

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

**UNIFOR, LOCAL 975**

**-AND-**

**ENBRIDGE GAS DISTRIBUTION INC.**

**Termination grievance, document disclosure issue**

**Mary Ellen Cummings, arbitrator**

**Appearances:**

**J. James Nyman for the union**

**Karen R. Bock and Leslie A. Frattolin for the employer**

**Interim award issued on November 9, 2015 at Georgetown, Ontario**

## AWARD

1. This is an interim award addressing the employer's request for the disclosure of the clinical notes of a counsellor the grievor saw around the time of his termination from employment. The grievor asserts that his termination from employment is related to a drug and alcohol addiction of which the employer has been aware. The grievor asserts that the employer has not accommodated his disability to the point of undue hardship. In addition, the grievor asserts that he has now demonstrated a long period of sobriety and ought to be reinstated in his employment.
2. The employer counters that it has accommodated the grievor, providing him with treatment, at significant cost, and payment of sick leave while in treatment. The employer believes that it has met its duty to accommodate and has properly terminated the grievor for cause. The employer is concerned that the grievor was not honest and forthright that he had relapsed, breaching the restrictions that he agreed to when he was returned to work after treatment. In all the circumstances, the employer asserts it is not appropriate to reinstate the grievor, a short-service employee, emphasizing that he held a safety-sensitive position.
3. The employer became aware that the grievor was seeing a counsellor because of a reference in the clinical notes of the grievor's treating physician. The employer asserts that what the grievor related to his counsellor in respect of his alcohol and/or drug abuse around the time of his termination and after is relevant to the matters in issue.
4. The union does not challenge that the clinical notes could be arguably relevant to the matters in issue. But, it relies on the Supreme Court of Canada's decision in *R. v. O'Connor* [1995] 4 S.C.R. 411 for the proposition that not all arguably relevant material must be disclosed. If the information is highly sensitive and private, the decision-maker has the discretion to either decline to order the production of the material, or choose a way to limit the dissemination of the information. In *O'Connor*, the Court was addressing the request by a defendant charged with sexual assault for production of the psychological treatment records in respect of the alleged victim. The Supreme Court of Canada concluded that if the court is first satisfied that the documents are "likely relevant" to any of the issues in dispute, including credibility, then the documents will be privately reviewed by the court to determine if some or all of the records should be disclosed. The Court said that it was seeking to balance the alleged victim's right to privacy against the defendant's right to make full answer and defence.
5. The union argued that the material the employer seeks is highly sensitive and private. The grievor sought counselling to help him deal with the consequences of two situations of sexual abuse that occurred, first when he was a child and then again as a teenager. The grievor believes that his adult behaviour of abuse of alcohol, drugs and other reckless activities are rooted in the sexual abuse. The union submitted that the grievor understands that he must lay out a good deal of his personal life in this arbitration. But he would like to protect some small part, the counselling to deal with the sexual abuse, from the arbitration process.

6. The union has proposed, and the grievor agrees, that the counselling notes be provided to me. If I believe that any of the notes are relevant to the matters in issue, I will provide them to counsel for the employer, with appropriate redactions.

7. The employer responded that it recognizes that the clinical notes of the counsellor may contain highly sensitive and private information. Counsel for the employer said that her client has no interest in acquiring information that has no relevance to the matters in issue. The employer said that I could either receive and vet the clinical notes, as suggested by the union. Alternatively, I could follow the practice set out in *Re Celgar Pulp Inc. and Pulp, Paper and Woodworkers of Canada, Local 1*, (Hickling) 1999, Carswell BC 3239. In that case, the arbitrator, after considering *O'Connor*, recognized that there were two procedures for dealing with a claim of privilege or privacy; submitting the documents to the decision-maker for review, or ordering the production of all of the documents to the party opposite, while imposing stringent conditions about who would see them and the use to which they could be put. Arbitrator Hickling directed that only counsel to the employer and any expert witness could see the documents, they could only be used in the arbitration litigation, and only a single set of notes about the documents could be made.

8. In the case before, counsel for the employer said they would be content to leave the choice between those two options to me. In reply, the union submitted that it would prefer that the counselling notes stay with me, and only the arguably relevant excerpts be provided to employer counsel.

9. I conclude that the option that is the least intrusive to the grievor's privacy, while still permitting the employer to receive disclosure of arguably relevant documents, involves me reviewing the clinical notes privately.

10. I direct that the grievor make his best efforts to acquire the clinical notes from his counsellor and provide them to counsel for the union. I further direct that counsel for the union provide the counselling notes to me. Having regard to the matters in dispute, including credibility, I will review the clinical notes and determine if there are relevant excerpts. I will then provide those excerpts to counsel for both parties, with appropriate redactions. If necessary, I will convene a conference call with counsel to discuss any unanticipated issues. Although I will make an initial determination as to what is arguably or likely relevant based on my understanding of the issues in dispute at this point, as the case continues, I will revisit that question and may make further disclosures.

Signed at Georgetown, Ontario, this 9<sup>th</sup> day of November, 2015.

A handwritten signature in black ink, appearing to read 'MEC', with a long horizontal stroke extending to the right.

Mary Ellen Cummings