

IN THE MATTER OF AN ARBITRATION

BETWEEN:

The University of Ottawa,

Employer,

- and -

The Association of Professors of the University of Ottawa,

Union

BEFORE: Michael Bendel, Arbitrator

APPEARANCES: For the Union:

Natasha Udell, Counsel
Brianne Carlson, Grievance Officer

For the Employer:

Céline Delorme, Counsel
René Houle, Manager, Labour Relations
Lise Griffith, Director, Health and Wellness Office
Julie Huot-Hébert, Advisor, Health and Accommodation

Heard in Ottawa, Ontario, on August 22, 2018, and May 8, 2019.

INTERIM ARBITRAL AWARD

I

The grievance of “Professor B” relates to her return to work following a period of illness.

On the first day of the hearing, the parties negotiated a Memorandum of Agreement (an “MoA”), whereby a psychiatrist would be selected to conduct an independent medical examination (an “IME”) for the purpose of verifying the grievor’s fitness to return to work and identifying any accommodations she might require in that regard.

The IME has been completed, with its author, Dr. Brad Booth, a psychiatrist, submitting a 27-page report on November 7, 2018.

However, the parties have not been successful in agreeing on an accommodation plan, or even in having full discussion of the conditions of the grievor’s return to work, scheduled for July 1, 2019. The employer, anxious to ensure a successful return to work for the grievor, sought an additional day of hearing in order to address the issues which appeared to stand in the way of the development and implementation of an accommodation plan.

On the resumption of the hearing, the parties identified two disagreements they had on how to move forward in preparing for the grievor’s return to work and asked for a ruling from the arbitrator. The two issues are these:

(a) the role, if any, of her Dean (referred to herein as “Dean X”) in developing and implementing a return to work plan; and

(b) the distribution of the IME report.

The pertinent provisions of the collective agreement are the following:

ARTICLE 8 Absence of discrimination

...

8.1.2 Accommodation The duty to accommodate is a joint responsibility...

...

8.1.4 Upon request of the Member, who has an attested medical need, the Dean, the Health and Wellness Office and APUO (when requested by the Member) shall develop an accommodation plan to be implemented in a timely manner. The Member will be informed of her right to union representation.

8.1.5 The Health and Wellness Office shall forward the accommodation request and any appropriate functional limitations, if applicable, to the Dean. The Dean shall then, in consultation with the Member, and APUO (where requested by the Member) implement an accommodation plan as soon as possible.

In the MoA, the parties provided, in part, the following:

4. The scope of the independent medical examination (hereinafter “IME”) will be as follows:

To clarify the nature and extent of the medical condition and prognosis (i.e. are there functional limitations stemming from the medical condition and if so, what are they and what is the duration?) The independent medical examination will also seek to clarify the recommended treatment plan for the condition, if applicable.

8. Upon receipt of the IME report, the appropriate Dean will be responsible to implement the accommodation plan, if necessary, as per Article 8.1.5 of the collective agreement. In the event of a dispute regarding the appropriate authority to implement the accommodation plan, such dispute shall be resolved by Arbitrator Bendel. Until that time, the parties agree that Dean [X] will not be involved in any accommodation discussions, should there be any, and will not be provided with the Grievor's medical file or information retained by the Health and Wellness Office.

...

10. The Grievor, by her signature below, confirms that any consents signed by her will allow disclosure to Lise Griffith and Julie Huot-Hébert from the Health and Wellness Office, René Houle, Emond Harnden representatives and Arbitrator Bendel, unless stated otherwise in writing, on the understanding that all such persons will treat the information in the records on a confidential basis.

...

15. Any dispute regarding the interpretation or implementation of this Memorandum of Agreement shall be referred to Arbitrator Bendel for binding resolution.

No viva voce evidence was adduced. The following are certain pertinent facts that appear in the documents filed at the hearing:

1. In the IME report, at page 3, it is recorded that in 2018, the grievor had "requested a transfer and secondment of her position from one faculty to another faculty for health accommodation", a request that was denied. At page 7, it is recorded that, according to the grievor, there existed a "long-standing toxic environment within the faculty". At page 10, it is recorded that, according to the grievor, she did not have "a good working relationship with the Dean so she instead went directly to the Provost in requesting her return to work".

2. In October, the employer and the union entered into correspondence concerning the consent form the grievor had been asked to sign as authorization for the disclosure of her personal health information. The employer agreed that the psychiatrist's diagnosis should not be disclosed. The IME

report provided to the Health and Wellness Office of the employer on November 7 was subject to substantial redactions. All or part of the sections of the report dealing with the grievor's medical history, current medications, substance use history, family psychiatric history, psychiatric history, diagnostic scales, mental status examination, prognosis, and recommended treatment had been obscured by its author.

3. Following the receipt of the redacted IME report by the Health and Wellness Office, the grievor was asked to consent to its release to her treating physician, but she declined to do so. She was provided with the redacted report, as was the union. It appears that Dr. Booth, the author of the IME report, required a consent from the grievor before he released the unredacted version.

4. The IME report identified several functional limitations, which were described as "significant", although no work performance issues were noted. Of particular note, it did not identify any limitations as regards the locations where the grievor could work or the persons with whom she could come into contact in the course of her work.

5. In a meeting with Health and Wellness Office and with Labour Relations on January 17, 2019, the grievor refused to consent to the disclosure to Dean X of the functional limitations identified in the IME report.

II

Ms. Delorme, counsel for the employer, stated that the employer had shown patience and cooperation on this file, but it now needed the resolution of a couple of issues to move forward with an

accommodation plan for the grievor. The arbitrator had jurisdiction to rule on any dispute relating to the interpretation or implementation of the MoA.

Ms. Delorme said that the first issue that was blocking the development of an accommodation plan was the grievor's insistence that Dean X not be involved in discussing or deciding anything to do with her return to work. Under sub-sections 8.1.4 and 8.1.5 of the collective agreement, the Dean was designated as a necessary member of the management team for developing and implementing accommodation plans. There was only one person who met the definition of Dean for the purpose of the grievor's return to work, and that was Dean X. The detailed provisions of the collective agreement regarding accommodation plans could not function in the absence of the Dean's involvement. Nothing in the MoA detracted from the employer's powers or the Dean's role as a member of the management team.

As for the IME, the self-evident reason it was provided for in the MoA was to bring some finality to the issue of the grievor's ability to return to work, including any functional limitations. The parties both agreed to the selection of Dr. Booth as the person to conduct the IME. Absent from the IME report was any indication that the grievor's health required limitations on her contact with Dean X or on Dean X's participation in the accommodation process, although the report did note that the grievor felt she had a poor working relationship with him and that there was a "long-standing toxic environment within the faculty". The functional limitations noted in the report had to be taken at face value and there was no legitimate basis for adding to or subtracting from them.

Ms. Delorme therefore sought a ruling from the arbitrator that Dean X had the appropriate authority to participate in all discussions related to the grievor's accommodation and to implement any accommodation plan.

Ms. Delorme sought the further ruling that it was too late for the grievor to withhold her consent to the disclosure of the unredacted IME report since she had agreed, in paragraph 10 of the MoA, to the release of the report to the persons listed therein.

Ms. Udell, counsel for the union, noted that sub-section 8.1.4 of the collective agreement related to the development of an accommodation plan, while sub-section 8.1.5 related to its implementation. In paragraph 8 of the MoA, the parties had turned their minds to a possible dispute regarding the appropriate authority to implement such a plan, but had remained silent on any dispute relating to its development. The arbitrator was only authorized, by the plain language of paragraph 8, to resolve disputes relating to the appropriate person to work on the implementation of the accommodation plan. Since there was as yet no accommodation plan to be implemented, paragraph 8 conferred no pertinent jurisdiction on the arbitrator.

According to Ms. Udell, the functional limitations stated in the IME report were not self-explanatory. Further input was needed from Dr. Booth on the meaning of certain items in that listing.

Ms. Udell stated that she had no submissions to make on the interpretation of paragraph 10 of the MoA.

III

Paragraph 8 of the MoA reads as follows:

8. Upon receipt of the IME report, the appropriate Dean will be responsible to implement the accommodation plan, if necessary, as per Article 8.1.5 of the collective agreement. In the event of a dispute regarding the appropriate authority to implement the accommodation plan, such dispute shall be resolved by Arbitrator Bendel. Until that time, the parties agree that Dean [X] will not be involved in any accommodation discussions, should there be any, and will not be provided with the Grievor's medical file or information retained by the Health and Wellness Office.

Under this paragraph, only "in the event of a dispute regarding the appropriate authority to implement the accommodation plan" would Dean X be precluded from participating in any accommodation discussions. Paragraph 8 appears to envisage a situation where it might be uncertain whether Dean X or some other person (or persons) might be regarded as "the appropriate Dean", in which case the arbitrator would rule on which of them had the responsibility to implement the accommodation plan. I do not understand the paragraph as meaning that, if the grievor merely had an objection to Dean X's participation, I should decide whether the objection was well-founded to the extent that it should lead to his exclusion from the process.

It follows that, in my view, I am not seized of a dispute of the kind described in that paragraph. Indeed, in the correspondence and discussions with counsel that led to the convening of the second hearing session, neither party took the position that I was being asked to resolve such a dispute, although paragraph 8 was mentioned. In addition, Ms. Udell, in her oral submissions, specifically denied that, in the present circumstances, I could exercise the authority conferred on me in paragraph 8.

It follows that the final sentence of paragraph 8 has no application: by its terms, it only applies between the time such a dispute is submitted to the arbitrator and the time the arbitrator resolves the dispute. No such dispute having been submitted, I hold that Dean X is not prohibited from participating in any accommodation discussions.

There remains for consideration the issue of the release or distribution of the IME report.

In paragraph 10 of the MoA, the grievor agreed that she would “allow disclosure” to the persons listed in that paragraph. Given the proximity of paragraph 10 to paragraph 8, which starts with the words “upon receipt of the IME report”, it seems obvious that the disclosure in question relates to the IME report. The centrality of the IME report to the MoA as a whole confirms this conclusion. I should add that the grievor’s consent to the release of a redacted version of the IME report, or a summary of the report, would not satisfy her obligations under paragraph 10, since nothing in the MoA suggests that the parties envisaged that the IME report would be anything other than the complete written opinion of the appointed physician. Some mention was made in argument of the Personal Health Information Protection Act, 2004, S.O. 2004, c. 3, Sch. A, but neither party made any specific submissions on the effect of that legislation on the grievor’s obligations under paragraph 10.

In paragraph 10, however, the parties were at pains to identify by name the persons to whom the IME report could be disclosed. Of note is that Dean X is not one of the persons so listed. I have no authority to add his name to the list. Nor was I asked to do so. It follows that the grievor is under no obligation under paragraph 10 to consent to the release of the IME report to Dean X.

(I should note that the parties agreed to a qualification on the grievor’s obligations under paragraph 10 by adding the words “unless otherwise stated in writing”. I have no idea what was envisaged by this addition and neither party referred to these words in their submissions, so I will say nothing more on the subject.)

I realize that without the IME report Dean X might very well be in a difficult position as regards participating in accommodation discussions, since, logically, such discussions should flow from the functional limitations identified in the report. However, I note that, under sub-section 8.1.5 of the collective agreement, the Health and Wellness Office is required to forward the functional limitations to the Dean, a requirement that is not specifically qualified by anything in the MoA.

In the absence of submissions on the question, I express no opinion on the extent to which the parties' general obligation, under the collective agreement and statute, to cooperate in the accommodation exercise qualifies, or takes precedence over, the provisions of the MoA.

I trust that, with the clarifications provided above, the parties will now be able to move forward with an accommodation plan for the grievor. I continue to remain seized.

DATED at Thornhill, Ontario, this 10th day of May 2019.

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

Michael Bendel,
Arbitrator