

## **Access to employee health records, arbitration and the Personal Health Information Protection Act, 2004: an arbitrator rules**

May an employer and a union gain access to a grievor's confidential health file in advance of an arbitration hearing? This was the issue determined by an Ontario arbitrator in *Sunnybrook Health Sciences Centre v. Ontario Nurses' Association* (October 2, 2006).

The grievance alleged that the employer did not accommodate the grievor during her pregnancy. Management staff, in consultation with Occupational Health Services (OHS) staff, had determined that the grievor could no longer continue with the modified work that was available to her without risking her health. The employer also determined that it could not accommodate her further and required the grievor to start her maternity leave two months before her due date. The union asserted that the employer discriminated against the grievor due to her pregnancy and failed to accommodate her medical restrictions.

The union then wrote the Manager of OHS requesting a copy of the grievor's file for the period covering her pregnancy. The union enclosed a signed authorization from the grievor for her release of the material to the union.

The OHS refused to disclose the requested documentation, contending that nothing could be released unless there was either a subpoena or an order of the arbitrator. For its part, the employer asked the grievor to consent to her OHS file being disclosed to the employer, but the grievor declined. The union maintained that the employer could not see the grievor's OHS file without her consent.

The dispute was resolved by the parties agreeing that since the OHS health information they both sought was relevant to the dispute, and since the arbitrator had the power to order the advance production of relevant documents, the arbitrator should order the OHS to produce the records to counsel for the employer and the union. But because the issue was significant to them in their ongoing labour relations, the parties also asked the arbitrator to rule on the appropriate procedure for the advance production of employee health files.

### **STATUTORY PROVISIONS**

The following statutory provisions were key to resolving the issue:

#### *Personal Health Information Protection Act, 2004 (PHIPA)*

##### Section 29 Requirement for consent

A health information custodian shall not collect, use or disclose personal health information about an individual unless,

- (a) it has the individual's consent under this Act and the collection, use or disclosure, as the case may be, to the best of the custodian's knowledge, is necessary for a lawful purpose; or
- (b) the collection, use or disclosure, as the case may be, is permitted or required by this Act.

## Section 41(1) Disclosures for proceedings

A health information custodian may disclose personal health information about an individual,

- (a) subject to the requirements and restrictions, if any, that are prescribed, for the purpose of a proceeding or contemplated proceeding in which the custodian or the agent or former agent of the custodian is, or is expected to be, a party or witness, if the information relates to or is a matter in issue in the proceeding or contemplated proceeding;

...

- (d) for the purpose of complying with,
  - (i) a summons, order or similar requirement issued in a proceeding by a person having jurisdiction to compel the production of information, or
  - (ii) a procedural rule that relates to the production of information in a proceeding.

The Occupational Health and Safety Act (OHSA) was also cited:

### Section 63(2) Employer access to health records

No employer shall seek to gain access, except by an order of the court or other tribunal or in order to comply with another statute, to a health record concerning a worker without the worker's written consent.

### Section 63(6) Conflict

This section prevails despite anything to the contrary in the Personal Health Information Protection Act, 2004.

## ISSUES TO BE DECIDED

The arbitrator stated these issues to be decided:

- (1) Is the OHS required to disclose a grievor's file [to the union and the employer] where the grievor signs a consent and authorization form directing the OHS to do that?
- (2) In the absence of consent from the grievor, can the employer still require the OHS to disclose a grievor's file to its counsel, before the hearing, upon the service of a summons to appear at the hearing and produce documents (a subpoena duces tecum )?
- (3) In the absence of consent from the grievor, can the employer still request an order from the arbitrator requiring the OHS to disclose a grievor's file to its counsel before the hearing? If so, must the union review the OHS file before the documents are produced to the employer?

## ISSUE 1)

### HEALTH FILES MUST BE DISCLOSED WHEN GRIEVOR CONSENTS

The arbitrator noted s. 29 of PHIPA requires the consent of the individual for the collection, use, or disclosure of personal health information. The section specifically refers to the circumstances under which the health information custodian can "disclose" health information – with consent and where "to the best of the custodian's knowledge [the disclosure] is necessary for a lawful purpose" or "is permitted or required by this Act." Preparing for a grievance arbitration is considered a "lawful purpose".

Section 41(1) permits disclosure for the purpose of a "proceeding" (a term defined in PHIPA to include arbitration) if the information "relates to or is a matter in issue in the proceeding or contemplated proceeding." Therefore the arbitrator reasoned that if there exists a proper, signed, written authorization and consent for the disclosure, the OHS is not entitled to refuse to disclose what the grievor has authorized to disclose simply because OHS has not received a subpoena to produce documents or has not been ordered to do so by the arbitrator.

The arbitrator went on to hold that, where proper written authorization and consent has been provided to permit disclosure to the union, neither the employer nor the OHS can refuse to disclose simply because a similar authorization and consent has not been given to the employer. The employer has alternative means of obtaining advance production of the documents.

## ISSUE 2)

### NO ADVANCE DISCLOSURE VIA SUMMONS TO PRODUCE DOCUMENTS IF GRIEVOR DOES NOT CONSENT

The employer argued that ss. 41(1)(a) and 41(1)(d) of PHIPA permits disclosure, including advance disclosure, upon service of a summons to appear and produce documents (subpoena duces tecum). The arbitrator rejected this argument, noting that although such a subpoena is an "order" of the arbitrator, it is an order to compel a prospective witness to attend at a hearing and bring documents along. It is not an order to produce or disclose documents before the hearing. Although a custodian of health information who has been properly served with a subpoena duces tecum must attend the hearing with the health records, and is permitted under s. 41(1)(d) of PHIPA to disclose that information at the hearing in compliance with the subpoena, at the time a subpoena is issued it is not an "order" to produce or disclose information before the hearing.

The arbitrator held that s. 63 of the OHS Act conflicted with, and prevailed over s. 41(1)(a) of PHIPA. Section 41(1)(a) of PHIPA can not be interpreted so broadly as to permit disclosure of personal health information to the employer before the hearing in circumstances where a determination of the arguable relevance of the documents by a neutral adjudicator has not yet been made. Where the arbitrator has not yet determined the relevance of the information, it can not be said that the "information relates to or is a matter in issue in the proceeding or contemplated proceeding" as stipulated by s. 41(1)(a).

## ISSUE 3)

### ARBITRATOR MAY ORDER DISCLOSURE TO EMPLOYER BEFORE THE HEARING WITHOUT GRIEVOR'S CONSENT

The arbitrator held that where the grievor withholds her consent to release the health file, an arbitrator may make an order requiring the production of the file only after considering the submissions and representations of the parties. Where the union and grievor have privacy concerns, or concerns about the nature and scope of the disclosure of confidential health information or the use to which it may be put, those issues may be addressed by the arbitrator in advance of the hearing. The arbitrator ruled that before making such an order to disclose the parties' interests must be balanced:

"In ordering the advance production of personal health information the arbitrator must balance the need to protect the confidentiality of that information and the privacy considerations of the grievor with respect to that information, with the right of all the parties to the arbitration to documents, including personal health information arguably relevant to ensure a fair and efficient hearing process. How and where that balance is to be struck will be dependent on the facts of the case, and the nature of the issues in dispute. Certainly the arbitrator, as a neutral adjudicator and ultimate trier of fact, is in the best position to determine the 'arguable relevance' of any personal health information to which a party may seek access in advance of the hearing."

Where an arbitrator makes an order requiring the OHS to disclose personal health information in advance of the hearing, such disclosure is permitted under ss. 41(1)(a) and (d) of PHIPA, the

arbitrator held. Disclosure to an employer under the order of an arbitrator is also permitted under s. 63(2) of the OHSA. While the union may request to be permitted to see the information before the employer sees it, the union does not have an automatic right to do so, and its requests will be considered on a case-by-case basis.

### In Our View

A grievor's consent to the granting of an order for production is not necessarily required. However a lack of consent to any disclosure from the employee whose personal health information is sought is a factor which an arbitrator can consider in determining whether an order ought to be made, and the terms and conditions pertaining to any order made. The arbitrator noted also that a grievor who refuses to disclose personal health information relevant to a claim for accommodation risks finding his or her claim severely compromised. An employer can not be faulted for not acting on information it has never been provided, particularly where the employer specifically requests the information.

For further information, please contact **André Champagne** at (613) 940-2735.

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