

## **Adjudicator reinstates employee who refused request for independent medical examination**

An adjudicator under the *Public Service Staff Relations Act* has recently considered the issue of when an employer is entitled to require that an employee submit to an independent medical assessment. The decision in *Grover v. National Research Council of Canada* (October 3, 2005) makes it clear that employers should exercise caution before demanding that an employee be examined by anyone other than his or her own physician.

The grievor in the case was a physicist serving as the Director of the Radiation Standards and Optics Section of the Institute of National Measurements Standards (INMS). He had been appointed to the position after a lengthy legal dispute with his employer dating back to 1987, when he had filed a complaint of discrimination with the Canadian Human Rights Commission.

After the grievor took issue in 2003 with initiatives to modify the structure of the management committee of the INMS, his relationship with the Director General became increasingly strained. In late January 2004, the grievor obtained a medical certificate from his physician prescribing "stress leave for four weeks, spread over eight weeks, as required". The doctor issued him the same prescription in late March 2004, and a colleague of the doctor issued a third identical prescription in June.

The employer noticed that the grievor used his sick days to miss most of his management meetings and expressed concern about the identical wording of the third certificate and the fact that the grievor's health was not improving. It asked the grievor to see a physician chosen by the employer and to refrain from attending work until he had done so. Although the employer testified that it was motivated to make this request by concerns about the grievor's health, it acknowledged that it had not raised those concerns with the grievor at the time.

At the adjudication, the employer testified that it had based its request for an independent medical assessment on its Occupational Health Monitoring Policy. The Policy stated that an assessment would be required "when there is evidence sufficient for management to be concerned over the ability of employees to perform their jobs without creating a safety risk to themselves or others, including the potential for damage to physical property... ." Despite the fact that the employer stated that it was motivated by concerns over the grievor's health and the safety of others, in some of its correspondence with the grievor, it had characterized his refusal to undergo the examination as "insubordination" and had warned of possible disciplinary consequences. At one point, it had imposed a five-day suspension on the grievor, which it had later rescinded. At another point, it had informed the grievor that, for the purpose of pay and benefits, he was considered to be on "leave without pay for other reasons".

During the "no work, no pay" period, the grievor had made a number of proposals to the employer to resolve the impasse, including suggesting that the two sides agree on a mutually acceptable physician to conduct the assessment. The employer had ignored those

requests. Eventually, it had warned the grievor that, if the situation persisted, it would consider terminating him for absenteeism.

### **AUTHOR OF HIS OWN MISFORTUNE OR TARGET OF EMPLOYER DISCIPLINE?**

At the adjudication, the employer argued that its refusal to allow the grievor to attend work was motivated by its concerns over his health and that this was an administrative response, not a disciplinary one. It claimed that the grievor was the author of his own misfortune because he had refused to cooperate with the employer's attempt to clarify his medical condition.

The grievor argued that he was not questioning the employer's right to request a medical examination, but only the grounds given for doing so. In the absence of a reasonable and detailed explanation for the request, he argued, he was entitled to withhold his consent for the examination. Nor had the employer established a reasonable basis for its expressed concerns over the safety risk posed by the grievor's presence in the workplace. The grievor submitted that the employer's actions were essentially disciplinary in nature and not merely administrative.

The issue for the adjudicator was whether the grievor's absence from work was the result of an indefinite suspension for insubordination or merely the administrative consequence of his refusal to participate in an independent medical assessment. The adjudicator held that correspondence between the employer and the grievor demonstrated that the employer's response was essentially disciplinary: its concerns over the grievor's health were never expressed to him, insubordination was mentioned repeatedly, and suspensions had been meted out to him.

Further, the adjudicator held that this discipline was unwarranted. In this regard, it found that the employer did not have the grounds to request an independent medical assessment of the grievor:

"It was admitted that the employer did not know what the medical situation of the grievor was. It was speculating. Furthermore, it was in a contradictory position, both questioning the grievor's illness and medical certificate and at the same time suspecting that his health was so deficient that he should not present himself at work until the employer was reassured as to his fitness to work. The grievor's responsibilities did not warrant such a measure, as opposed to an employee with suspected back problems who is expected to lift heavy equipment regularly."

The adjudicator also noted that the criteria set out in the Occupational Health Monitoring Policy for an independent medical examination were not present in the grievor's case, as there was no evidence that the grievor's attendance at work could pose a danger to him or others.

Accordingly, the adjudicator allowed the grievance and ordered that the grievor be reinstated with compensation for the 14 months of work that he had missed.

### **In Our View**

Part of the problem faced by the employer in this case was that it was caught in a contradiction between its stated concern over the grievor's fitness to work and its expressed doubts about the validity of the grievor's medical certificates. If the issue is one of concern about an employee's fitness to work, the employer may, on reasonable and probable grounds, require the employee to submit to an independent medical examination. However,

if the employer is skeptical of the employee's medical certificate, it may be entitled to demand more information from the employee's physician or request an examination by a physician chosen by agreement between the employer and the employee.

For further information, please contact **Carole Piette** at (613) 940-2733.

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