy is not unreasonably invaded. The employer must reasonably consider the information it receives or otherwise has at its disposal when determining whether or not an entitlement for sick leave with pay exists.
10. An employee's right to privacy and confidentiality of sensitive medical information is recognized at common law. The employer's right to insist on a medical certificate or request additional information is restricted insofar as it cannot require information that truly breaches an employee's privacy/confidentiality rights (such as a specific diagnosis or normally confidential details). It is reasonable for the employer to want to know how long the employee will be away from work and the expected date of return, the specific date(s) or period of time the medical practitioner attended the employee, or information concerning restrictions on work activities or necessary accommodations. These are legitimate employer concerns and do not breach privacy/confidentiality rights.

11. There is an obligation on employers to protect the health and safety of their employees. For example, the Canada Labour Code states that “every employer shall ensure that the safety and health at work of every person employed by the employer is protected.” Many collective agreements also contain similar provisions. As a result, an employer has the right to assure itself that an employee does not represent an unacceptable risk to her/his own safety or that of other employees.
12. Furthermore, under human rights law, an employer has a “duty to accommodate”. As a result, an employer may be justified in requiring medical information or corroboration from a health care practitioner relating to an employee’s request for accommodation (information on functional limitations as opposed to diagnosis).
13. Notwithstanding the framework established by legislation and the collective agreement, there are restrictions on the type of information an employer has the right to receive, and the methods used to obtain it.
14. General arbitral jurisprudence suggests that an employer has a limited right and duty to demand that an employee undergo a medical examination if the employer has reasonable and probable grounds for suspecting that the employee is a source of danger to himself/herself or other employees or is unfit to perform her/his duties. The employer has an obligation to provide an employee with sufficient and detailed information concerning the reasons for the requested medical examination.
15. However, there is a general reluctance among arbitrators to require employees to undergo a medical examination by physicians not of their own choosing, except in rare circumstances or as a last resort. Arbitrators have also placed limits on the extent to which an employer can demand medical information be divulged from an employee’s own physician, even to a third party medical practitioner.

16. What if an employee refuses to submit to an independent medical examination (or to agree to disclose medical information to a third party)? Some case law supports the view that such refusal may be an acceptable exception to the “obey now, grieve later” rule because breaches of an employee’s right to privacy and confidentiality of medical information cannot be remedied through the grievance procedure. However, an employee needs to carefully consider how s/he will respond to a direction of this nature as a likely response of an employer would be to deny the benefit being claimed or take administrative action such as relieving an employee of his/her duties. Despite the strong precedents protecting an employee’s privacy, there are no guarantees that a grievance challenging the subsequent action of the employer would succeed. In any case, an employee should clearly state their concerns in writing which include reference to the privacy interest and the impossibility of having the breach of privacy remedied at a later date.
17. A physician or other licensed health care professional should not provide information about a patient to an employer or a third party health care practitioner without the patient’s consent (unless s/he is compelled by law to do so). Disclosure without consent would violate the employee’s common law right to privacy and confidentiality of medical information, as well as the statutory and regulatory requirements of the respective health care professions. In such cases, a complaint should be made to the professional regulatory body. Should the employer utilize information secured without the patient’s consent, the employee should attempt to have the decision nullified through the grievance procedure if the information so obtained was used in whole or in part.
18. The opinion of an employee’s own physician is generally given more weight by an arbitrator because of the doctor’s knowledge of the patient and the condition over a longer period of time. This assumes that the employee’s doctor’s opinion is clear, s/he is available to testify and can confirm an employee’s state of health for the period in question.

19. A medical certificate from any health care practitioner may be accepted by the employer. Indeed, with changes in health care certification and delivery, this would appear to be the case in practice. However, to date there is an absence of case law that requires an employer to accept, for example, a chiropractor's certificate without supporting language in the collective agreement. In addition, a recognized authority (Palmer, *Collective Agreement Arbitration in Canada*, 2nd Edition), at page 667, states: "Generally ... [certification] will mean [certification by] a medical practitioner qualified under the relevant legislation, and not a nurse or chiropractor."
20. Leave for an employee's medical and dental appointments may be supported by explicit language in the collective agreement. Or, depending on the nature of the illness or medical condition at the time the leave for the appointment was required, the request may fall under the sick leave provision. Where the agreement is silent with respect to an employee's medical or dental appointments, access to leave may fall under a general "other leave with or without pay" provision. In most cases, the application of such a clause is at the employer's discretion.
21. Leave for medical and dental appointments of Treasury Board employees falls under the employer's Leave With Pay Policy. As such, it does not form part of the collective agreement and is not a matter that can be contested at arbitration/adjudication. It should be noted that prior to 1971, the collective agreement provided for employees to earn a bank of special leave credits up to a maximum of 25 days to be utilized for marriage leave, bereavement leave, leave for the birth of a child and leave "for other reasons" (including illness in the immediate family and medical and dental appointments). When this provision was deleted from the collective agreement, the employer indicated that it would continue to allow employees to take time off for appointments and this is reflected in the employer's Leave With Pay Policy.

22. Most collective agreements provide for an advance of sick leave credits when an employee has insufficient or no credits to cover the granting of sick leave with pay. When the provision states that it is “at the discretion of the employer” and does not qualify how the discretion is to be exercised, the employer’s discretionary powers are considerable. To interfere with an employer’s decision, an arbitrator would need to find evidence of bad faith on the employer’s part, or an absence of rationality so blatant and obvious that it can only be attributed to bad faith. When the agreement contains this kind of discretionary language, there is no acquired right to an advance of sick leave credits based on past practice, the employer is not required to provide prior notice of future denials of advances and evidence of differential treatment between employees may not be sufficient to meet the test of “bad faith”.

References:

3. Lajoie and Treasury Board (Transport), PSSRB File 166-2-16411, (1987) (Brown); Viau and Treasury Board (National Research Council), PSSRB File 166-2-16811, (1987) (Cantin); Trevethan and Treasury Board (Communications), PSSRB File 166-2-16391, (1987) (Nisbet); Trépanier and Treasury Board (Agriculture Canada), PSSRB File 166-2-16082, (1987) (Cantin); Watt and Treasury Board (Transport), PSSRB File 166-2-13952, (1983) (Pyle); Serniak & Bueckert and Treasury Board (Solicitor General), PSSRB File 166-2-26708 to 10 and 166-2-26715 to 17, (1992) (Korngold Wexler); Roberge and Treasury Board (National Defence), PSSRB File 166-2-15444, (1988) (Korngold Wexler)
4. Kuderian and Treasury Board (Revenue Canada - Customs & Excise), PSSRB File 166-2-18982, (1990) (Lowden)/FCA File A-71-90; Martin and Treasury Board (Employment & Immigration Canada), PSSRB File 166-2-18959, (1990) (Lowden).

5. Pendrigh & Stephens and Treasury Board (Transport Canada), PSSRB File 166-2-11445/46, (1982) (Steward); Morkin and Treasury Board (Revenue Canada - Customs and Excise), PSSRB File 166-2-25580/82/83, (1995) (Turner)
6. Strasser v. Roberge (1979) 103 D.L.R., (3d) 193; Jones et al and Treasury Board (Transport), PSSRB File 166-2-9010, (1981) (Kates); Richards et al and Treasury Board (Transport), PSSRB File 166-2-10242 (1982) (Frankel); Morrissey and Treasury Board (Customs and Excise), PSSRB File 166-2-25574, (1994) (Deans); Morkin and Treasury Board (Revenue Canada - Customs and Excise), PSSRB File 166-2-25580/82/83, (1995) (Turner); Barker and Treasury Board (Solicitor General), PSSRB File 166-2-13902, (1984) (Brown);
7. Gobeil and Treasury Board (National Defence), PSSRB File 166-2-15433 & 15726, (1988) (Galipeault); Roberge and Treasury Board (National Defence), PSSRB File 166-2-15444, (1988) (Korngold Wexler); Hanna and Treasury Board (Environment), PSSRB File 166-2-20717, (1991) (Galipeault); Long and Treasury Board (National Defence), PSSRB File 166-2-17139, (1988) (Galipeault); Fontaine and Canadian Food Inspection Agency, PSSRB File 166-32-30979, (2002) (Taylor)
8. Hollander-Boutin and Treasury Board (Public Service Commission), PSSRB File 166-2-16872, (1989) (Galipeault); Breukers and Treasury Board (Employment and Immigration), PSSRB File 166-2-25201, (1994) (Simpson)
9. Smith and Treasury Board (Transport), PSSRB File 166-2-16877, (1988) (Galipeault); Serniak & Bueckert and Treasury Board (Solicitor General), PSSRB Files 166-2-26708 to 10 & 166-2-26715 to 17), (1992) (Korngold Wexler); Poulin and Treasury Board (Solicitor General), PSSRB File 166-2-15354, (1987) (Korngold Wexler); Arnfinson and Treasury Board (Revenue Canada - Customs and Excise), PSSRB File 166-2-13851, (1983) (Williams)

10. Pacific Press Ltd., (1977), 15 L.A.C. (2d) 113 (Thompson)
11. Canada Labour Code Part 2: Occupational Health and Safety - Source: <http://laws.justice.gc.ca/en/L-2/17061.html> (updated to August 31, 2001); Lorrain and Treasury Board (Solicitor General), PSSRB File 166-2-14709, (1985) (Galipeault)
14. Fraser Valley Milk Producers Co-operative Association (Dairyland Foods) (1989), 9 L.A.C. (4th) 276 (Munroe); Tobin and Treasury Board (Fisheries and Oceans), PSSRB File 166-2-18410 to 18412, (1990) (Galipeault); Hébert and Treasury Board (External Affairs and International Trade), PSSRB File 166-2-21575 and 166-2-21666, (1992) (Galipeault)
15. Brown and Beatty, Canadian Labour Arbitration, 3rd Edition (7:3230); NavCanada and the Canadian Air Traffic Control Association (2000) 86 L.A.C. (4th) 370 (Swan)
16. Riverdale Hospital and C.U.P.E. Local 79 (1985), 19 L.A.C. (3d) 396 (Burkett); Shell Canada Products Ltd. and C.A.I.M.A.W., Local 12 (1990), 14 L.A.C. (4th) 75 (Larson)
17. MacMillan Bloedel Ltd. and C.E.P. Local 76, (1997) 67 L.A.C. (4th) 443 (Taylor)
21. Treasury Board of Canada Secretariat Leave With Pay Policy (http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/compensation/LWP_e.html); Agreement between Treasury Board of Canada and the Public Service Alliance of Canada - Clerical and Regulatory Group (Code 503/4/69 - Expiry 30 September 1969)
22. Leclerc and Treasury Board (Revenue Canada - Customs and Excise), PSSRB File 166-2-10204) (1982) (Galipeault)