IN THE MATTER OF AN ARBITRATION, PURSUANT TO THE
B.C. *LABOUR RELATIONS CODE*

BETWEEN:

METRO VANCOUVER
(the "Employer")

AND:

GREATER VANCOUVER REGIONAL DISTRICT EMPLOYEES' UNION
(the "Union")

(Sick Leave Benefits and Termination Grievance)

AWARD

ARBITRATOR:	JULIE NICHOLS
COUNSEL for the EMPLOYER:	GREGORY HEYWOOD
COUNSEL for the UNION:	MARJORIE BROWN JOHN HODGINS
DATE of HEARING:	JUNE 24 & 25, 2013 and JUNE 3 & 4, 2014
PLACE of HEARING:	VANCOUVER, B.C.
DATE of AWARD:	AUGUST 7, 2014

Introduction

This case involves the termination of the sick leave benefits and employment of Ryan Borhaven, the Grievor. After receiving medical information related to the Grievor's absence from work, the Employer requested, pursuant to Article 9.08(5)(b) of the Collective Agreement, that he attend an independent medical examination ("IME") with a doctor of its choosing. The Grievor, while maintaining that he would attend the IME, was unwilling to sign the consent forms that were required by the Employer's third party provider. As a result, the IME was not carried out. The Employer maintains that, given its contractual right to require the IME and his insubordinate conduct, it properly discontinued the Grievor's sick leave benefits and had just cause for termination. The Union takes the position that the Employer was not entitled to insist on an IME and its failure to consider alternatives for the provision of medical information and to act on the Grievor's accommodation request led to the improper cancellation of his sick leave benefits and to his unjust discharge.

At the initial hearing, a dispute about the scope of the grievance arose. That issue was addressed in a July 2, 2013 interim ruling in which I concluded that the scope of the dispute did not include the issues of whether the Grievor has a disability or the merits relating to duty to accommodate obligations. Those matters were not canvassed and will not be addressed here.

The Employer called three witnesses: Dr. Ray Baker, an expert witness; Don Littleford, Director of Housing; and, Linda Kinney, Return to Work Advisor in Human Resources. The Union called one witness: Bill Eastwood, President of the Union.

Preliminary Issue: Admissibility of Expert Report and Testimony

The Employer intended to introduce an expert report by Dr. Baker and have him testify about the process of performing an IME. The Union objected to the admissibility of the evidence. To expedite the proceeding, I ruled that the evidence was admissible, with reasons to be set out in my final award. Those reasons follow below.

The Union objected to the admissibility of the expert report on the basis that it was unnecessary, time-consuming and expensive. It submitted that Dr. Baker had no expertise to address the reasonableness of the Employer's requirement for the IME or the meaning of the Collective Agreement, and that this matter was not sufficiently technical or outside my expertise to require the admission of expert evidence. In the alternative, it maintained that the report addressed the fundamental issue in dispute (i.e., whether the demand for the IME and medical records was reasonable) and strayed into advocacy. It submitted that evidence was unhelpful given that the IME process has been addressed by the College of Physicians and Surgeons (the "College") and must be assessed on a case-by-case basis. Since Dr. Baker did not examine the Grievor, his conclusions were hypothetical, were not relevant to this specific matter and amounted to hearsay. It relied upon the following authorities: *BCTF -and- BCPSEA (Provincial Matters Grievance: Medical Certificates)*, [2004] BCCAAA No. 177 (Taylor); *R. v. D.D.*, [2000] SCJ No. 44; *Brough v. Richmond,* [2003] BCJ No. 748 (BCSC); *Communications, Energy and Paperworkers Union of Canada, Local 1-S -and- SaskTel (Casual Sick Leave Grievance)* (2011), 211 LAC (4th) 387 (Pelton).

The Employer submitted that much of the Union's objection went to weight, rather than admissibility. It maintained that Dr. Baker's evidence was necessary as he is an expert in the IME process and could testify about the medical necessity of obtaining collateral information as well as consent. These matters (i.e., what a physician needs to do his job) were not within my province of expertise. It relied upon *Malaspina University College -and- Malaspina College Faculty Assn.*, [1996] BCCAAA No. 554 (Bruce); and *Port Coquitlam (City) -and- CUPE, Local 498 (Dobby Grievance)*, [2005] BCCAAA No. 108 (Munroe).

In terms of qualification as an expert witness, I accept that Dr. Baker is properly qualified to give expert testimony with respect to the IME process. He has extensive medical qualifications and experience, has specialized in the field of occupational and addictions medicine since 1988, has performed a significant number of IMEs, and has testified as an expert witness on many occasions (including in relation to the IME process).

On the question of admissibility, expert evidence may be admitted if it is relevant and necessary in that it assists in understanding matters that fall outside the adjudicator's common experience and knowledge. The Union submitted that this case centers on whether the Employer was entitled to require the IME and the medical disclosure. It is my task to determine whether the Employer's actions were proper, further to the Collective Agreement and the law. Yet, in my view, Dr. Baker's evidence is of assistance in understanding the IME process from a medical perspective and the medical reasons for aspects of that process, including the consent forms. Those are matters that fall outside my area of expertise. Although Dr. Baker provided general evidence which was not specific to the particular facts of this case, the evidence is relevant, at least in a limited way. In the context of determining what is reasonable in the specific circumstances, the medical rationale for aspects of the IME process may be one factor, among others, that should be considered when the actions of the Employer are assessed.

As noted above, the expert evidence was admitted. However, the weight it should be given is a separate matter which was canvassed by both parties in their final argument and will be addressed below.

The IME Process

In his report, Dr. Baker opined the following:

> My Opinions
> In this matter I note that IMA (independent medical assessment) and IME (independent medical examination) are used interchangeably. This is not uncommon. … Physicians are under strict guidelines dictating how they must handle personal, confidential patient information. All physicians, including physicians performing independent occupational diagnostic evaluations are limited in the types of information they may provide to employers. The type of information that physicians performing independent medical evaluations are permitted and expected to provide employers is limited to what is necessary for effective workplace management and for the employer to accommodate the employee's safe, sustainable return to work.
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> 1. a. What is an IMA?
> An IMA or IME is a formal process performed by a physician or team of healthcare professionals, under informed voluntary consent of the person being assessed, consisting of structured diagnostic interviews, physical examination, laboratory and/or other

appropriate diagnostic investigations, review of medical records and collateral information such as information from the workplace.

b. Why is it performed?

An IMA or IME is sometimes required to obtain sufficient diagnostic information in order to make decisions with respect to appropriate treatment, fitness to safely work, establishment of appropriate workplace accommodations and restrictions as well as to determine eligibility for various types of disability insurance.

2. What is a physician's role in performing an IMA?

The physician performing the IMA is expected to remain objective and independent, providing opinions and recommendations that are not biased or influenced by the party purchasing the evaluation. The examining physician will, by means of interviews with the assessed person, physical examination, diagnostic investigations, review of medical documents, interviews/examination of collateral sources of information, assemble the available information in order to reach a comprehensive diagnostic formulation and make appropriate recommendations. …

3. a. What information does a physician customarily require from a participant prior to conducting an IMA?

The participant must first understand the nature of the examination process and the destination and type of content of the information that comes from the evaluation. The examining physician requires consent, usually signed consent, from the person to be examined indicating that they understand the nature of the evaluation, that they agree to allow the examining physician to communicate with other health professionals who have provided medical services to him or her, to examine their medical records and to gather other information that is pertinent to their medical condition as well as information from the workplace that is related to the person's past, current or future health and safety.

b. Why is such information necessary?

Conditions causing workplace disability are often complex, involving combinations of physical and medical issues, emotional and psychiatric problems and frequently including psychosocial (and vocational) stressors. Usually the physician performing the IME spends only several hours with the person in performing the examination. In order to arrive at a complete and accurate diagnostic picture the examining physician must have access to the pertinent medical, psychiatric and psychosocial information available from reliable and credible sources.

4. What is the impact, if any, on the IME if the conducting physician is not made aware of the participant's past history?

It could be impossible to reach an accurate diagnostic formulation if there is significant medical history that is withheld from the physician responsible for providing the opinions and recommendations.

5. What information is contained in the IMA report?

An IME/IME generates two types of report. The full report lists all the details elicited during the diagnostic interviews, physical examination, diagnostic investigations and review of medical records and collateral information. This type of report is suitable for regulated health professionals or health insurers who have similar requirements with respect to privacy confidentiality. The full or comprehensive IME report concludes with a diagnostic formulation listing medical/psychiatric diagnoses, psychosocial problems

and stressors, current 'global assessment of function', specific treatment recommendations and prognosis.

Reports to non-medical personnel such as employers (unless the employer has its own occupational medicine department employing licenced [*sic*], regulated heath professionals) consist of "need to know" information. That would include:

- Nature of disorders diagnosed (not diagnostic specifics)
- Treatment adherence
- Recommendations for further diagnostic evaluation (e.g.: specialist consult)
- Fitness to work
- Estimated duration of disability
- Recommendations for accommodations/restrictions
- Graduated return to work recommendations
- Likely prognosis

6. Is Form #1 and Form #2 standard consent forms used in conducting IMA's?

Yes

7. Are the terms of the release of information set out in Form #1 and Form #2 necessary for a proper IME?

Yes

Dr. Baker testified that an IME serves to provide necessary medical and psychiatric information regarding the health of an individual in order to assist a third party in making decisions about that person. The IME physician's role is to gather information about an individual's fitness, diagnosis, problems and stressors; and, to review their diagnosis and treatment plan (if it exists) or suggest a treatment plan. A full report with private information may be released to other licensed health professionals. Non-medical professionals receive information that is limited to what they need to know to maintain a safe and productive workplace.

Information relating to the medical and psychiatric history is gathered primarily from the individual but also from collateral sources, including medical documentation, physical examination, laboratory tests, and the workplace. Collateral medical information is gathered from other treating professionals via telephone interviews or written documents (including hospital and clinical records). That medical information is important because an IME physician only sees an individual for a short period of time. For a person with a complex history or co-morbidity of psychiatric and medical issues, it can be difficult to make an assessment in that timeframe. To remain unbiased, Dr. Baker reviews collateral documentation after examining the individual.

He testified that, generally, it is better to have thorough medical information and that certain information may be relevant in a psychiatric assessment (e.g., anti-social behaviour). In his view, withholding information could impact the quality of the IME. The impact would depend on the complexity of the case, but it could be disastrous. He would not agree to perform an IME if he knew beforehand that there would be no access to information as it would put him in a position where he had been asked to give a medical opinion without the necessary information. If irrelevant medical information was disclosed to him by a treating professional, he would not reference it in his medical report.

Dr. Baker indicated that, prior to the IME interview, he needs to know that the individual understands what to expect and what the physician is being asked to do and consents to it. In his opinion, the two consent forms in this case are fairly standard and similar to forms he uses. They are used to make it clear that the person agrees to the process and to get permission to send the report to a third party. He uses consent forms that permit the disclosure of a report to the treating physician and a non-medical report to the employer. His forms also permit the disclosure of information from health professionals to the IME physician and identify any limit on the information that will be provided from the treating physician. He would not perform an IME without both of the consent forms signed. He noted that doctors often delete part of a medical record if they feel strongly that it is not relevant. It is not uncommon to get redacted medical records. He, generally, does not make inquiries about the information that has been removed, unless the record is highly redacted and there is a question about relevant information. In that case, he may telephone the doctor.

In cross-examination, while Dr. Baker agreed that the consent forms sent by the Employer did not provide a detailed description of all of the components of the assessment, he believed the Employer's documents provided a sufficient explanation such that a reasonable person would understand that they were to undergo a medical assessment. The forms were similar to those he uses in terms of the amount of information provided. He clarified that while the general content of the forms is fairly standard, they can vary tremendously in wording.

He indicated that, in terms of obtaining informed consent, the physician is expected to explain the IME process at the beginning of the interview to ensure that the individual understands what is going to happen. He agreed that the Grievor would not know about that practice from the Employer's letters or the consent forms. He could complete an IME if an individual provided the medical information after the IME process was explained as he does not review the information in advance, although he noted many practitioners review the documentation prior to the evaluation. When it was put to him that the provision of information in advance was only one way to carry out the IME, Dr. Baker agreed in part, pointing out that he would want to ensure that the individual would provide access to the information or he would not proceed. He agreed that no College Guideline provided that, if a limitation was placed on consent, the IME could not occur. Yet, he noted that if limitations were set on the assessment such that he could not complete the exam, he would not go ahead with it.

Dr. Baker agreed that if a doctor did not redact medical information, the IME physician may receive irrelevant information. He confirmed the withholding of relevant medical history could lead to an erroneous diagnosis, depending on what was withheld. He indicated that information from a person's childhood could be important, but he does not always receive that information. While the release of thorough information was necessary for the assessment, he agreed the disclosure did not have to be further to the specific consent forms provided to the Grievor. He confirmed that he carries out IMEs on the request of a third party; he does not determine whether an IME is necessary.

The Collective Agreement & IMEs

Article 9.08(5)(b) of the Collective Agreement provides:

> Employees in receipt of benefits under either the STII Plan or the LTD Plan may be required by either the Corporation or the insurer to produce medical certification at any time from a duly qualified medical practitioner stating that such employee is unable to carry out the duties of their position (or any position, as the case may be) and providing a prognosis with respect to the employee's return to work. Such certification shall be at the employee's cost.
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> An employee may also be required to undergo a medical assessment by a physician other than the employee's own. This requirement may occur at the initiative of the Corporation

> or the insurer. Where such a medical assessment is required, either the Corporation or insurer, as the case may be, shall pay for the cost of the assessment.

Eastwood has been the Union President since 1994 and is primarily responsible for handling labour relations issues. He testified that this provision was in place prior to his involvement in collective bargaining. The Union has only been involved in a fraction of situations involving medical notes and he had only been exposed to a limited sample of IMEs. He believed there is no agreement between the parties that the Employer may select the IME physician.

Eastwood agreed, in cross-examination, that Article 9.08(5)(b) authorized the Employer to request an IME and that the provision did not identify any pre-requisites for that request other than the employee being in receipt of benefits. The Union had not negotiated any changes to the Employer's right to request as IME by a doctor other than the employee's own. In the few cases that he is aware of, the IME physician was put forward by the Employer, although he maintained that there was no tacit agreement on that issue with the Union. He was not aware of a situation where an employee did not sign a consent form.

Eastwood also agreed that in order to maintain sick leave benefits, an employee must comply with the Collective Agreement and that for the administration of benefits the parties had agreed that, if requested, a medical note or evidence of disability must be provided. In his view, the Employer had to get a thorough explanation first before going to a second doctor. He agreed that there were some cases where a second medical opinion was necessary and that a request for a permanent accommodation warranted a higher level of scrutiny than a three day absence.

Kinney has worked in Human Resources since 1990. As a Return to Work Advisor, she deals with a variety of matters, including employees returning to work, sick leave and long term disability issues, IMEs, and workplace accommodations. She testified that, while the Employer receives several requests for temporary accommodations each month, it does not often receive requests for permanent accommodations. The Employer would not move an employee from their regular position until it had information that supported the conclusion that the move was appropriate. In general, the Employer would obtain an

IME when it did not have enough information to move forward with an accommodation situation; that is, when it is "stuck" in its efforts to get individuals back to work or to keep them back at work.

Chronology of Events

There is little dispute on the facts, although the parties view their significance very differently. I set out the relevant events below and indicate any inconsistencies in the evidence as they arise.

Littleford has been with the Employer for 31 years and has been the Director of Housing since 2004. The Housing Corporation ("Housing") operates approximately 50 complexes with 3500 tenants in the Lower Mainland. Of its 66 employees, 26 are Resident Managers and four are supervisors.

The Grievor, who was initially a temporary employee in the construction group, became a full-time Resident Manager on August 27, 2011. He was assigned to a residence in Burnaby where he was responsible for managing 120 units. He has no discipline record.

The Grievor went off work and voluntarily provided a medical note, dated June 25, 2012, that indicated he "is severely stressed. He is having issues with his superior and is unable to continue in his present position. He needs time off and ideally a change in his job." Prior to receiving the note, Littleford had had no discussions about the Grievor's issues in the workplace.

Kinney discussed the June 25th note with her supervisor because it referenced stress and a change of supervisor. She testified that the note was not typical and the Employer had not previously received a note of this nature recommending a change in job. She told the Grievor that the Employer did not have sufficient information and would be sending a letter to his physician. The Grievor did not object.

Kinney prepared a letter to the Grievor's doctor ("Dr. S"), dated July 3, 2012, with standard questions to obtain information about any limitations that prevented the Grievor

from working. Dr. S replied by July 6th and indicated that the Grievor was "[t]otally unable to work in the present position" and the limitations were permanent. He specified "treatment is to place in different job or possibly under different supervisor". In terms of return to work, the Dr. S indicated "never in present situation". With respect to prognosis, Dr. S wrote "[p]oor. [The Grievor] has documented issues concerning his work and supervisor. Communication with [the Grievor] would be helpful."

In Kinney's view, Dr. S's answers provided no insight into limitations, no support for a change in job or supervisor and no assistance in determining what accommodations would be required. It was the first time that she received such a response. She testified that, without further information, the Employer was unable to move forward. An IME was arranged to obtain additional resources to assist in addressing the Grievor's absence and what appeared to be a mental health issue. It felt it had exhausted its efforts with Dr. S, who was unresponsive to the Employer's questions.

In cross-examination, Kinney indicated that, in her opinion, there was no value in following up with Dr. S as she felt her questions had been clear and he responded with the same insufficient information. She had sent the same forms to other doctors who were responsive to the questions. She told the Grievor that the information she had received from Dr. S was not new and they would be proceeding with an IME.

Littleford testified, in cross-examination, that he had believed that Dr. S would clarify the Grievor's restrictions, but the information received from him was incomplete. In Littleford's view, the Employer did not need to go back to Dr. S as the doctor should have figured out that he had not responded to the questions. The Employer did not offer proposed solutions as it did not understand the medical restrictions; nor, did it request any medical clarification from the Grievor, Dr. S, or the Union prior to requesting the IME.

Eastwood, in cross-examination, agreed that there are many occasions when employees complained about supervisors. He acknowledged that he had never seen a medical note that recommended a new supervisor. He described Dr. S's responses to the Employer's July 3rd letter as sketchy and curt and agreed that they outlined the need for a permanent

accommodation, but did not specify whether the problem was the job or the supervisor. He testified that he could understand why the Employer wanted more information.

Early in the week of July 9th, Kinney advised the Grievor of the scheduled IME and that he would be provided with a letter and consent forms to sign. He was agreeable. In cross-examination, she confirmed that she booked the IME on the specialist's earliest available date without checking the Grievor's availability.

The Grievor came to Kinney's office on July 12th. She reviewed the letter which indicated that he had an appointment to see a physician (who appeared to be a psychiatrist) on July 18th. He wished to take the consent forms home to review them. He did not object to the IME and did not indicate any reason he could not attend.

Kinney left messages for the Grievor to follow-up on the consent forms and confirm his attendance at the IME. When they made contact on July 17th, the Grievor advised that he could not attend due to a conflicting appointment. He did not comment on the consent forms. The IME was cancelled and the Employer incurred cancellation charges.

Kinney attempted to contact the Grievor on a number of occasions in early August to get an update on his situation. Her calls were not returned. On August 14th, she wrote to the Grievor and asked him to contact her (that letter was sent to the incorrect address and was sent to the correct address on September 27th). She spoke to Eastwood about her attempts to make contact. Eastwood told her he would contact the Grievor for an update. In cross-examination, she indicated that, at this point, she was seeking an update from Dr. S. She did not advise Eastwood of the questions she had or that the information from Dr. S was insufficient.

Kinney received a note from Dr. S, dated August 27, 2012, indicating that the Grievor "is unable to return to current work position now or in the future. He needs placement in another position in the GVRD. The present job is detrimental to his mental and physical health." In Kinney's view, the information from Dr. S was unhelpful as it provided no specific or additional information about the Grievor's current situation and no support for moving him to another position. She questioned whether Dr. S understood the situation

and whether his requests were "medically driven", as opposed to being based on personal preference. The Employer did not go back to Dr. S because, in his three updates, he did not provide any new information. Shortly thereafter, the Employer, again, made arrangements for an IME in order to understand the nature of the Grievor's condition and whether a disability existed as well as to obtain recommendations for his return to work.

In cross-examination, while she agreed that it was possible to ask Dr. S additional questions or explain what information was needed, she maintained that the Employer normally received answers to its letters and Dr. S had been unresponsive. Based on the information that they had, the Employer did not consider going back to Dr. S as an option and decided to go ahead with the IME. In terms of Dr. S acting as an advocate, Kinney confirmed that the Employer did not have a basis for and was not contesting his opinion.

A second IME was arranged with a doctor identified as practicing occupational medicine, as the Employer thought the Grievor might feel more comfortable with that physician. Kinney left the Grievor several messages indicating that the Employer wanted to proceed with a second IME because it did not have the information it required. Her messages were not returned. On September 14, 2012, she wrote the Grievor to provide the IME appointment information and consent forms. The letter was sent to the wrong address and was re-sent to the correct address with the August 14th letter on September 27th.

The September 14th letter enclosed Forms 1 and 2 for the Grievor to complete. It explained that Form 1 would allow the sharing of a health assessment report with his health care providers as well as the sharing of a non-medical summary with the Employer. Form 2 allowed for the disclosure of information from health professionals.

The first paragraph of Form 1 provided: "I, [the Grievor] acknowledge that I have been asked to participate in an independent assessment of my condition. I hereby authorize Circa Medical Services through its duly authorized assessor or assessors (medical, psychological and/or functional) to conduct a thorough assessment and to be permitted to review copies of all medical and/or employment records related to my condition, that will assist in completing this assessment." The second paragraph authorized the Employer to communicate with the medical assessor to provide information related to his

employment. The third paragraph confirmed the understanding that a non-medical summary of information would be provided to the Employer, included an acknowledgement that an explanation of the nature of the assessment had been received and confirmed authorization for the examination to be performed. Paragraph four authorized the IME physician "to discuss and share the results of the assessment including any reports with my treating physician". Paragraph five provided that "I also understand that the sole purpose of this assessment is to evaluate my medical, psychological and/or functional condition. For this reason, I acknowledge that no treating relationship will be established between any of the assessors and me." The sixth paragraph indicated "I understand that I may decline any parts of the assessment process. I further understand that the assessment may be terminated if the assessor determines that it is in the interest of my health and safety. I am signing this document voluntarily and agree to take part in this assessment." It is necessary to note that Form 1 differed slightly from the similar form provided to the Grievor in July. The fourth paragraph of the form provided in July allowed the assessor "to discuss and share the results of the assessment including any reports or other documentation with the referring source GVRD, as well as my treating physician". [my emphasis]

Form 2 provided for consent to "the disclosure and transmittal to or the examination by [IME physician] of the records compiled by [name of health professional] at [telephone number] from [date] to [date]". The name of the treating physician and the dates were left blank for the Grievor to fill in.

Littleford sent a letter, dated September 24, 2012, to the Grievor and copied the Union, outlining the efforts that had been made to contact him and indicating that he was required to attend an IME on October 9th and that the consent forms needed to be completed. He advised that if there was no response by September 28th, the IME would be cancelled and the Grievor would be deemed ineligible for sick leave benefits. That letter was also sent to the wrong address, although Littleford understood the letter was later delivered to the Grievor.

In cross-examination, Littleford testified that, in his letter, he did not explain what additional information the Employer was looking for. He believed it was self-evident that Dr. S had not expanded on the Grievor's restrictions. Up to this point, he had not contacted the Grievor, Dr. S, or the Union about the insufficient information. He copied the Union on the letter as a matter of courtesy to give Eastwood a "heads up" and because he was frustrated that the Grievor was not following the Collective Agreement. He hoped Eastwood would provide some support to resolve this situation.

Kinney received a letter from the Grievor around September 28, 2012 in which he made a number of complaints about her treatment of him on July 17th and about the conduct of others. He also indicated:

> …I want to return to work under certain circumstances, those of which that are not being met as advised by my physician. I am willing to attend the IMA @ 8:30am October/9/2012, Having said that I WILL NOT sign Form #1 and Form #2 The Consent form at all. I will allow Metro Vancouver's Physician… … to release the findings of the IMA to the Metro Vancouver and my Physician."
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> All the documentation and correspondence from my Physician that Metro Vancouver has should be sufficient information for the Psychiatrist to view. I don't feel safe doing this job as I have been threatened by tenants because of decisions made by Management. My privacy is not secure and my child has been threatened. I will protect my family by any means necessary. This position has jeopardized my family's happiness and overall quality of life.

Littleford testified that he had not previously heard of concerns about threats by tenants and the Grievor had not initiated any of the processes in place to deal with unsafe situations. In cross-examination, Littleford indicated that he understood from the Grievor's supervisor that he found dealing with tenants difficult.

Littleford's September 24th letter was the first correspondence Eastwood received from the Employer on this issue. The Grievor had raised concerns about the consent forms being blanket requests to share medication information from Dr. S's files. Eastwood advised the Grievor that consent to release his private information was his to give and, if there was a reason to withhold it, it was within his rights to do that.

In cross-examination, Eastwood confirmed that he told the Grievor that the Employer could ask him to attend the IME, but, if he had problems with the consent forms, he could

ask to have them changed. Eastwood knew the Employer would not be happy about that, but he felt there were alternatives to signing the form. He agreed that neither he nor the Grievor was in a position to know what information a physician required to perform the IME. Eastwood also agreed that, in the "early days", the Grievor did not want to release any medical information. He confirmed that the Union and the Grievor did not object to the Employer's requirement that he attend the IMEs that had been scheduled in July or October. He also confirmed that the Union did not object to the IME doctors' qualifications, independence or impartiality and that the Grievor did not express concerns about either of the IME doctors. The "roadblock" to the IME was the requirement that the Grievor sign the consent forms.

On October 1, 2012, Kathleen Cowan, a Senior Human Resources Advisor, wrote to the Grievor and indicated that the third party providing the IME services had confirmed that, without the signed consent forms, the physician could not conduct the IME. She asked that he advise her of his intention with respect to the consent forms by 3:00pm that day.

Eastwood emailed Cowan that afternoon to advise that the Grievor was willing to attend the IME, but was not willing to consent to the sharing of his medical information held by Dr. S to the IME physician. He advised that the other elements of the forms were acceptable and, if the form could be re-written, the Grievor would sign it. Cowan indicated that the IME physician required both forms to be completed and they could not accommodate the Grievor's request.

On October 10, 2012, Littleford wrote the Grievor, copied the Union and advised, among other things, that due to his refusal to consent to the release of medical information, the IME had been cancelled and, effective October 9th, the Grievor was no longer eligible for sick leave benefits. He requested that the Grievor contact the Employer so that a third IME could be arranged as a final attempt to obtain medical information to support his absence and accommodation request. He indicated that continued refusal to participate in the IME and accommodation process would result in termination. The letter was dated the day after sick leave benefits ended as it had been delayed due to a phone call with the Union.

Eastwood testified that he was concerned with the lack of discussion prior to the cessation of benefits. In cross-examination, he disagreed that the October 10th letter gave the Grievor a "heads up" that his behaviour could lead to termination. While the letter stated that the Grievor could be terminated, there had been no warning letter and no progressive discipline. In his view, the Employer was heading straight for termination. He had hoped there would be a discussion about limiting the scope of the consent forms, but agreed that no one had medical expertise to determine what the IME physician would need to complete the IME. He disagreed that the Grievor had attempted to deflect the IME and maintained they were looking for an alternative. The Grievor was concerned about both forms as he did not know what non-medical information would be shared with the Employer and was concerned about the scope of disclosure from Dr. S as he did not know what was in those files.

On October 16, 2012, the Union grieved the termination of sick leave benefits and the threat of termination indicating that the Grievor "has not refused to attend the IME", but has declined to sign the consent forms in their present form. It attached further information from Dr. S and stated:

> [The Grievor] shares the Employer's desire to affirm the need for his medically supported workplace accommodation and to this end we have attached a form completed by [Dr. S] on October 16th, 2012. We hope this additional information provides the Employer with an adequate background regarding his request for accommodation. Should the Employer require more information about [the Grievor's] need for accommodation please supply us with specific questions that we can put to [Dr. S].

Eastwood testified that the Union provided this information to assist with the situation (given the Grievor's genuine concerns with disclosure) and to spark a conversation about accommodation. The Employer did not respond with respect to the accommodation process, any follow-up to the information provided, or further information being required from Dr. S. Eastwood believed they had made reasonable attempts to address the Employer's concerns and, if it wanted more information, it could have asked for it.

Littleford testified that the additional medical information repeated what had been provided earlier. Dr. S had not indicated whether his recommendations were medically driven. Littleford wanted to understand the Grievor's medically based limitations in

order to understand what to do to accommodate an illness or injury. In cross-examination, he could not recall sending a reply to the Union's October 16th letter.

Littleford wrote the Grievor on November 1, 2012, copied the Union and indicated that the Employer was willing to attempt to facilitate a resolution between him and his supervisor, but for sick leave benefits to be reinstated and accommodation to be considered, the Grievor must commit to the IME process. He advised that a failure to do so would result in termination. In cross-examination, he indicated that he did not articulate to the Grievor or the Union what further medical information was required, other than to outline the need for the IME. He assumed that Eastwood understood that the information from Dr. S had not addressed restrictions and did not allow accommodations to be developed, which necessitated the IME.

At some point, Littleford, with Eastwood's permission, phoned the Grievor to discuss the workplace issues and what it would take to get him back to work. It was possible the IME came up. He recollected that the Grievor did not think it would be possible to return and maintained his position that he would not sign the consents.

Littleford again wrote the Grievor on November 21, 2012, copied the Union and indicated that the termination decision would be based on his continued refusal to participate in his requested accommodation and he would be considered absent without leave. He urged the Grievor to reconsider and attend the IME. In cross-examination, he acknowledged that the Grievor said he would attend the IME but, in Littleford's view, there was no purpose in attendance without the consent to the disclosure of the necessary medical information. In terms of the accommodation process, he agreed that the Grievor did not refuse to attend meetings when requested and no accommodation meetings had been scheduled, but maintained the accommodation process was not followed as the Employer did not fully understand the Grievor's restrictions.

A grievance meeting was held shortly thereafter. On November 26th, Eastwood wrote to Carol Mason, Chief Administrative Officer, indicating that the fourth paragraph of Form 1 and the disclosure of "ill-defined documents with open-ended dates" caused the Grievor privacy concerns, but that he was "not refusing to provide relevant medical information

in support of his claim for benefits or his need for medical accommodation". Eastwood requested a "simple modification" of the consent form that "restricts, or more properly focuses, the sharing of information" from Dr. S. If the form could not be modified, he requested that specific questions for Dr. S be provided.

The Employer contacted its third party provider. The provider advised that other consent forms were not used (although they may be altered to add to the distribution of information) and that the release of medical information from the individual's doctor to the IME physician was always required.

In cross-examination, when it was put to him that he never responded to the Union's request to particularize the information required, Littleford maintained that he could not provide questions to Dr. S because he was not a doctor. While the information that the Employer needed was not specified, he believed Eastwood understood the Employer required the IME and the issue was whether the Grievor could refuse to provide consent.

Mason emailed Eastwood indicating she had been advised that there was no modified consent form that could be used and she had asked for additional information to assist in considering options. In a December 12, 2012 email exchange with Eastwood, Mason took the position that the Employer's request to have the Grievor consent to an IME was reasonable and encouraged the Grievor to change his position. Eastwood advised her that the Grievor was "willing to provide permission for the sharing of relevant and specific documents" necessary to support his absence and accommodation; however, with respect to "signing the consent form in it's [*sic*] present guise he remains unflinching in his refusal. A modified consent form is required to satisfy his privacy concerns."

On January 4, 2013, Eastwood wrote Mason and attached medical information from Dr. S, who indicated "[the Grievor] is unfit for duties at his present place of employment but could work in another position". He confirmed that he had made a diagnosis for the Grievor, that accommodating him at a different job site would address the disability he had diagnosed and that he had no other recommendations for accommodation. When asked how the accommodation would assist the Grievor, Dr. S indicated "[a]t present [the Grievor] has issues with his superior and feels harassed by superior and subsequently by

tenants." The Union requested that the Employer proceed with an accommodation without delay and advise if it had specific questions regarding the accommodation. Eastwood indicated that the purpose for providing this information was to try to provide more depth to Dr. S's previous answers, to explore what aspects of medical information the Employer needed to begin the accommodation process, and to try and dissuade the Employer from seeking the consent forms and the IME.

Eastwood testified that the Employer did not respond to the letter. There were no discussions about the accuracy or truthfulness of the information provided by Dr. S or what additional information was needed for the sick leave claim. In terms of the consent, the Union had hoped it would be able to focus on what information the Employer wanted, rather than a blanket request. The Union advised the Employer on January 16th that it had decided to proceed to arbitration.

On January 21, 2013, Littleford wrote to the Grievor and advised:

> On a number of occasions I have written to you informing you that failure to attend or consent to an independent medical assessment will lead to the termination of your employment with [the Employer].
>
> Most recently my letter dated November 21, 2012 informed you that parties involved in an accommodation process, including the employee, are required to participate in the process. Your continued refusal to sign the consent forms required for the independent medical assessment has lead us to the decision to end your employment relationship effective immediately.
>
> …

Positions of the Parties

Employer

The Employer submits that it was entitled to cancel the sick leave benefits and to discharge the Grievor. It relies on the principles that: an employee must justify an absence due to illness with appropriate medical documentation; an employer has a legitimate business interest in facilitating an employee's return to work; and, it is reasonable for an employer to seek sufficient information concerning the restrictions

preventing the employee from performing their job to meet its obligations and protect its rights. It argues that, further to the law and Article 9.08(5)(b), it was entitled to require the Grievor to participate in the IME (noting the only pre-requisites are that the employee is in receipt of sick leave or long term disability benefits). Its practice of ordering employees to attend IMEs with a physician of its choosing has existed over several collective agreements and is well-known to the Union. The Union did not object to the Grievor attending the IME or the selection of either IME physician. It says the Grievor repeatedly refused to sign the consent forms to allow the IME to take place, despite receiving clear warnings of the employment consequences. Accordingly, the grievance should be dismissed.

The Employer argues that the term "accommodation" can be a casual reference to obliging a preference or a formal reference to legal obligations further to an employer's duty to accommodate under human rights legislation. The latter only arises where there is an established disability; there is no requirement to accommodate a preference. In this case, a disability has not been proven. It says it cannot be required to accept the information provided and, due to privacy interests, be prevented from delving into the medical reason for the absence. While an individual's medical information is their own, once an employee uses it as a basis to request a change in the workplace, it must be shared in a limited fashion. Here, the Grievor's medical information was only to be shared with the IME physician, with the Employer receiving a non-medical summary.

The Employer submits that it had reasonable grounds to challenge the medical information. The medical documentation was unusual and inadequate as it prescribed a permanent accommodation with a different job or supervisor, without disclosing a medical basis for the absence or sufficient information about restrictions. It failed to provide information about the nature of the disability, the prognosis (if any), or the expected return to work. Further correspondence from Dr. S continued to be unhelpful and insufficient as it repeated the same information, although with differing medical recommendations. Dr. S related the Grievor's stress and anxiety to an interpersonal conflict with his supervisor. Conflicts with superiors are not unusual and can occur for many reasons. Therefore, the Employer says it was entitled to seek further information in

order to assess whether this situation involved a "medicalized" workplace conflict; to deal with the changing recommendations which raised doubts as to the bona fides of the illness; and, to determine whether accommodation was required and, if so, what might facilitate a return to work. In these circumstances, the requirement to attend the IME was reasonable when privacy rights and the Employer's business interests are balanced.

The Employer says the consent forms are standard and typically used in the IME process. Access to credible collateral medical information is necessary in order to make a complete and accurate diagnosis. An accurate diagnosis could be impossible if significant medical history is withheld. Irrelevant information may be disregarded, but a nuanced analysis may be necessary to determine what information is relevant. Only the IME physician can make that informed assessment and artificial limits cannot be placed on what the physician needs to do the IME. It points to Dr. Baker's evidence that both consent forms were necessary and he would not proceed without the signed consents. The Employer maintains that modified consent forms would have compromised its ability to obtain accurate and reliable information on which to determine the veracity of the Grievor's illness and what, if any, accommodation was required. It says that providing further questions to Dr. S would have been fruitless as he had provided additional and inconsistent information which raised concerns about the bona fides of the absence.

While an employee's consent to release medical information cannot be compelled, an employee who does not consent will likely suffer the consequences of refusing to provide information to establish their entitlement to benefits. Thus, the Employer argues it was entitled to discontinue the benefits as the Grievor, by refusing to provide the necessary consent, failed to provide sufficient medical documentation to substantiate his absence.

The Employer notes that the Grievor did not object to the IME or to the consent forms in July, but later raised a conflicting appointment. Kinney then had difficulty contacting him, although Eastwood did not. Only after he was asked to attend the October IME, were concerns raised with the consent forms. It says these circumstances should be considered to assess whether the Greivor was "a bit of a gamer" and frustrated the process. There is no medical evidence suggesting the Grievor's conduct was non-

culpable. He was provided with a clear directive and warned that his failure to comply would result in his discharge. Despite being given opportunities to reconsider, his "unflinching" refusal to provide any information obstructed the IME process. As such, the Employer submits that his culpable behaviour warranted termination.

In support of its submissions, the Employer relies on the following authorities: *Calgary Co-operative Assn. -and- Union of Calgary Co-op Employees (CF Grievance)*, [2012] AGAA No. 27 (Ponak); *Telus Communications Co. -and- Telecommunications Workers Union (Denial of Benefits Grievance)* (2010), 192 LAC (4th) 240 (Lanyon); *Canadian Merchant Service Guild -and- Seaspan International Ltd. (Carlson Grievance)*, [2007] CLAD No. 57 (Taylor); *British Columbia School District No. 9 (Castlegar) -and- Castlegar District Teachers' Assn. (Dudley Grievance)*, [1996] BCCAAA No. 478 (Sanderson); *British Columbia -and- British Columbia Crown Counsel Assn. (Fell Grievance)*, [2010] BCCAAA No. 97 (Lanyon); *sanofi pasteur, vaccines division of sanofi-adventis Group -and- Communications, Energy and Paperworkers Union of Canada, Local 1701 (Disclosure of Medical Information Grievance)* (2010), 202 LAC (4th) 322 (Knopf); *Canada Post Corp. -and- Public Service Alliance of Canada (Tamayo Grievance)*, [1997] CLAD No. 510 (Brunner); *Port Coquitlam, supra*.

Union

The Union submits that when privacy rights are properly considered, the Employer's actions were unreasonable. It did not employ the least intrusive measures, gather only medical information that was reasonably necessary at the specific stage of the inquiry, or take reasonable steps to follow-up with Dr. S. It also made inadequate efforts to consider the further information provided by the Union. Accordingly, the Employer was not entitled to require the IME in the manner it did and the Grievor was entitled to resist the unjustified invasion of privacy which would have resulted in irreparable harm.

In terms of sick leave benefits, the Union submits that Article 9.08(5)(b) provides that the Employer can initiate the process for assessment but does not provide the right to choose

the IME physician. Absent such a right in statute or in the Collective Agreement, the Employer cannot compel attendance at the IME. In any event, while the language may contemplate the selection of an independent doctor in appropriate circumstances, the Union says the Employer is not relieved from first making all reasonable efforts to obtain information from Dr. S. If additional information was then required, the Employer should have involved a specialist appointed by Dr. S or a physician selected by mutual consent. The requirement to be examined by a physician selected by the Employer should be the "last resort".

The Union submits that the Employer sought all of the Grievor's medical information. While it may be necessary to provide some information, this must be balanced against the invasion of privacy. Simply because information exists, does not mean it is should be disclosed. The fact that an IME physician would like to see information is no different than the Employer wanting all information available. Whether the information is given to a third party physician or to the Employer, the principles of least intrusive measures and notions of reasonableness and relevance apply.

With respect to the consent forms, the Union says that there was no attempt to limit the scope of or to identify the information to be disclosed so that the Grievor, Dr. S and the Union could consider what might be redacted. The ability of Dr. S to self-censor is not identified in the forms and the Employer rebuffed the suggestion of modifying them. Yet, the consent forms for the July and October IME were modified (i.e., reference to the GVRD removed in relation to the sharing of reports). Dr. Baker testified that consent forms were standard in terms of content but varied in their wording. Given that the forms can be changed, it says the Employer's refusal to discuss limitations was unreasonable.

The Union notes that the College Guidelines recognize that necessary medical records are those that are relevant. It submits that neither the Employer nor the IME physician should have access to a lifetime of records unrelated to the medical issue raised by the sick leave. There is no right to full information. The consent forms were inappropriate as they would have provided the Grievor's entire medical history to the Employer.

The Union says Dr. Baker's evidence is of little value. He was not involved in the Grievor's case and can offer no insight into the necessity of the IME or whether the information sought was required. It says there is no direct evidence from the physicians who were to assess the Grievor about whether there was sufficient information to carry out the IME. The Employer called only hearsay evidence of the third party provider on the requirement for the consent forms. Thus, there is inadequate evidence to establish the central point that an unlimited consent is required and doctors cannot proceed without the entire medical record (see *Wigmar Construction Ltd. -and- Int'l Assn. of Bridge, Structural and Ornamental Ironworkers, No. 97* (1984), BCLRB No. B278/84).

The Union recognizes that the issues of whether there was a legitimate reason for the sick leave and the accommodation request are matters in dispute. However, it submits that the notion of accommodation is relevant in a procedural sense. It is not enough for the Employer to make no inquiries to investigate an accommodation request before a disability is proven.

It also argues that the Employer has conflated the sick leave provision with the duty to accommodate. Given the distinction between the approaches to sick leave and accommodation cases in terms of access to medical information, the Employer has inappropriately dealt with this case exclusively as a sick leave case under Article 9.08(5)(b) when the parties approached it as an accommodation matter from the outset. The Union says the Employer erroneously took a single-minded approach to the situation because it believed it had an absolute right to the IME.

Further to that distinction, the Union argues the law of accommodation is not determined by the Collective Agreement. Within that area of law, an employer is limited in its ability to compel medical information (including an employee's consent to its release) and to require attendance at an examination by a physician of its choice. Privacy rights must be considered and any steps taken must be minimally invasive and are subject to the reasonableness test. Once disclosure has been made, privacy has been compromised.

The Union agrees that adequate information to justify an absence and a claim of disability must be disclosed. The issue is the quantity of information that will suffice in a given

situation. Here, the Employer improperly insisted on the IME and the disclosure of the Grievor's entire medical history to a physician of its choice. It determined that Dr. S did not understand the situation and chose not go back to him or to work with the Union. Instead, it should have followed-up, explained what was not acceptable or what information it was seeking, discussed the issue with the Union, and used Dr. S as a resource. This latter approach would have complied with its obligation to employ the least intrusive means of inquiry in the face of privacy rights. While an IME may be necessary at some point, it is not the first step.

The Union submits that since the Employer has taken the position that the Grievor's conduct is wilful, the analysis in *Wm. Scott & Co.*, [1976] BCLRBD No. 98 applies. It says the Employer is not assisted by the fact that the Grievor did not object to the IME where, at law, it had no right to require his attendance. His refusal to sign the overly broad consent and submit to the IME was nothing more than a refusal to comply with an improper request that was contrary to law. Had he complied, he could not be made whole. Thus, his resistance to the Employer's order provided no cause for discipline.

Alternatively, even if the Employer had the right to require the IME, the Union says it failed to make the proper inquiries and to work with the Grievor and the Union to obtain the appropriate information. The Grievor did not refuse to provide any information, but was seeking a modified consent which would limit disclosure. He committed no offence by asserting his privacy rights and doing so does not make him a "gamer". In any event, it submits that it has been recognized that an employee should not be disciplined for refusing to consent to the disclosure of medical information. Thus, the first question in the *Wm. Scott* analysis must be answered in the negative.

To support its argument, the Union relies on the following authorities: *Corporation of the District of West Vancouver -and- West Vancouver Fire Fighters Union, Local 1525*, unreported, December 13, 2012 (Hall); *Accenture Business Services for Utilities -and- COPE, Local 378 (Interim Relief Grievance)* (2008), 175 LAC (4^{th}) 353 (Taylor); *SaskTel, supra*; *Telus, supra*; *BCTF, supra*; *British Columbia Crown Counsel Assn. (Fell Grievance), supra*; *R. v. Dyment*, [1988] 2 SCR 417.

In terms of remedy, the Union seeks an order for reinstatement, which would require the sick leave benefits and accommodation request to be properly processed. It submits that, subject to the outcome of this Award, there may be outstanding matters to address and, with one exception, remedial issues should be deferred. At this time, it seeks an award of $7,500.00 as damages for the injury to the Grievor's dignity and/or mental suffering as a result of the Employer's single-minded pursuit of the IME and the imposition of improper discipline in response to the Grievor asserting his privacy rights (relying on *Stork Craft Manufacturing Inc. -and- United Steelworkers of America, Local 2952 (Lecours Grievance)*, [2002] BCCAAA No. 409 (Ready); *GVRDEU (Dove Grievance)*, unreported, January 19, 2007 (Dorsey); *Sunset Lodge -and- British Columbia Nurses' Union (Tataryn Grievance)*, [2003] BCCAAA No. 299 (Hope))**.**

Employer's Reply

In reply, the Employer says it was not seeking a lifetime of medical information, noting that the timeframes on Form 2 were left blank. It maintains that the Grievor refused to provide any information and would not consent to have a non-medical summary sent to the Employer. It submits that the concept of proportionality is applied to requests for medical information, depending on whether the situation involves return to work or accommodation. An employer has greater access to information in the latter case. It says many of the Union's authorities are distinguishable as they relate to a return to work situation (as opposed to a request for a permanent accommodation) or to cases involving a unilaterally imposed rule (not a negotiated entitlement in the Collective Agreement). It notes that this case is not about the duty to accommodate and it has not implicitly conceded that a disability has been proven by using the term "accommodation" in its communications. It says that the claim for damages for injury to dignity is an unparticularized tort claim that has been raised belatedly in the proceeding.

Discussion and Decision

The primary questions in this case are whether the Employer properly terminated the Grievor's sick leave benefits and, ultimately, his employment due to his refusal to sign the consent forms. Those questions cannot be answered without considering the Grievor's privacy rights and the Employer's right to the information it needs to make decisions in the workplace. These considerations were described in *Seaspan, supra* (at para. 53):

> To paraphrase what I said in *BCPSEA No. 3, supra*, I am keenly aware of the competing interests here. The Guild seeks protection for the privacy and dignity of its members and the right to be free from unreasonable invasion of those strongly-held values. The Employer seeks sufficient information to properly discharge its responsibilities and protect its rights under the collective agreement as well as to fulfill its duty of accommodation and to make informed and timely decisions in the interest of returning employees to work as safely and as quickly as possible. One endeavors to strike the right balance between the interest of the employee in the privacy and dignity of his person with the legitimate business interests of the Employer.

The arbitral approach of balancing these rights has been thoroughly canvassed in a number of authorities. Recently, Arbitrator Hall in *West Vancouver, supra* accepted and conveniently summarized many of the established principles that had been discussed by Arbitrator Lanyon in *Telus, supra*:

> …Mr. Lanyon identified these "general principles" regarding an employer's authority to request or demand a medical examination:
>
> - An employer has no right at common law to search or physically examine an employee without their consent. The right to demand a medical examination or the disclosure of medical information does not fall within the retained rights concept of management rights. As a result, any such authority must be found either by way of contract or statute (para. 75).
> - An employee's right of privacy is a core value underlying protections found in the *Charter*. The importance of maintaining privacy over medical records is essential to a person's dignity, and is also important in terms of recovery. Because privacy is a fundamental Canadian value, it imbues the law of employment developed through arbitration (paras. 76-78).
> - The rules in the *KVP* test did not concern privacy rights, and they are insufficient to address the balancing of rights in respect to the privacy of employees. Besides the obvious issue of the required consent of an employee, there are arbitral principles such as the least intrusive measure that are required to be applied at each stage of the medical inquiry (para. 80).

- The benefits under a health and welfare plan are contractual, and there is an onus on employees to prove that they meet the criteria established for entitlement. This onus is usually met by the employee providing a medical certificate (para. 81).
- If an employer has reasonable grounds to do so it may require an employee to produce additional medical information. A general arbitral principle that attempts to balance the privacy rights of employees with the legitimate business interests of the employer is to direct employers to use the least intrusive means capable of securing whatever information they require. Further, the disclosure of medical information should receive no broader distribution than is "reasonably necessary" (paras. 82-83).
- An employer is only entitled to what is reasonably necessary at a specific stage of the medical inquiry. Thus, as compared to an original application for benefits, in respect to issues such as an employee's fitness to return to work, or in cases of accommodation, an employer is given greater access to medical examinations and information (paras. 83 and 85).
- Once the employee meets the onus and there are no reasonable grounds for the employer to challenge that medical information, the employee is entitled to the contractual benefit (para. 84).

[at p. 45-47]

It is critical to bear in mind that the application of these principles in the balancing of rights in any particular case will depend on its specific circumstances, including the stage of inquiry as the matter evolves.

In this case, the parties have addressed the Employer's right to require medical information and, on its own initiative, a medical assessment by a physician other than the employee's own in Article 9.08(5)(b). Thus, there is a contractual entitlement for the Employer to require the Grievor to attend a medical examination in certain circumstances. However, as the Union points out, the language does not expressly provide that the Employer can choose the IME physician. I note that in *Telus, supra*, the collective agreement provided that the employer could require a medical examination by a physician of its own choice. Even with that language, Arbitrator Lanyon indicated that the next issue was "under what circumstances does the Employer have the right to exercise the option" (see para. 110). Given the language of this Collective Agreement, it must be determined whether the Employer, in the particular circumstances of this case, was entitled to require the IME when and in the manner it did. That analysis requires a careful review of the chronology as the dispute evolved.

The parties differ on the overall characterization of this matter. The Employer argues that it does not involve the duty to accommodate further to human rights legislation as a disability has not been proven and it has no obligation to accommodate a "preference". Yet, it also argues that because the employee requested a permanent accommodation, it was entitled to the medical information it sought. The Union submits that there is a recognized distinction between duty to accommodate and sick leave cases and the Employer erred in addressing this situation only as a sick leave matter, as opposed to treating it as an accommodation case. It says employers are limited in their ability to compel medical information in cases of accommodation and the Employer resorted to an extreme approach as opposed to taking minimally invasive steps.

The distinction between sick leave and accommodation cases was addressed in *West Vancouver, supra.* First, Arbitrator Hall described a spectrum relating to the provision of medical information (at p. 29):

> …And, as the authorities indicate, context has an important bearing on the nature of any medical information which an employee may be asked to provide. More specifically, and by way of example only, the cases recognize what might be characterized as a spectrum regarding the extent to which an employer may reasonably be permitted to request medical information. That spectrum is often seen as ranging from "baseline" information where an employee is making an initial claim for benefits to a more intrusive inquiry where an employee is seeking accommodation under human rights principles.

He noted the following with respect to the distinction between accommodation and sick leave cases (at p. 34-35):

> There is admittedly an overlap between accommodation and return to work under a sick leave management program, and there may be features common to both; moreover, the distinction may at times be one without a material difference. But the respective rights and obligations of employers, unions and employees vary, as do some of the bases for those rights and obligations, depending on whether the context is a workplace accommodation to the point of undue hardship in accordance with human rights principles or is a return to modified duties under an employer-initiated program. One obvious difference concerns the collective agreement: it may be appropriate, for purposes of accommodation, to override a contractual term; on the other hand, a unilaterally implemented employer program must be consistent with, and may well be constrained by, provisions which have been negotiated with the employees' bargaining representative. The distinction is also crucial because it may affect the nature and extent of modified duties and/or the disclosure of medical information. <u>In terms of the latter, some cases support the disclosure of a diagnosis at the point of accommodation; however, the authorities hold almost universally that an employer is only entitled to know the nature of</u>

> an employee's illness or injury where the context is sick leave management. Finally, not all illnesses and injuries will constitute a "disability" as that term has been interpreted under British Columbia human rights legislation.
>
> [my emphasis]

Arbitrator Hall recognized that, in sick leave cases, the employer has a legitimate interest in managing absenteeism and may request sufficient information to ensure that the illness is legitimate and determine the impact on attendance. An employer may inquire into the nature of the illness (as opposed to diagnosis), the prognosis (if any), the expected date of return to work as well as, in some circumstances, any alternative, modified or reduced duties that may be performed (p. 35, 39-41). He also concluded that the duty to accommodate cannot be used in the context of a sick leave claim to acquire more medical information than would otherwise be permitted, noting the following (at p. 55):

> I have accepted the Union's position that the duty to accommodate cannot be used by the Employer in the context of a sick leave claim to acquire more medical information than would otherwise be allowed… …and have found that the duty to accommodate did not arise on the facts presented at arbitration. However, the accommodation process does not depend on whether an employee has initiated the request. Indeed, where an employer has constructive knowledge of the need for accommodation, it is obliged to begin the process, and the affected employee must cooperate or forego the right to accommodation in the workplace. And, information received in the course of managing a sick leave claim may indicate a need for accommodation.

There is a recognized distinction in terms of the amount of medical information that can be requested, depending on whether the matter involves sick leave or accommodation. This case has not, at least at this point, evolved into one where there is an established disability and is not at the extreme end of the spectrum described in *West Vancouver, supra* where the obligations relating to the substantive search for accommodation have been triggered further to human rights principles. Thus, properly characterized, it is a sick leave case which could, potentially, raise the need for accommodation. However, it cannot be said that this a "baseline" sick leave case in its initial stages where the Employer is making first inquiries to establish the bona fides of the claim. The Grievor has received sick leave benefits, there has been some disclosure of controversial medical information and the Grievor's absence was not short term. Accordingly, this case does not fall on the end of the spectrum that would apply to the early stages of the

claim. The Employer has a clear interest in determining whether the Grievor's absence is legitimate in relation to his ongoing entitlement for sick benefits as well as how to effect his safe return to work. In my view, to determine whether the Employer's approach was appropriate, the information requested and the manner in which it was sought at the specific point in the chronology must be considered.

Ability to Require the IME

The first question is whether the Employer was entitled to require the Grievor to attend the IME when it did so. This must be assessed using the balancing of interests approach, which necessarily turns on all the particular circumstances of the situation. Thus, the facts here are critically important to the determination of the issue.

On June 25th, the Grievor provided a note from Dr. S which, on the evidence, was unusual in that it indicated the Grievor was stressed, had issues with a supervisor, and needed a permanent change in job. It is fair to conclude it provided insufficient detail about the nature of the illness or the expected return date. The Employer requested further information on July 3rd. Neither the Union nor the Grievor objected to the questions posed. Dr. S responded indicating that the nature of the Grievor's condition was "acute stress/anxiety reaction", he was "totally unable to work in present position", the restrictions were permanent (estimating that he could never return to work in the present situation), his prognosis for a successful return was "[p]oor. [the Grievor] has documented issues concerning his work and supervisor. …". There was no indication he was being referred to a specialist; rather, Dr. S indicated "treatment is to place in different job or possibly under different supervisor". With that information, the Employer understood that the absence related to stress and anxiety and that the limitations appeared to be permanent. It had no information about the limitations in relation to his actual job duties or to placements within its organization. I agree that, at that point, the Employer had insufficient medical information on which to assess ongoing eligibility for sick leave benefits or possible accommodations within the workplace and was entitled to request further information from the Grievor.

The Employer then requested that the Grievor attend an IME on July 18th. Neither the Union nor the Grievor objected to the IME or raised concerns about the consent forms. That IME did not occur as the Grievor indicated he had a conflicting appointment. Given that the IME was scheduled quickly and without consultation with the Grievor, I am not prepared to find that he was intentionally avoiding the examination. On the facts, the issues in dispute did not crystallize at that time.

The Employer then had difficulty contacting the Grievor to obtain an update on his condition. On August 27th, he provided a note from Dr. S indicating that "he was unable to return to current work position now or in the future. He needs placement in another position in the GVRD. The present job is detrimental to his mental and physical health." The Employer then arranged for the Grievor to attend an IME in October. By that time, the Grievor had been off work for approximately two and a half months and had been receiving sick leave benefits. The medical information appeared to indicate there were, potentially, both mental and physical issues which related to his position or his supervisor. Dr. S's recommendations were unclear as to whether the Grievor's return required a different job (and, if so, what type of work and position); a different supervisor; or, some combination thereof. At this stage in the chronology, after three communications from the Grievor's doctor, I find that the Employer still had insufficient information on which to engage in any meaningful assessment of the Grievor's ongoing eligibility for benefits or his return to work.

An employer has a continuing right to inquire into absences from work and an employee has a continuing obligation to account for their absence. An employer is not required to accept any medical certificate and, with reasonable grounds (e.g., the information is insufficient or contradictory), may make further inquiries to determine whether the absence is bona fide. A note from a family physician indicating that the absence is due to illness and the return date is unknown has been recognized as being insufficient. Yet, the employer must use the least intrusive means of obtaining the information and the disclosure of further information must be reasonably necessary in the circumstances, which may vary with the stage of the medical inquiry (see *Castlegar District Teachers' Assn. (Dudley Grievance), supra* at paras. 25-28; *British Columbia*

Crown Counsel Assn. (Fell Grievance), supra at paras. 55, 58-60, 84; *Telus, supra* at paras. 82, 112-113). The information that has already been disclosed and the reasons for the request for further disclosure will also be important considerations. There may be reasonable grounds for seeking an IME where there is a conflict in the medical evidence which may raise concerns about the bona fides of the illness, where the circumstances raise questions about whether there may be "medicalization of a workplace dispute" or where the treatment plan and prognosis are such that there are questions about the effectiveness of current treatment (*British Columbia Crown Counsel Assn. (Fell Grievance), supra* at paras. 92, 94-95).

In my view, on the basis of the medical information it received by late August (given the nature of the illness as described, the clear connection to a dispute with a supervisor and the prescribed need for permanent, but different, accommodations without information relating to particular limitations), the Employer had reason to question whether there was a "medicalization" of a workplace issue and whether the illness was bona fide. While it was possible for the Employer to go back to Dr. S for further clarification, I accept that his three previous communications were unhelpful and provided insufficient information. At no point did the Grievor, Dr. S, or the Union indicate a specialist was involved or there was some alternate source of medical information available.

There is another critical element in the factual matrix of this case. After the Employer arranged the October IME, the Grievor indicated that he was willing to attend the assessment. His intention was later reiterated a number of times by the Union. In balancing the competing rights that arose here and in assessing whether the Employer employed the least intrusive means in this particular context, it is important to focus on the privacy rights at issue and for which protection was sought. On these particular facts, there was no objection to attending the IME itself. The Grievor identified in his correspondence to Kinney in late September, his concerns related to Forms 1 and 2, not the examination. Eastwood testified that the dispute related to the scope of the forms. Thus, on the evidence, the Grievor did not raise any privacy concerns with respect to attending the IME, nor did the Union take exception to the examination at the time.

The parties disagree on the number of times the Employer must go back to the treating physician before embarking on the IME further to its Collective Agreement entitlements. In my view, the ability to proceed with an IME depends entirely on the specific context at the particular stage of inquiry. There can be no formulaic approach to determining whether an IME may be required. Based on all of the circumstances that evolved in chronology of this case, I conclude that there were reasonable grounds for the Employer to exercise its contractual right to require the October IME.

Unilateral selection of the IME physician

The second issue is whether the Employer was entitled to require the IME to be performed by the physician it chose. While there may be a general issue between the parties as to the interpretation of Article 9.08(5)(b), on the evidence, that was not the true crux of the dispute here. This issue must also be determined as it arose on the facts of this case as well as in the context of balancing privacy and operational rights.

The notion of the least intrusive means applies to the selection of the IME physician in light of the invasiveness of the assessment, the confidential relationship between patient and doctor, and the privacy interests at stake. In *British Columbia Crown Counsel Assn. (Fell Grievance), supra*, Arbitrator Lanyon noted that, when ordering IMEs, the common first step that is consistent with the notion of the least intrusive means is to appoint a physician that is agreeable to the parties (see paras. 76 and 88). In *Telus, supra*, where the collective agreement provided for the right to have the IME physician appointed by the employer, he set out principles respecting the circumstances under which an employer was entitled to exercise that right. Those principles were helpfully summarized by Arbitrator Hall in *West Vancouver, supra* as follows (at p. 47-48):

- The general principle is that an employer is required to use the least intrusive measure, and is only entitled to medical information that is reasonably necessary at the specific stage of the medical inquiry (para. 110).
- At the initial application stage, the employee has the onus of meeting the eligibility criteria for the benefit. Further, at both the initial stage and any subsequent stage, the employer may challenge medical information provided by the employee if there are

reasonable grounds, such as the information being insufficient or contradictory (paras. 111 and 113).

- If the employer does require additional information it should turn first to the employee's own physician and, if a specialist's opinion is required, to a specialist selected by the employee's physician. This is consistent with the principle of applying the least intrusive measure. (paras. 114 and 115).
- If there is still a need for an independent medical examination after those steps have been exhausted, it should be conducted by a physician that is agreeable to both parties. Only after that route has been attempted, or where the employee refuses to cooperate, should the employer have the right to demand an independent medical examination of its own choice (paras. 115 and 116).

In *West Vancouver, supra*, the collective agreement provided for a requirement that an employee to attend a physician designated by the employer. As a "least intrusive" course of action, Arbitrator Hall commented as follows (at p. 48):

> Directing an employee to attend an examination by a medical professional who has been unilaterally selected by the Employer without any input from the employee (or the employee's physician) should be the "last resort". Or stated somewhat differently, the "physician designated by the Municipality" should wherever possible be an individual who is also acceptable to the employee (or the employee's physician) if earlier efforts to obtain the requisite information have been properly exhausted.

The theme in the authorities is that, where an IME is necessary, the physician who performs the assessment should, at least as a first step, be agreeable to the employee. The distinction here is Article 9.08(5)(b) does not expressly provide that the Employer can select the physician, but rather permits an "assessment by a physician other than the employee's own". I have received no bargaining evidence relating to the origins of the language. The evidence is that the Employer's practice has been to select the IME physician. Eastwood testified that, in the few cases that he was aware of, the IME physician had been chosen by the Employer, but there was no agreement to the practice.

In any event, I do not have to embark on a general interpretation of the language of the Collective Agreement and expressly decline to do so because, in this case, there was no objection to the Employer's choice of physician. The parties were not at odds on that issue. Whether or not the Employer was entitled to choose the physician further to the Collective Agreement, Eastwood testified that there was no concern about the selection or qualification of the IME physicians in this case; the real "roadblock" was the consent forms. The Grievor was prepared to attend and be assessed by the physician chosen by

the Employer. Further to the arbitral theme identified above, I conclude that, on the evidence, the IME physician was acceptable to the Grievor and the Union. Accordingly, I am not prepared to find that the IME, as arranged by the Employer, was unreasonable or inappropriate in these particular circumstances.

Consent forms

The third question is whether the Employer was entitled to require the disclosure of medical information through the execution of the unmodified consent forms. This must also be considered in relation to the standard of what is reasonably necessary at the particular stage of the inquiry. Arbitrator Lanyon addressed the competing concerns relating to the scope of disclosure in *British Columbia Crown Counsel Assn. (Fell Grievance), supra* (at para 85):

> One significant part of the answer to the issue of privacy in these circumstances is that an employee has put their own medical status (privacy) at issue. This is an important principle underlying these cases. However, it is not usually all information that an employee objects to disclosing; rather, it is the amount or type of information that is at issue. And in respect to the issue of privacy it is not the case, as it can be at times in respect to other evidentiary matters, that once the door is opened, it is open in all respects. As stated, the Employer is entitled only to the specific information required to make its determination (*Accenture Business Services for Utilities, supra*); and an employer is not entitled to impose additional requirements with respect to medical examinations and certificates (*Braemore, supra*). It goes without saying that if an employee has broken their arm the Employer is not entitled as a matter of right to that employee's psychiatric or sexual history.

Although *BCTF, supra* dealt with sick leave forms, the principle of balancing the interests involved was aptly described by Arbitrator Taylor (at para 96):

> ... It is axiomatic that employers would prefer more rather than less information. But, just because more information is available does not mean that it should be made available or is lawfully available. The proper approach is to balance the teacher's right to privacy against the legitimate business interests of the employer to properly administer the sick leave provisions of the collective agreement. This requires an assessment of the extent to which the forms further the employers' objectives against an assessment of the extent to which the forms invade individual privacy and the concomitant right to safeguard the confidentiality of medical information.

It is necessary to examine the consent forms used here. The Employer argues, bolstered by the evidence of Dr. Baker who uses similar documents, that the consent forms were

necessary because the IME physician requires as much information as possible to make an accurate diagnosis. Dr. Baker testified he would not perform an IME without the signed consent forms to avoid being asked to complete an assessment without the necessary information. The Union points out that the College's Guidelines respecting IMEs provide that "if a patient attempts to set limits upon the examination, e.g. regarding past history or the extent of the physical examination, explain why the information or examination is necessary. If the patient chooses not to cooperate, consider whether you are able to proceed with the examination in view of the limits set by the patient. If not, record this fact and terminate the examination." It argues that there is insufficient evidence to establish that an IME could not have occurred here with a restricted consent and that no weight should be given to the assertion that physicians cannot proceed without the entire medical record.

I do not have evidence about whether a physician was able (or, perhaps, willing) to carry out an IME with a restricted consent in this particular case. There is no evidence relating to the reasons for the third party provider's position that the consent forms could not be modified, particularly when they had been modified to some extent between July and September. I do not find the fact that Dr. Baker would not proceed with an unsigned consent particularly helpful. I note that he also testified that he would not carry out an IME where there were rigid limitations such that he could not complete the examination, which is more consistent with the College Guidelines. It appears from the evidence that the ability to carry out an IME with restricted consent or limitations is dependent on the particular circumstances and, possibly, the particular physician.

Whether or not the IME physician would have performed the assessment in the particular circumstances, the issues of when consent is required and what disclosure is reasonably necessary remain. The evidence of Dr. Baker is of some assistance in terms of the reasons why medical information is, generally, required in the IME process. I accept that for the IME physician to provide an "accurate diagnostic picture" s/he must have access to the pertinent collateral information, which typically includes medical information from the treating physician. I also accept that in order for the IME physician to be in a position to properly carry out the IME, s/he needs to know that the individual will consent to the

disclosure of certain information as part of the process. The College Guidelines support the conclusion that the process may be frustrated if the IME physician is unable to obtain the collateral documentation because of limits set by the individual. Accordingly, I conclude that the Employer's requirement that the consent, in some form, be executed prior to the IME being carried out is a reasonable one.

The Employer argues that neither it, nor the Union, nor the Grievor could limit the information to be disclosed to the IME physician as none of them possess the necessary medical background to determine what is relevant. I agree that non-medical parties are not in the best position to determine relevance with respect to information the IME physician needs to conduct the assessment. Treating physicians redact irrelevant information if they feel it is appropriate. Dr. Baker, who has worked with imperfect information, follows up, as required. Thus, it is the medical professionals who decide, as part of the process, what is relevant and necessary.

Turning to the consent forms themselves, paragraph one of Form 1 permits the IME physician "to review copies of all medical and/or employment records related to my condition that will assist in completing this assessment" [my emphasis]. Paragraph three indicates that a non-medical summary of information will be provided to the Employer. Paragraph four authorizes the IME physician "to discuss and share the results of the assessment including any reports with my treating physician". Paragraph five provides that "I also understand that the sole purpose of this assessment is to evaluate my medical, psychological and/or functional condition." Form 2 provides consent for the disclosure and examination by the IME physician of the records from a specified health professional for a certain period of time. The name of the treating physician and the dates were left blank for the Grievor to fill in.

It is clear on the wording of the forms that the consent only permits the IME physician to review records related to the Grievor's condition, which may be limited by date. I accept based on the College's Guidelines and Dr. Baker's testimony that it is accepted practice that physicians review the scope of consent in the course of the IME process. Based on Dr. Baker's testimony, some irrelevant information may be disclosed as part of the

medical files, if it is not redacted. This is somewhat balanced by the fact that irrelevant information is not included in the resulting reports. A further protective measure is that the Employer does not receive any of the medical information, but only a non-medical summary.

I am cognizant of the Union's submission that overbroad disclosure, even to a third party, results in a compromise of privacy. However, while privacy is a significant and important right, it is not absolute. It is the IME physician who reviews the medical information that is disclosed, for the purposes identified in the consent form. The IME physician is medically trained, operates under the professional standards of the College and is in the best position to assess what is relevant for the purposes of the examination. While the process may not be perfect, there are certain safeguards in place. In my view, caution should be exercised to ensure that the protection of privacy does not undermine the IME physician's ability to properly perform the examination. One concern with a more limited consent, particularly if information is restricted by individuals who are not medically trained, is that the process could become impractically protracted and/or produce inaccurate results if relevant information is not disclosed. Given that the Employer, in the specific circumstances of this case, was entitled to require the IME, I find that the consent forms, when reviewed in their entirety, are reasonable and the Employer was entitled to require that they be used in their present form.

Termination of Sick Leave Benefits

I have concluded that the Employer was entitled to require the IME in the manner it did, including the use of the unmodified consent forms. The Grievor's refusal to complete the forms led to the cancellation of the October 9th IME. As such, the Employer was not provided with the necessary information to assess his ongoing entitlement to sick leave benefits. Arbitrator Lanyon addressed the impact of these circumstances in *Telus, supra* (at para. 121):

> Once again the Short Term Disability Plan represents a negotiated benefit. The contract stipulates, and an employee understands, that she/he must meet the eligibility requirements

> in order to qualify for benefits while they are injured or ill and unable to perform the majority of their duties. They also understand that this involves medical evidence… …and the obligation to produce the required documentation to demonstrate this. If they fail to meet the required eligibility requirements, either initially or subsequently, then they are not entitled to the negotiated benefit. This may be because the medical evidence is insufficient, contradictory, or they simply refuse to produce it. In all cases the Employer is entitled to deny or to discontinue benefits. …

Based on my conclusions above, the Grievor has not satisfied his ongoing obligation to establish eligibility for sick leave benefits under the Collective Agreement. Accordingly, in this situation, I find the Employer was entitled to terminate those benefits.

Termination of Employment

The issue of whether the Employer had just cause to terminate the Grievor's employment is entirely separate from the discontinuation of sick leave benefits. There is no assertion that the Grievor's refusal was caused by non-culpable reasons. Accordingly, the applicable framework is the *Wm. Scott* analysis.

The first question is whether the Grievor's actions provided some cause for discipline. In essence, the Employer maintains that the Grievor was given a legitimate order to sign the consent forms and participate in the IME process and his refusal to do so, despite repeated warnings, amounted to insubordination. The Union maintains that the Grievor has committed no employment offence and should not be disciplined. It points to Arbitrator Lanyon's comments in *Telus, supra* (at para 91):

> A second, and equally important issue, in respect to an employees? refusal to consent to disclosure of medical information, is discipline. No employee may be disciplined for their refusal to consent to the disclosure of their confidential medical information - as opposed to other conduct which may flow from that decision (i.e. the abuse of sick leave or the refusal to return to work). This is captured well by Arbitrator Swan in *Nav Canada*, supra:
>
> > 64 Specifically, it is difficult to imagine circumstances in which an employee could be disciplined for not granting consent. The very notion of consent would, indeed, be undermined by any such conclusion. There may be administrative consequences of refusal of consent, including being placed on leave, paid or unpaid depending upon the circumstances, but I am unable to envision circumstances in which discipline for, for example, insubordination could ever be justified by a refusal to provide information or to undergo an examination which has no statutory or collective

> agreement authorization, and which would amount to a serious invasion of personal privacy or integrity.
>
> [my emphasis]

The authorities distinguish situations where there is no authorization to require an IME from those where such authority exists in the collective agreement. Article 9.08(5)(b) provides authorization for a medical assessment by a physician other than the employee's own and, based on my conclusions above, the Employer's direction in this case was legitimate. There is no dispute that the Grievor repeatedly did not follow the Employer's order, despite being advised on October 10th as well as November 1st and 21st of the consequences. In that respect, I find there is some cause for discipline. In circumstances where an employee is refusing to comply with the legitimate direction of the employer, the employer must be able to take steps to manage the situation. Therefore, the first question in the *Wm. Scott* framework is answered in the affirmative.

The second question is whether the termination was excessive in all of the circumstances. There are a number of factors that may be applicable to this issue, depending on the case. Ten factors were set out in *Steel Equipment Co. Ltd.*, (1964) 14 LAC 356 (Reville) and can be summarized as follows:

1. the previous record of the grievor;
2. the long service of the grievor;
3. whether or not the offence was an isolated incident in the grievor's employment history;
4. provocation;
5. whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses, or whether it was premeditated;
6. whether the penalty imposed has created a special economic hardship for the grievor in the particular circumstances;
7. whether the company rules of conduct, written or unwritten, have been uniformly followed or whether they have been applied in a discriminatory fashion;
8. circumstances negativing intent (e.g., likelihood that the grievor misunderstood the nature or intent of an order given to him and, as a result, disobeyed it);
9. the seriousness of the offence;
10. any other circumstances that should be considered.

Not all of the factors apply here, but several must be considered along with the Grievor's conduct as it occurred in this case.

The Grievor has a clean disciplinary record and there is no evidence of any other incidents which suggest that he has a pattern of insubordinate behaviour. This appears to be an isolated issue. However, he is a short term employee and it cannot be said that the Grievor was provoked or refused to sign the consents on the spur of the moment. His response to the Employer's direction was intentional and maintained after he discussed his privacy concerns with Eastwood.

In my view, the issue of whether the termination was excessive in all of the circumstances really turns on the last three factors. With respect to the circumstances negativing intent and the seriousness of the offence, the facts must be reviewed in context.

The Grievor was advised, in Littleford's October 10th letter, that a third IME could be arranged as a final attempt to obtain information and that his continued refusal to participate would result in his termination. The Union, in its October 16th grievance, indicated that the Grievor shared the desire to affirm the need for his absence and accommodation. It provided additional information from Dr. S, noting that if further information was required, specific questions could be taken to the doctor. The Employer did not respond to the information provided or the invitation to provide questions. At that point, the stalemate became entrenched. Littleford continued to warn the Grievor, in his letters of November 1st and 21st, that failure to sign the consent forms would result in his termination, but did not mention or respond to the information provided by the Union on October 16th. In late November, the Union indicated that the Grievor was not refusing to provide "relevant" medical information. It requested modified forms that would "restrict or more properly focus" the sharing of information or, alternatively, specific questions that could be taken to Dr. S. In December, the Employer looked into modifying the consent forms and advised Eastwood that it was not possible. Eastwood's response was that the Grievor was prepared to permit the "sharing of relevant and specific documents" necessary to support his absence and requested accommodation but that he remained "unflinching" in his refusal to sign the consents in their present form. On January 4, 2013, the Union provided more information which confirmed that a medical diagnosis

was the basis for the accommodation request. The Employer did not respond and, later, terminated the Grievor's employment.

First, I note that the Grievor and the Union raised privacy concerns and attempted to engage in a dialogue with the Employer about how they could be met. At the end of the day, I have determined that, on balance, the consent forms were reasonable in the circumstances of this case. However, that does not mean the Grievor's concerns were frivolous, baseless, or pursued in bad faith. His conduct was based on a belief, which was supported by the Union, that he had a legitimate interest to protect. In the end, his position on the consent forms has not been upheld. Yet, I do not find that the evidence supports the Employer's assertion that he was a "gamer" in terms of intentionally avoiding the IME. Further, the unresponsiveness of Dr. S, while unfortunate and frustrating for the Employer, cannot be visited on the Grievor.

Second, when the Grievor's overall conduct is considered, it cannot be characterized as a refusal to provide "any information" (although it may have initially been communicated as such). Rather, he wished to disclose only relevant information. From October 2012 to January 2013, the Union continued to provide further medical information from Dr. S. However, by that point, the Employer believed it was unhelpful and not based on a medical issue; it was focussed on the IME. Littleford assumed the Union understood what was insufficient about the medical information, but took no steps to engage in any dialogue about what information it was looking for. In the end, the Employer became frustrated with the Grievor's refusal, although I note that in December 2012, it was still investigating what modifications could be done with the forms.

Third, the hallmark of insubordination is disobedient or defiant behaviour that undermines management's authority in a meaningful way. When reviewed in context, the Grievor's refusal cannot be characterized as an act which was intended to defy the authority of management. Rather, his conduct was motivated by a genuinely held view that the consent forms breached his privacy for which there could be no remedy once the damage was done. He and the Union recognized the Employer's legitimate need for the information and attempted to find alternative options which would satisfy it. For these

reasons, I conclude that while the Griveor's conduct attracts some discipline, it cannot be characterized as a severe form of misconduct.

Finally, considering all of the circumstances, I cannot ignore the fact that, while the Employer required the IME (as it was entitled to do), it did not engage in any substantive or meaningful dialogue about the insufficiency of the medical information with the Grievor or the Union. It was clear in the Employer's evidence that it was looking for, at least, information about the actual restrictions that were preventing the Grievor from working. That discussion could have occurred without the Employer forgoing its right to require the IME. If nothing else, it would have clarified for the Grievor and the Union what information was required and why the IME process was necessary. In my view, even where an entitlement to an IME exists, these genuine overtures for meaningful dialogue should not have been ignored.

The Employer relies on a number of authorities to support its position that termination was appropriate which I find are distinguishable, particularly given the recognition by both the Union and the Grievor of the legitimacy of the Employer's need for some information and their attempts to provide further documentation. Thus, taking all of these factors into consideration, I find that the Employer's decision to terminate the Grievor was an excessive response and cannot stand.

Remedy

Turning to the third question in the *Wm. Scott* analysis, in substitution of the termination, the Grievor's employment status should be restored on the conditions outlined below. There are a several issues that remain outstanding, including the requirement that the Grievor participate in the IME process. Given the number of unknown factors at this point and in light of the passage of time, it is appropriate to return this matter to the parties with the following directions:

1. Upon his reinstatement, the Grievor's will be considered to be on unpaid leave.

2. The Grievor will be provided with one further opportunity to sign the consent forms within three weeks from the date of this Award or another period of time agreed to by the parties.

3. The Grievor will also be provided with one further opportunity to participate fully in an IME which will be arranged at a reasonable time by the Employer.

4. If the Grievor fails to sign the consent forms or to participate in the IME, his employment status will terminate.

5. Assuming the Grievor participates, once the information from the IME process is provided to the Employer, it will assess the information and, within a reasonable time, advise the Grievor and the Union as to the status of the matter based on the information.

As noted above, the Union recognized that there may be outstanding remedial matters for the parties to address. However, in terms of immediate relief, it claims $7,500.00 in damages for the Employer's unreasonable pursuit of the IME and the imposition of improper discipline. I note that the authorities it relies upon address situations that are very different from this case; and, in light of my conclusions above, I find there is no basis for the damages claimed.

I remain seized to deal with any matters arising from the interpretation, implementation or application of this Award.

DATED: August 7th, 2014

JULIE NICHOLS, ARBITRATOR