

IN THE MATTER OF AN ARBITRATION

BETWEEN:

Toronto Transit Commission

-and-

**Amalgamated Transit Union
Local 113**

Grievance of Kahmall Smith

Lorne Slotnick, Arbitrator



Representing the Employer – Steve Lavender

Representing the Union – Dean Ardron

Representing Manufacturers Life Insurance Co. – Brendan Wong

Hearing – Toronto, Ont., July 4, 2018

INTERIM AWARD

The grievance before me is one of many arising from the discharge of TTC employees over benefit claims made through a clinic called Healthy Fit. This decision addresses the union's request, made at the hearing on July 4, that Manulife produce documents related to a second clinic named Layered Health Solutions. I adjourned the hearing after discussions with counsel on this issue.

The request for additional documents arises from the evidence of Glenn Benard, a Manulife investigator summoned to testify by me at the request of the union. In examination-in-chief, Mr. Benard has testified that from 2014 to 2016, hundreds of TTC employees made claims originating at Layered Health that were processed by Manulife. Layered Health was investigated by Manulife after a tip was received about improper claims.

Mr. Benard testified that Manulife concluded there was fraudulent activity involved, that it discussed Layered Health regularly with the TTC at the same time as Healthy Fit was being discussed, that it filed a criminal complaint about Layered Health with the Toronto Police Service on the direction of the TTC, and that it delisted Layered Health in early 2017.

An agreement made by the TTC, the ATU and Manulife in April 2018, and incorporated into an interim award by me, (2018 CanLII 34065 (ON LA)) included the following: “Benard shall conduct a diligent search of Manulife’s records for all documents relating to all information provided to Mark Russell, Pat Daniels, and/or the Toronto Transit Commission between April 2014 and July 2015, including emails, letters, and any notes of conversations. Any production being subject to privilege.”

Manulife provided a large number of documents. The union has now asked for additional material. It seeks documents from the same time period (April 2014 to July 2015) related to Layered Health, beyond those which have already been produced pursuant to the agreement referred to above. In addition, it seeks documents from August 2015 to February 2017 related to any communications between Manulife and the TTC related to Layered Health.

The union says this material is relevant to its argument that this grievor and others have been subjected to discriminatory discipline. It asserts that no employees have been disciplined over Layered Health claims, even though their conduct was, in the union’s view, strikingly similar to that of employees who made claims through Healthy Fit. It says the documents will reveal information about what the TTC knew about Layered Health and when.

The TTC takes no position on the union request. However, it is important to note that the TTC asserts that any evidence related to Layered Health is irrelevant and should not be admitted. The

parties have agreed, however, to allow such evidence to be presented provisionally, with the understanding that the admissibility or weight of that evidence will be first argued in front of whichever arbitrator is first to hear final argument.

Manulife opposes the request for additional documents, describing it not only as a fishing expedition, but also a fishing expedition that was initiated too late. It notes that the agreement relating to Mr. Benard's evidence arises from a summons that is restricted to Healthy Fit documents. Manulife has already incurred costs in responding to the summons, and expected Mr. Benard to be finished his evidence on July 4, counsel argued.

The union responds that it can have a revised issued that includes the Layered Health documents. It says it had no factual basis to make the request earlier than it did, as Mr. Benard's testimony was the first time the union became aware of the existence of the documents requested.

In my view, the documents requested are arguably relevant to the union's argument on discriminatory discipline, an argument the union is entitled to make. Further, it is clear from Mr. Benard's evidence that at least some of the requested documents exist, or at least existed at some point. However, I find the union's request is overly broad, potentially requiring Manulife to expend significant resources searching for documents that, accepting Mr. Benard's evidence, are unlikely to exist. I will order production of only those documents whose existence was confirmed by Mr. Benard in his evidence.

I therefore order Mr. Benard to conduct a diligent search of Manulife's records for the following material, and to produce it to counsel for TTC and ATU, subject to privilege:

- The text of the tip that prompted the investigation of Layered Health
- The criminal complaint regarding Layered Health that was filed with Toronto Police Service, including all appendices.
- Any summaries of the weekly update conference calls held between Manulife and TTC from August 2015 and until February 2017.

Counsel for Manulife is to advise me and counsel for TTC and ATU as soon as possible when he expects that the material can be produced, so that we can schedule a date for completion of Mr.

Benard's testimony.

A handwritten signature in black ink, appearing to read "Lorne Slotnick", written over a horizontal line.

Lorne Slotnick, Arbitrator

July 6, 2018