LABOUR RELATIONS CODE
(Section 84 Appointment)
ARBITRATION DECISION

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 3338

UNION

SIMON FRASER UNIVERSITY

EMPLOYER

(Re: Sick Leave Aggregation – Preliminary Matters)

Arbitration Board:	James E. Dorsey, Q.C.
Representing the Union:	Michael J. Prokosh
Representing the Employer:	Patrick Gilligan-Hackett
Dates of Written Submissions:	March 22; 27; and 31, 2017
Date of Decision:	April 3, 2017

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1. Grievance (2010), Mediation (2016), Jurisdiction and Hearing Dates (2017)

[1] "Entitlement to sick leave for each illness or injury is based on seniority" and its "usage for each illness or injury shall not be aggregated for a period greater than" seven years.[1] The difference in this arbitration arises from employer requests for information from employees on absences for three or fewer working days and the manner and basis on which the employer determines discontinuous sick leave absences are to be aggregated as sick leave for a single illness or injury.

[2] The grievance was filed September 20, 2010 and advanced to arbitration April 12, 2011. The grievance was subsequently discussed at the collective bargaining table. Later, the 2010-14 collective agreement was renewed for the term April 1, 2014 to March 31, 2019.

[3] I was notified of my appointment to arbitrate this grievance on February 2, 2016. The union and employer agree I am properly appointed as an arbitrator under their collective agreement and the *Labour Relations Code* with jurisdiction to finally decide the merits of the grievance.

[4] Mediation on three dates in September, after union disclosure of particulars in August and numerous documents on the first day of mediation, did not achieve a settlement. The union's statement of particulars includes twenty-four paragraphs identifying arguments and alternatives, which it elaborated on in an subsequent August email. The statement of particulars lists six remedies the union seeks and requests employer disclosure of documents.

[5] In January 2017, the union estimated seven days were required for a hearing "in light of how this case deals with many issues and facts covering a period of time

[1] CUPE, Local 3338 -and- Simon Fraser University Collective Agreement (2014-2019), Article 35.02

spanning a number of years." At that time, the employer thought four days would be sufficient. A hearing was scheduled for seven dates in June 2017.

2. Orders to Disclose Documents

[6] Since August, the employer has been willing to disclose documents that do not contain a third party's person information and it disclosed various documents in September 2016.

[7] Counsel agree an order in this arbitration is required for the employer to disclose documents containing the personal information of bargaining unit employees and other persons in order for the employer to comply with the *Freedom of Information and Protection of Privacy Act*.[2] There is a difference over certain conditions the employer seeks included in the order.

[8] There is no employer claim of litigation or other privilege intertwined with the order request. In this respect, the circumstances are not congruent with the employer's following description:

> As will be evident, the terms proposed by the University reflect, with adaptations appropriate to the circumstances of a labour arbitration, the principles underlying and purpose of using a Halliday order to address issues of medical privacy in civil litigation. The proposed terms also recognize the University's (and, as an agent of the University, my) obligations under the *Freedom of Information and Protection of Privacy Act* when dealing with third-party personal information, particularly third-party personal information of a sensitive nature. [3]

[9] Other differences are the union and employer are parties to the dispute; they have an ongoing relationship; and the union is the exclusive bargaining agent for the employees whose personal medical information is to be disclosed.

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[2] RSBC 1996, c. 265, 33.3(1)(t): "A public body may disclose personal information referred to in section 33 inside or outside Canada as follows: … to comply with a subpoena, a warrant or an order issued or made by a court, person or body in Canada with jurisdiction to compel the production of information."

[3] The reference is to *Halliday v. McCulloch* [1986] B.C.J. No. 223 (C.A.). See *British Columbia Crown Counsel Assn.,* [2010] B.C.C.A.A.A. No. 46 (Lanyon), ¶ 97 for a description of "Jones", "Halliday" and "Ryan" disclosure orders. The union submits a modified "Jones", not a "Halliday", order is appropriate in this situation. See also *British Columbia v. British Columbia Government and Service Employees' Union* [2005] B.C.J. No. 17 (CA) – "It is a fundamental common law axiom that a party to litigation is entitled to full disclosure of all documents and other evidence that is relevant to the litigation, subject only to privileged exceptions. Disclosure of documents to counsel for a party that is withheld from the party itself compromises the candour of the relationship between lawyer and client and impairs counsel's ability to obtain fully-informed instructions in the conduct of the proceedings. Disclosure limited to counsel and expert witnesses should be discouraged in all but very exceptional cases." (¶ 64)

[10] At the same time, measures must be taken to guarantee the union's use of employee personal information disclosed by the employer is limited to this grievance-arbitration and there is no unnecessary disclosure within this use.[4]

[11] Employer counsel informs the documents have been compiled and are available for disclosure. Counsel have identified disclosure deadlines that are convenient in their schedules.

[12] Therefore, balancing the union's right to disclosure of documents to have a full opportunity to prepare and present its case and protection of employee or other person's privacy, I order:

> The employer to disclose to the union, on or before April 18, 2017, without redaction all relevant and potentially relevant documents in its custody or under its control, including any document which contains the personal information of a bargaining unit employee or other person, on the following terms and conditions:
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> 1. All documents disclosed by the employer are to be used by the union for the sole purpose of this arbitration and any application for review, appeal or other proceeding arising from any decision in this arbitration.
> 2. All documents disclosed by the employer under the terms of this order will be delivered to McGrady & Company, the union's counsel in this arbitration.
> 3. With respect to any document disclosed by the employer which contains the personal information of a bargaining unit employee or other person, McGrady & Company will:
>   (a) control the copying of any document which has been disclosed by the employer under the terms of this order;
>   (b) collect all copies of any document made under McGrady & Company's control at the conclusion of this arbitration or any subsequent proceeding arising from this arbitration except copies entered as exhibits in the arbitration and retained by the arbitrator and counsel for the employer;
>   (c) except for a copy to be retained for its file, destroy all copies of the documents collected in accordance with paragraph (b); and
>   (d) after destruction confirm to counsel for the employer that all copies, except for the retained file copy, have been destroyed.
> 4. This order extends to and includes any relevant and potentially relevant document, including any document in the employer's custody or under its control which contains the personal information of a bargaining unit employee or other person, that is identified as relevant or potentially relevant at any time before the conclusion of the arbitration.

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[4] For a similar approach see *University of British Columbia* [2005] BCCAAA No. 166 (McPhillips) – "… often in cases such as this where disclosure of potentially very private information is necessary, conditions will be included in the order made by the arbitrator to ensure that the disclosure is as limited as possible to ensure privacy rights are not compromised any more than is absolutely necessary for a fair hearing." (¶ 49)

[13] I make the following reciprocal order directed to the union to facilitate the employer's preparation and presentation of its case and protection of employee or other person's privacy.[5] I order:

> The union to disclose to the employer, on or before May 16, 2017, without redaction all relevant and potentially relevant documents in its custody or under its control, including any document which contains the personal information of a bargaining unit employee or other person, on the following terms and conditions:
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> 1. All documents disclosed by the union are to be used by the employer for the sole purpose of this arbitration and any application for review, appeal or other proceeding arising from any decision in this arbitration.
> 2. All documents disclosed by the union under the terms of this order will be delivered to Gilligan-Hackett & Company, the employer's counsel in this arbitration.
> 3. With respect to any document disclosed by the union which contains the personal information of a bargaining unit employee or other person, Gilligan-Hackett & Company will:
>
> (e) control the copying of any document which has been disclosed by the union under the terms of this order;
>
> (f) collect all copies of any document made under Gilligan-Hackett & Company's control at the conclusion of this arbitration or any subsequent proceeding arising from this arbitration except copies entered as exhibits in the arbitration and retained by the arbitrator and counsel for the union;
>
> (g) except for a copy to be retained for its file, destroy all copies of the documents collected in accordance with paragraph (b); and
>
> (h) after destruction confirm to counsel for the union that all copies, except for the retained file copy have been destroyed.
>
> 4. This order extends to and includes any relevant and potentially relevant document, including any document in the union's custody or under its control which contains the personal information of a bargaining unit employee or other person, that is identified as relevant or potentially relevant at any time before the conclusion of the arbitration.

[14] These orders are not intended to compel disclosure of any document or portion of any document for which solicitor-client, litigation or other privilege is claimed.

[15] These orders are made under the *Labour Relations Act* with the intention they are orders allowing disclosure of personal information under the *Freedom of Information and Protection of Privacy Act* and compelling the production of information under the *Workers Compensation Act*.[6]

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[5] Although there is no employer application for an order, during the submission process I informed counsel that I anticipated any order will be directed to both the employer and union.

[6] RSBC 1996, c. 492, s. 95(1.1)(c): "If information in a claim file, or in any other material pertaining to the claim of an injured or disabled worker, is disclosed for the purposes of this Act by an officer or employee

[16] These orders encompass all documents, not just documents that contain personal information of bargaining unit employees or other persons.

[17] Because initial disclosure might lead to requests for additional documents the orders are intended to extend to any subsequent disclosures. No date is identified for any subsequent request for disclosure should it arise. It is left to counsel with their schedules and commitments at the time to make a timely request and arrange timely disclosure.

[18] I retain and reserved jurisdiction over the interpretation, application and operation of these orders.

3. Employer Application to Bifurcate Hearing

A. Employer and Union Submissions

[19] On March 22nd, prompted by the union's application for a disclosure order, the employer applied to bifurcate the hearing and delay hearing any evidence relating to remedy until the difference over the interpretation of the relevant provisions of the collective agreement has been decided.

[20] The employer's approach is that the core difference is a question of collective agreement interpretation and if its aggregation methodology prevails "nothing more will be required." If not, the remedial issues can be returned to the union and employer for resolution.

> The University believes that bi-furcating the hearing has the potential to significantly reduce the number of hearing days (likely from seven days to two days), the number of witnesses, the number of documents, the number of authorities, the length of argument, the extent of preparation, and, as a result, the magnitude of both parties' costs. It is, therefore, an orderly, constructive and expeditious measure to take in the effort to resolve this dispute.
>
> The University says that ordering a bi-furcated hearing accords wholly with the principles of the *Labour Relations Code*, most notably those found in sections: 2(e) (promoting conditions favourable to the orderly, constructive and expeditious resolution of disputes); 89(h) (encouraging settlement of the dispute); and, of course, 92(1)(a).

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of the Board to a person other than the worker, that person must not disclose the information except … (c) in compliance with a subpoena, warrant or order issued or made by a court, tribunal, person or body with jurisdiction to compel the production of information."

[21] The union objects to this change in approach arising at this time after agreement in January to schedule seven mutually convenient dates in June to hear a dispute "raising significant allegations affecting numerous employees' finances, Human Rights issues, privacy issues, collective agreement interpretation issues and many remedies."

[22] The employer submits arbitral discretion to bifurcate a hearing should be exercised in appropriate circumstances "… to maximize efficiency in the hearing process. If the early resolution of an issue may be dispositive of the matters before it, then bifurcation is a useful procedural tool, provided there is no unfairness to any party in following such a procedure."[7] Emphasizing the phrase "may be dispositive", the employer submits:

> … the recognized approach in British Columbia is to treat maximization of efficiency as the first consideration if the simple *possibility* exists that early resolution of a dispositive issue will be achieved by bifurcation unless the bifurcation will result in an unfairness. That approach conforms with the requirements of the *Labour Relations Code*, in particular section 2(e).
>
> The University has sought a very specific form of bifurcation here, essentially between the determination of whether there is any contractual liability at all and, if there is any contractual liability, the determination of the remedy for that liability; with a related submission that if a remedy ever needs to be addressed, the first stop should be with the parties themselves.
>
> The question of contractual liability here is first and foremost a question of the interpretation of the collective agreement. If you accept the University's interpretation, that determination will be wholly dispositive of the matters before the board. And it may be wholly dispositive of the matters before the board if you adopt either the Union's interpretation or an interpretation which falls between that advanced by the University and that advanced by the Union.
>
> The Union's reply fails to identify any well-founded objection – that is any objection rooted in real unfairness – to bifurcation. The University says that the evidence led by both parties about the interpretation of the collective agreement is likely to be wholly or substantially separate from the evidence that would be led by the parties about the remedy, if any remedy is required and assuming the parties cannot work things out for themselves.
>
> It is difficult to see how a practical recognition of that evidentiary separation, through bifurcation, could lead to any unfairness to either party and such a bifurcation is almost certain to maximize efficiency. The University says its application to bifurcate the hearing is wholly consistent with the principles recognized and applied in British Columbia and it should, therefore, be granted.

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[7] *Abbotsford Police Department* [2007] B.C.C.A.A.A. No. 242 (Coleman), ¶ 25 citing *Ontario (Liquor Control Board of Ontario)* [2005] O.G.S.B.A. No. 88, which cited a 1999 Ontario Grievance Settlement Board decision. See also

[23] The union disagrees. It submits bifurcation will further delay a prolonged process to the prejudice of the union and affected employees and there will be significant duplication in evidence.

> The evidence and issues pertaining to the merits and the remedies, are very much intertwined and not separable: …. A review of the Particulars reflects this point. If bifurcation were ordered, there would be significant overlap in the evidence/issues. In order to fully present the Union's case regarding the sick leave process, collective agreement interpretation, *KVP* issues/analysis (including but not limited to evidence as to whether there has been consistent application of the Employer's approach/policies over a number of years), Human Rights concerns, privacy concerns, issues regarding the *Employment Standards Act ("ESA")* and past practice evidence spanning several years, that evidence will significantly overlap with evidence regarding remedies. It would not be fair, efficient, practical, or economical, to require the Union to call that evidence twice: …. Let alone the stressful circumstances which a number of the potential witnesses already face (medical issues etc.) and the vulnerabilities they are already experiencing. Requiring these witnesses to testify more times than necessary would not be consistent with the *Code* generally, section 2(e) of the *Code* in particular, or the arbitral case law. Also, a key issue will be whether the various documents/information sought are "reasonably necessary" for the administration of casual sick leave. Again, the evidence/issues on that point, as well as the related Human Rights, privacy, past practice and collective agreement interpretation issues, will overlap with the evidence/issues on remedies.
>
> Therefore, it is not just an issue of – as the Employer asserts – "interpretive questions" or "aggregation methodology".
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> Among other things, when calling evidence to detail why a narrow approach was intended and should be adopted – to the words "each illness or injury" – as opposed to the very broad expansive interpretation asserted by the Employer (side effects, symptoms etc), much of that evidence will also be relevant to the remedies sought (effects of the Employer's interpretations/polices/approaches in terms of the hardships caused to employees, and injury to dignity etc, privacy concerns etc). There will be overlap all over the place.
>
> Furthermore, there will be *ESA* arguments regarding alleged overpayments. Not only whether or not the "overpayments" are actually overpayments under the Collective Agreement, but also, the issue of the harshness associated with the Employer pursuing these "overpayments", many years after the "fact". Again, those Casual Illness leaves were previously approved by the Employer and the Forms reflected that no Physicians' Certificates were required (that point was signed off on by the Employer). The evidence regarding those events as well as the effects that the Employer's conduct in this regard (years after approving the leaves), had on the employees involved, overlaps with both the merits and remedies
>
> Furthermore, the remedies being sought in this case are not limited to monetary payments/make whole orders. While the money is important, it is not the only remedy. Others include but are not limited to: declarations regarding interpretations; declarations regarding the Employer's policies/approaches; orders regarding the Employer's policies/approaches and forms etc. The Union and

> employees should not have to wait for a second hearing and subsequent decision in order to get the remedies to which they are entitled.
>
> Finally, if the Application To Bifurcate is granted, then there would be significant prejudice to the Union. However, if the Application To Bifurcate is denied, there would not be any prejudice to the Employer: ….

B. Discussion, Analysis and Decision

[24] The British Columbia arbitration decision cited by the employer involved an unusual mid-hearing application based on recent events.

> Generally, the Employer alleges that following the first hearing day on September 3, and during the period between then and when the matter was scheduled to resume in early October, the grievor and the Union improperly shared and/or released certain information related to the arbitration, which the Employer says should have been kept confidential to the hearing or to either sides' preparations for the hearing. Employer counsel says that the release of this information into the workplace by both the Union and the grievor, represents a serious breach of the successful candidate's privacy rights, amounting to abuse of process, and sufficient to require that the grievance be summarily dismissed.[8]

[25] The application was to bifurcate this issue a continuing hearing on the merits of the job selection grievance. It was about separate hearings on the merits (or liability) and remedy. In that context, Arbitrator Coleman wrote:

> Arbitration should be as expeditious and efficient as possible in any case. To that end, hearings should only be bifurcated to deal with intervening and preliminary matters, when it makes good sense to do so, and where it is expeditious and efficient to do so. The principles usually applied, apart from relevant legislation, are articulated in *Canadian Broadcasting Corp. and C.U.P.E. (Broadcast Council)* (1991), 22 L.A.C. (4th) 9, repeated in *School District No. 27 (Cariboo-Chilcotin) and Cariboo-Chilcotin Teachers' Assn.* (1994), 46 L.A.C. (4th) 385. Both cases involved allegations that the Employer had not provided proper contractual representation to the grievors, and whether that was a sufficient defect to have the discipline declared void ab initio. Both arbitrators determined that the question of bifurcation should be dependent on "such issues as fairness to the parties, practicality and the economical use of time." Applying those considerations, the arbitrator in *Canadian Broadcasting Corporation* concluded that the nature of the two issues was such that a determination of the preliminary matter would be dispositive of the case, but because the evidence and argument on the discipline and representation were intertwined, it did not make sense to bifurcate the hearing. *School District No. 27* went the other way, on the same logic but different facts:
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> > If it were clear that the preliminary issue could be dealt with separately from the merits, this would be the very sort of case in which a preliminary determination should be made. It appears that the evidence on the merits will be extensive and that going into the merits may be stressful for the grievor and others. If the evidence on the preliminary question could be restricted to that issue and

[8] *Abbotsford Police Department* [2007] B.C.C.A.A.A. No. 242 (Coleman), ¶ 3

> dealt with fairly expeditiously, the possibility that the preliminary issue might dispose of the whole matter would make it very desirable to deal with the preliminary issue first. (emphasis added)
>
> A decision on the preliminary matter would have been dispositive of the grievance in both cases. But in *School District No. 27* it was possible to restrict the evidence to the preliminary issue, and decide it expeditiously, whereas in *Canadian Broadcasting Corp.* at least one of those two circumstances was not present. The evidence was not separable.
>
> The same result prevailed in *Ontario (Liquor Control Board of Ontario) and O.L.B.E.U. (East)* (2005), 142 L.A.C. (4th) 442, where the board concluded that a great deal of evidence relevant to the main grievance was necessary for the preliminary matter and there would be insufficient economy to warrant bifurcation.[9]

[26] Arbitrator Coleman denied the application to bifurcate. He concluded: "But I am not convinced that there is a known and good potential that a decision on the abuse of process issue will be dispositive of the grievance, or that a fair hearing is at risk."[10]

[27] A 2000 Ontario decision cited by the union had circumstances more similar to this grievance arbitration. Arbitrator Dissanayake wrote:

> Neither party was able to bring to my attention an arbitration award which has directly dealt with the issue before me, i.e. the issue of bifurcating the liability (or merits) and the remedy. The parties nevertheless filed with me a number of cases, most of which deal with the bifurcation of a preliminary or jurisdictional issue from the merits of the case. See, *Re Hiram Walker & Sons Ltd*., (1973) 3 L.A.C. (2d) 203 (Adams) - (Arbitrability and merits); *Re Super Valu Store*, (1988) 12 L.A.C. (3d) 434 (Caudle); *Re Canadian Broadcasting Corp*.; (1991) 22 L.A.C. (4th) 9 (Thorne) - (Flaw in disciplinary action and merits); *Re Board of School Trustees of School District No. 27 (Cariboo-Chilcotin)*, (1994) 46 L.A.C. (4th) 385 (Kinzie) - (Flaw in disciplinary action and merits); *Re Shoppers Drug Mart #222*, (1995) B.C.D.L.A. 53-06 (Hickling) - (Breach of union representation provision and merits of just cause)."[11]

He determined "the norm is that all issues must be dealt with in one hearing" and decided the hearing would proceed on both issues on the dates schedule.[12]

[28] Any past general reluctance by parties and arbitrators to bifurcate hearings has given way to some commonly accepted exceptions. Case management conferences, hearings and decisions on preliminary issues have become accepted procedures to conduct grievance arbitrations in as expeditious and efficient manner as possible.

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[9] *Abbotsford Police Department* [2007] B.C.C.A.A.A. No. 242 (Coleman), ¶ 23 - 25
[10] *Abbotsford Police Department* [2007] B.C.C.A.A.A. No. 242 (Coleman), ¶ 27; 33
[11] *Toronto Star Newspapers Ltd.,* [2000] OLAA No. 396 (Dissanayake), ¶ 7
[12] *Toronto Star Newspapers Ltd.,* [2000] OLAA No. 396 (Dissanayake), ¶ 9; 17

[29] Separate hearings on the merits of a grievance and remedy are commonly agreed between unions and employers. Except for the issue of reinstatement in dismissal grievances, separate hearings on just cause and remedy has become the norm in discipline grievances. Arbitrators accept and expect this approach because it is usually agreed and a hearing on just cause is usually dispositive of the grievance. If the grievance is dismissed, no further evidence is required. If grievance is allowed, unions and employers almost always agree on a remedy.

[30] In other grievance arbitrations, the union and employer, not the arbitrator, know the extent to which the evidence is entwined or distinct. The arbitrator is not well positioned to know whether it will be an unnecessary use of resources to hear both the merits and remedial issues in a single hearing if the grievance is ultimately dismissed.

[31] The discretion to bifurcate a hearing by the use of the power of an arbitration board to "determine its own procedure"[13] is to be exercised in a manner that furthers the sometimes-conflicting expectations that grievance-arbitration is fair, speedy, informal, efficient, and non-technical process in which non-lawyers are comfortably participating. This grievance-arbitration is an example of a process that does not meet the expectation of speedy or informal dispute resolution.

[32] This grievance does not readily present a clear path for a course that will ensure fairness to the parties, practicality and the economical use of time. There is no bright line between what is severable relevant evidence limited to the employer's theory that there is simply a difference over collective agreement language and the union's multiple arguments and remedies extending into employer practices in varied circumstances.

[33] In this situation, a direction to bifurcate cannot identify the scope of permissible evidence and will generate recurring differences and likely time consuming wrangling over what is and is not permissible or relevant to what is to be heard. It will invite formality, technical objections, consume resources and possibly prolong, rather than shorten, proceedings.

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[13] *Labour Relations Code*, s. 92(1)(a)

[34] I am not persuaded bifurcating the hearing will advance the goals, credibility or reputation of grievance-arbitration. I am not persuaded bifurcating the hearing will promote conditions favourable to the orderly, constructive and expeditious settlement of this dispute. Therefore, the employer's application is dismissed.

APRIL 3, 2017, NORTH VANCOUVER, BRITISH COLUMBIA.

James E. Dorsey

James E. Dorsey