

Re:

Misuse of sick leave
Obligation to explain

**FINDINGS AND DECISION
in a dispute between**

**HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND
Represented by**

**THE NEWFOUNDLAND AND LABRADOR HEALTH BOARDS ASSOCIATION
ON BEHALF OF CENTRAL REGIONAL INTEGRATED HEALTH AUTHORITY
(the "Employer")**

and

**THE NEWFOUNDLAND AND LABRADOR NURSES' UNION
(the "Union")**

The Grievor: Ms. Kim Peyton (formerly Roberts), RN

For the Union: Mr. David Conway, LLB.
Mr. Quintin Hewlett, Local Vice-President, Advisor

Witnesses: Ms. Kim Peyton, Grievor
Dr. Margot Walker

For the Employer: Ms. Alison Walker, Labour Relations Officer
Ms. Lori Combden, Advisor

Witnesses: Ms. Tonia Ryan, Nurse Manager
Ms. Lori Compton, Human Resources Manager

The Arbitrator: John A. Scott, Ph.D.

Statement of Grievance: "Suspension in violation of the Collective Agreement."

Corrective Action Requested: "That the suspension be rescinded and that I be paid for my sick leave and all references to it be removed my personnel file; Full Retroactivity; Full Redress."

The hearing was held in Grand Falls-Windsor on September 14 & 15, 2011.

The parties agreed that:

- the Arbitrator was properly appointed and had authority to hear the case;
- the Arbitrator’s notes of the evidence and argument, as recorded in the final Award, will prevail in the event of conflict;
- parties likely to be affected by the outcome of the hearing have received notice and been informed of their right to appear and/or be represented;
- all matters pertaining to the grievance procedure and all time limits, whether statutory or arising from the Collective Agreement, are properly observed or are waived;
- issues of quantum, if any, will be considered separately and that if the Parties do not reach agreement within sixty (60) calendar days after publication of the Award, they will be referred to the Arbitrator for consideration;
- that issues of interpretation, should they arise, would be referred to the Arbitrator within sixty (60) calendar days after publication of the award;

DOCUMENTS TAKEN INTO CONSIDERATION

- Consent # 1 Collective Agreement, expiring June 30, 2012
- Consent # 2 May 13, 2010 Grievance: Union file number G-6264-10
- Consent # 3 Letter of discipline: May 13, 2010
- TR # 1 October 20, 2009 e-mail: Director of Nursing to all Nursing Staff
- TR # 2 Central West Health Corporation Leave Requests 07-08-09 & 30-10-09
- TR # 3 Sept 21, 2008 Memo re Annual Leave during Peak Leave Periods
- TR # 4 Grievor’s Medical Certificates dated March 25 & May 4, 2010
- LC # 1 Grievor’s April 7 Air Canada itinerary booked January 7, 2010 @ 5:25 PM
- LC # 2 Grievor's April 9 Air Canada itinerary booked April 6, 2010 @ 9:37 PM

COLLECTIVE AGREEMENT ARTICLES DIRECTLY CONSIDERED

ARTICLE 4 - MANAGEMENT RIGHTS

- 4.01 The Union recognizes and agrees that all the rights, powers and authority both to operate and manage the hospital under its control and to direct the working force is vested exclusively with the Employer except as specifically abridged or modified by the express provisions of this Agreement. Should a question arise as to the exercise of management’s rights in conflict with the specific provisions of this Agreement, failing agreement by the parties, the matter shall be determined by the Grievance and Arbitration Procedure.

ARTICLE 16 - ARBITRATION

16.02 Board Procedure

The Arbitration Board shall hear the evidence and shall render its decision in an expeditious manner and in any case, the decision shall be rendered in writing within one (1) month after the hearing subject to mutual agreement to the contrary.

16.03 Decision of the Board

Arbitration awards shall be final and binding and communicated to the parties in the form of a signed copy.

16.04 Jurisdiction of the Board

An arbitration board may not alter, modify or amend any provisions of this agreement but shall have the power to set aside or modify a decision of the Employer. No arbitration board shall make an award which would amend or change a collective agreement, a judgement or an earlier award.

ARTICLE 17 - VACATION

17.03 Vacation Period

All employees shall receive their annual vacation between May 1 and October 31, both dates inclusive. An employee shall be entitled to request annual vacation other than between May 1 and October 31, which request shall not be unreasonably denied.

17.04 Selection of Vacation Dates

Employees in each nursing unit, in consultation with their supervisor, shall determine the method of selecting vacation dates. In the event that majority agreement cannot be reached, preference in vacations shall be regulated according to a rotation plan. The initial placing of employees in the rotation plan will be in accordance with seniority, thereafter, the rotation will proceed without regard to seniority.

17.05 Choice of Vacations

Employees shall be granted a choice of vacation in accordance with 17.03 and 17.04 provided that once the schedules have been posted they shall not be changed except by mutual consent between the employee and the Chief Executive Officer. Vacations shall be given consecutively except by mutual consent between the employee and the Chief Executive Officer. Vacation for the purposes of this Article shall include all current, accumulated and accrued annual leave. Employees shall not be compelled to take more annual leave than they request.

17.06 Annual Leave Pay

An employee who has earned at least two (2) weeks annual leave, upon giving at least three (3) weeks notice prior to the pay day preceding the day on which she/he wishes to receive her/his advance payment, shall receive, prior to the commencement of her/his annual leave, any regular pay cheque(s) which may fall due during her/his annual leave.

17.07 Annual Leave Commencement

Whenever possible, an employee shall be entitled to receive her/his regular scheduled days of rest immediately before the commencement of her/his annual leave.

17.12 Substitution of Vacation for Sick Leave

An employee who qualifies for sick leave under Article 19 while on vacation may change the status of her/his leave to sick leave effective the date of notification to the Employer. The employee shall submit on her/his return to duty a medical certificate stating the total period during which she/he qualified for sick leave.

ARTICLE 31 - DISCIPLINE

31.01 Employer Actions

An employee who has completed her/his probationary period may be suspended, discharged, or disciplined but only for just cause.

31.02 Procedure

When an employee is disciplined, such employee shall be advised in writing by the employer of the reason for such discipline. Such disciplinary action will be taken in accordance with Clause 31.03 below. This notification shall be by registered mail or hand-delivered letter.

31.03 Adverse Report

The Employer shall notify the employee in writing of any dissatisfaction concerning her/his work within fourteen (14) calendar days of the event of the complaint. This notification shall include particulars of the work performance which led to such dissatisfaction. If this procedure is not followed, the expression of dissatisfaction shall not become a part of her/his record for use against her/him at any time. This Article shall apply in respect to any expression of dissatisfaction relating to her/his work or otherwise which may be detrimental to an employee's advancement or standing with the Employer. The record of the employee shall not be used against her/him after eighteen (18) months have elapsed, providing another warning or reprimand relating to the same or similar offence has not been given within that period. The employee shall be responsible to see that any such document is removed from her/his file. The employee's written reply to such notification of dissatisfaction shall become part of her/his record. A letter of discharge, or a letter of suspension, shall also be considered an adverse report for the purposes of Article 31.

31.04 Reinstatement

Where it is determined that an employee has been suspended without pay or discharged in violation of clause 31.01, that employee shall be immediately reinstated in her/his former position without loss of seniority or any other benefit which would have accrued to her/him if she/he had not been suspended or discharged. One of the benefits which she/he shall not lose is her/his regular pay during the period of suspension or discharge which shall be paid to her/him at the end of the next complete pay period following her/his reinstatement.

31.05 Personal Record

All reference to a suspension or discharge placed on an employee, who was reinstated under the provisions of clause 31.04, shall be removed from her/his personal file and future references for employment requested by the employee or another Employer shall contain no indication of the suspension or discharge.

31.06 Redress

Subject to clause 31.04, in cases where an employee is found to be unjustly disciplined, redress shall be awarded the employee in such a manner as is acceptable to the Union and the Employer or as directed by an Arbitration Award.

OPENING STATEMENTS

For the Employer, Ms. Walker pointed out that the grievance claims violation of the Collective Agreement in respect of a one-month suspension and withholding of sick leave benefits. The grievance arises under Article 31 dealing with discipline. The Employer has the right, under that article, to discipline for just cause. The discipline imposed was appropriate to the Grievor's behaviour. The Employer will show that, based on the evidence it had at the time, it is more probable than not that the Grievor did misuse sick leave benefits.

The Employer argues that there has been no violation of the Collective Agreement, and that the grievance should, therefore, be denied in its entirety.

For the Union, Mr. Conway pointed out that the grievance has arisen out of a unfortunate series of circumstances including the Grievor's personal medical condition and the Employer's decision to discipline based on those circumstances. The letter of discipline (Consent # 3) sets out the Employer's understanding of the facts of situation. That letter reads, in part:

... This letter is a follow-up to our meetings on May 3, 2010 and May 12, 2010 where we discussed the fact that you were denied vacation yet continued to take the vacation while on sick leave from your employer.

On October 30, 2009 you submitted a leave request form seeking annual leave from April 9 – 23, 2010. This leave request was denied. On January 7, 2010 you booked a vacation to Florida for the same time frame. You were aware that your leave was denied and you would be unable to take the trip you had booked yet you did not cancel the vacation or reschedule for an alternate date. Your actions represent an misuse of sick leave and discipline is warranted.

You will be suspended without pay from your position for the period May 13 – June 9, 2010. In addition, you will not be approved sick leave during your vacation period from April 9 – 23, 2010. A copy of this adverse report will be attached to your personnel file for a period of 18 months. Any further incidents will result in further disciplinary action up to and including termination..."

Mr. Conway suggested that the grievance turns on a question that lies at the heart of the facts of this case: Can an employee be genuinely unable to work due to illness, and yet be able to travel? The Union submits that the answer to this question is Yes, and that this answer determines the outcome of the grievance. The Union will call the Grievor and the Grievor's family physician, Dr. Margot Walker, who will confirm that the Grievor's sick leave was legitimate.

The Employer bears the onus to establish just cause in its discipline. However, just cause must take account of legitimate illness-based sick leave. Similarly, the employee is required to justify that sick leave. While the Employer did ask questions, they did not, in fact, heed the information, despite the Grievor's attempts, and those of her doctor, to provide it. Instead the Employer chose to impose discipline.

In the Union's view, this case is black and white. There has been no fraudulent use of sick leave. Despite the Employer's right to question the use of sick leave, the facts make it clear that no misuse occurred.

The Union requests the grievance be upheld, the two-week sick leave be reinstated, the four-week suspension reversed, and the Grievor made whole in respect of benefits and seniority.

EVIDENCE

THE FIRST EMPLOYER WITNESS was Ms. Tonya Ryan, Nurse Manager with Central Health in Grand Falls who held responsibility for Unit 3B, where the Grievor worked as Nurse II. 3B is a 17 bed unit with a variety of patients, many awaiting long term care. Ms. Ryan described her academic, postgraduate, and professional background and employment history with the Central Health from graduation in 1994 up to becoming Nurse Manager "about three years ago." Ms. Ryan also described her duties as Nurse Manager, one of which includes approving leaves for the nursing staff who report to her. Asked if she was familiar with the instant grievance, Ms. Ryan testified that:

I was Kim's direct Nurse Manager. At the time of the grievance she was Nurse II on 3B... She would assign nursing staff on the unit. There are two pods, each with one Nurse and one Licensed Practical Nurse. Kim would make assignments after getting report in the morning. She is at the desk and speaks with the doctors and assigns duties to the staff. She deals with normal day-to-day matters including pharmacy and staffing issues and securing extra help, if that's required. She's the clinical resource Monday to Friday, and attends – in fact, she runs – team rounds, which is in the multidiscipline group where each week patients are discussed and issues relating to discharge and the like are dealt with. She is the go-to person for day-to-day issues and also orients new staff to the unit. It is a leadership role senior to the Nurse I. She is the clinical lead on the unit. It is the Nurse II with whom I communicate most day-to-day.

Asked if the Grievor is still Nurse II on 3B, Ms. Ryan answered that, due to the implementation of the Ottawa Model of nursing, the Nurse II role was no longer required. The Grievor accepted

a position in the Diagnostic Imaging Department. "She does not currently report to me, no."

Ms. Ryan explained the process of granting Spring Leave, which she described as being very difficult.

For Summer Leave requests, staff generally put in their requests on a rotational basis. If someone got #2 last year, he or she would get #1 this year – for three weeks, and then everyone else got just two weeks. We can only let one go per unit at a time. If I am first, I get to bid early for the August 1-21. If I'm # 2, I have to go for the July 15-31 period. No one asks for time that's already booked. It's very specific and very easy and very predictable. It lets you book your vacation. The summer schedules are booked from May to October. Any other leaves, beyond the summer leaves, must be requested prior to the schedules' publication. For instance to get a leave for a weekend, that's done on a biweekly basis. Educational leaves and courses do not continue during the summer. There are no conferences, so it is really predictable for us.

Beyond the summer, requests go to staffing, who complete the schedules. The requests are either approved or not, and that is put on the six week schedules that the staff get. Other short notice leaves are granted depending on what relief is available.

Normally, the six week schedule is posted and staff receive it two weeks prior to the start of that six week period. If you have to get leave, you must request it prior to that schedule being prepared. You can request it otherwise, but it will not be on a schedule. If there are special circumstances, appeals go to a manager.

The spring leaves are a lot different, and very complicated. In October we put out a memo to say that if you are requesting time in March, April, or May you should request time around October 30th or 31st.

Ms. Ryan identified, as TR #1, the memo issued on October 20, 2009 by Carole Dalton, Director of Nursing, to "all RN and LPN Staff", which reads, in part:

"In order to facilitate allocation of resources and approval of annual leave requests, please submit your vacation/annual leave requests for February, March and April 2010 in the usual manner, by October 30, 2009."

Ms. Ryan explained that the magnitude of spring requests...

has grown over the last few years. It's become an enormous task for the Employer. Once that memo goes out, staff request their dates on the form (TR #2) designed for this. There is a place for the staff member's name and one showing the date of submission, and another for the requested period. Once that memo goes out we tell staff (TR #3) not to book their vacations until the leaves are approved. For Spring 2010 we had 64 members request time for the period between March 15 and April 25. They often submit multiple requests. This is to show flexibility in their requests and to get a better chance for approval.

The process used for making the decision about approval or denial of leaves is then initiated. The next big crunch for us after the requests come in is the Christmas schedule. That's another big task, because nurses rotate one year for the next taking Christmas or New Year's leave. That is difficult because of the contract. Everyone is on the master schedule. That means every second weekend must be off. In six weeks, nurses are off every second weekend. So, for us, the three stat holidays over the Christmas period have to be factored in to accommodate the schedule, which is on a building-wide basis. And we have to do that before we look at the Spring leave requests. We have about 110 nurses with specific positions and 42 float positions for relief in the building for maternity, sick leave, annual leave, and stat days.

So we usually look at the Spring leave requests right before or right after Christmas. We try to do it as soon as possible. Almost all are trying to use Air Miles or those deals, and the pressure starts to build. We take the files from the staffing office. They are sorted and put in folders for the months involved and for the building as a whole.

It is a very specific process that has been used for many years. We sort the requests, first, by whether you went last year or not. That's the first pile. If you did not go last year, you are put in another pile. We first look at those who did not go last year, and we take all approvals and copy onto the schedule by date requested.

For instance, if I ask for April 2010 by June of 2009, and I'm first request submitted, I go on the schedule for the date I asked for. The date the request is actually made determines success. First come first served. It is done in order. We have three 6 week schedules to cover the whole Spring period. If I have second and third options, the alternate periods are also put under my name on the schedule. Once we go through the whole schedule for those who did not go on spring vacation last year, we then start on filling in for those who did go last year. They're treated the same way, but after we finished those who did not go last year. We had 64 names, and many of them had overlapped multiple requests.

But the manager has to keep in mind that the skill mix on a given unit has to be taken care of. If a particular nurse is off on vacation, we have to ask whether there is a nurse who can cover for the skills that are missing, so that we are sure of patient safety. We have to ensure that if we let them go on vacation we have an adequate and appropriate mix in the building. All managers have to consider this, not just for the individual unit. Even if I was the 10th person to make a request I may not be successful due to the skill mix at the time; but if I have a second request in, we may be able to grant that. It is not as simple as the summer requests, which are all unit-specific.

Ms. Ryan estimated that, of the 64 requests submitted for the Spring 2010 period ...

the majority were approved, but some were not, based on the skill mix issue, and some because of the vast numbers in this specific time frame... The managers group met on Wednesday, January 6, 2010 to go through the decision procedure.

Asked how soon after the January 6 managers' group meeting the nursing staff were given the results, Ms. Ryan said:

Nursing know when the meeting is; and, if they're at work, the staff will know that day or the next. Staffing is given a copy of the schedules that the managers use with the approvals and denials. It goes from the managers' group to the Staffing Coordinators very quickly. The Staffing Coordinators use the annotated schedules and make up the specific six week schedules. So we tell individuals verbally whether their requests have been approved.

TR #2 is a copy of the two Spring leave requests made by the Grievor. The first was submitted on August 7, 2009 and requested leave for the period from April 1 to April 9, 2010 inclusive. The second leave request was submitted on October 30, 2009 and requested the period from April 9 to 23, 2010. Both requests contained a handwritten notation "not replaced" next to the Grievor's classification "Nurse II". Ms. Ryan testified that this was the first occasion she had ever seen this notation.

Normally, if Kim is off on short term leave, a day here or a day there. She is normally not replaced. But, normally, long-term leave is replaced when we can.

Asked whether the Grievor had ever made this note on any prior request she'd made, Ms. Ryan answered, "No, she had not." Ms. Ryan also testified that the Grievor had applied for Spring leave for 2009, and that it had been approved. In 2010 the Grievor's leave request for April 1 to 9 was approved, but the request for April 9 to 23 was denied.

I actually spoke to her in person either that day or the next. I told her the April 1 to 9 period was approved, and the 9 to 23rd was denied... She told me she wanted the later dates. She felt that since she was not replaced she should have gotten it. I told her we had to look at the building as a whole. Often Kim is treated as a second nurse; so, instead of two RNs and one Nurse II, she could also be one of the two RNs for the building as a whole... She was not happy, but I think I explained why only one could be approved... She was not going to be happy... We did have additional conversations about it at a later date. She repeated that she was "not replaced", and so could not see not being approved. But that did not affect the building-wide issue, and how we have to staff the building safely ... No, the denial was never grieved or challenged.

Asked if she was aware of other Nurse IIs who were treated similarly, Ms. Ryan said:

For that time we had three Nurse IIs, including Kim. One was approved – actually two, including Kim's April 1-9 request – and the other was denied totally. The other Nurse IIs were in the same position as Kim: not replaced except for short

term leaves, but often treated as core staff in the building, depending on what is going on in the building.

Ms. Ryan testified she had received TR #4, a pair of medical certificates: one dated March 25, 2010 and the other dated May 4, 2010. The first certificate indicates that the Grievor is "required to be absent from work from March 25 / 10 to April 30 / 10." The second certificate shows that the Grievor is "able to return to work as of May 4 /10 at noon." The first certificate shows that the "symptom(s) rendering the employee unable to perform... duties" is "cognitive dysfunction". It was signed by Dr. Margot Walker. Ms. Ryan testified that Grievor had not presented with any issues or concerns prior to going off on sick leave, and that there had been no problems with her work that she had noticed. Ms. Ryan also testified that, prior to this point, there had been no problems with the Grievor's sick leave. "I think there was one in January for gastro, but nothing..." Ms. Ryan explained that:

The only time I saw Kim after this note was very early in the morning on April 9 at the St. John's airport. I was waiting with my family to go to Florida, and saw her at the ticket counter.

Asked if the Grievor had seen her at this time, and what the Grievor's reaction had been, she said:

Very shocked, I think... looked away very quickly, and turned back on to me. We eventually came face-to-face. I said 'hello', and asked her where she was going. We exchanged pleasantries and wished each other a good trip. She said she was going to Florida with her children and parents: a 'last-minute thing'. That was it... She seemed to be very uncomfortable. I just think she was constantly fidgeting, just nervous... I've encountered her multiple times... But she seemed more uncomfortable than she normally is with me. I think we were surprised to see each other there... It really stood out in my mind. We'd had conversations about the request. It was a couple of conversations, so it stuck out for me... I got on a flight for Toronto... or Montreal ... I can't remember which, but it was the same flight. I was just going on vacation for three weeks, but I called my Director of Nursing in the airport and told her that she was taking the vacation we had denied her. I felt it was my responsibility to report this, as I was going away for three weeks... The Director of Nursing was Carole Dalton. She is no longer there. She left in October for another position. On returning from my trip, I went to see Carole about the situation. She had already spoken with Lori Combden in HR.

We set up a meeting for May 3 with Kim, and told her to bring a Union representative. At the May 3 meeting was myself, Lori from HR, and Carole, and Kim, and Joanne Griffin, her Union rep. Carole led the meeting. She asked Kim

if she had gone on a trip, and Kim, of course, said 'Yes'. Specifically, she was asked when it was booked. Originally she said it was booked and cancelled in April, but her second answer was that it was booked on January 7, and cancelled in March. So it was confusing to us when exactly it was booked and cancelled. So Lori asked for her documentation on booking and cancellation. We had some discussion about what the Employer could do to help her get back to work, and asked if there was anything to offer her. We discussed my checking in with her in the morning and afternoon, and in my absence Carole would do so too, to see if she was doing OK, or needed anything.

Asked what the Employer's main concern at this meeting was, Ms. Ryan said:

The circumstances leading up to my seeing her at the airport. There were multiple conversations because of the denial. There were conversations about her not needing to be replaced, and I explained that the building needed to be covered. And there was the fact that it looked like she booked the trip after she knew about the denial. And, as far as I knew, she was still off, and I was shocked... when I saw her. It looked like a misuse of sick leave.

Asked whether she recalls any discussion in the meeting about a conversation she might have had with her doctor about this trip, Ms. Ryan answered "No". Ms. Ryan confirmed that the Grievor had provided the requested documentation about her trip at the second meeting, on May 12. Those attending the May 12 meeting were:

myself, Lori, Kim and Joanne Griffin...The documentation showed that the trip was booked on January 7, 2010, and it was to leave on April 7. But on April 6 it shows that she changed it to April 9. There was no documented cancellation of the trip. That was not what she told us in the meeting when she said several times that she'd cancelled it. But that's not on the documents. It made us very suspicious. It was not what she said on May 3. What she said about the dates on May 3 did not match the documents... The May 12 meeting was not a long meeting. Once Lori got the documents then Lori, Carole and I had a discussion of the whole situation. We wanted to give her the opportunity to resolve the conflicts from the meeting on the third and the documentation. It was evident it was very suspicious that she booked after the denial. The fact is she told us that she'd cancelled, but in that meeting she told us that her parents had told her not to, and she had up to 45 minutes prior to the trip to cancel... There were no indications of any illness up to the time of the sick note, and the next encounter was at the airport...The Employer believed this was an absolute misuse of sick leave.

Asked who was involved in the Employer's decision to discipline, Ms. Ryan answered:

Myself, Lori and Carole discussed it, and asked for advice from another HR person, and we made the decision.

Asked why, specifically, the Employer decided that discipline was warranted, Ms. Ryan said:

... the very suspicious incidents leading up to the trip and the changing story from May 3, about cancellations and the only 45 minutes needed to cancel... As her Manager, I saw her several times a day, and saw no signs that she was struggling. There was no indication she was going to go on this trip. It was obvious to us that this was misuse of sick leave, and we felt very strongly that it was disciplinary in nature, and important for the Employer to act on it.

Asked if there were any outcomes for staffing as a result of the sick leave, Ms. Ryan said:

Obviously, the trip was denied based on adequate coverage for the building. Sick leave is difficult to staff... So we ended up incurring overtime. It left us short for offering annual leave. It impacts the Employer and those left to do the work. It is always a patient safety issue. Any sick leave has a heavy impact on us.

Asked whether there were any concerns about her role, Ms. Ryan said:

The Nurse II is a clinical lead position. She is the nurse in charge. Nurses and LPNs look up to her. She is the clinical lead expert, Monday to Friday. She is needed to keep the multidisciplinary team together. Her's is an important leadership role.

ON CROSS EXAMINATION, Ms. Ryan was asked how long she had been a Manager as of August 2009. She answered that she started that position either in 2009 or in 2008. Asked how many requests for sick leave the Grievor had submitted prior to August 2009, Ms. Ryan said that she could not give a precise number "but we keep them on file, so the requests would be on my file as Manager." Ms. Ryan agreed to provide access to the requests.

Ms. Ryan confirmed she had informed the Grievor of the denial of her request for the April 9 – 23 leave. "Yes, either on the day of, or the day after." Asked if it could have been the day after that, Ms. Ryan said:

I don't think so. We had a memo about the requests and the approvals and denials. When that came out, I had already told her. The memo was on January 8, the Friday... Kim booked her trip on January 7. That came out on the documents provided for the May 12 meeting... If the itinerary shows it was after 4:00 pm, then she booked it after I told her.

Ms. Ryan said the Grievor had not behaved any differently in late 2009 and early 2010,

... so far as I was aware, and nothing seemed wrong. I was aware that she and her husband had split up. I was aware of that from others, not from Kim.

Asked to explain the phrase "cognitive dysfunction" as it appears on the medical certificates, and

to say how she might recognise it in someone, Ms. Ryan said:

It's a broad term. It refers to an inability to concentrate. I could not say exactly what this includes ... That's between Kim and her doctor. It's an umbrella term for a variety of issues. I would suspect that I'd see her unable to concentrate... I had not noticed anything prior to March 25.

Asked if she had received any voicemails from the Grievor relating to this, Ms. Ryan said: "Nothing specific, just that she was off sick." Asked if, in late March 2010, she had any reason to question the medical certificate, she answered, "No", but agreed that the certificate did not jibe with her own observation. Asked why she'd not followed up on this at the time, she said:

I'd expect that I'd see issues. I've had staff with issues in the past, and have recognized the symptoms and had discussions about help. We don't currently practise questioning medical certificates. I normally sit down with the person and ask if there is anything we can do, not just about "cognitive dysfunction"... I had nothing beyond what was on the note.

Ms. Ryan confirmed that at the May 3 and May 12 meetings she had suspicions, as a Manager, about the timing of the trip the Grievor had taken. Asked If anything had caused her to suspect the medical certificate, Ms. Ryan said: "The meeting was to discuss the range of events that led to the suspicion." Asked whether her suspicions had cast doubt on the March 25 - May 30 time frame set out on TR #4, she said:

No. I can't speak to what happened in the Doctor's office; but only about what the Employer knew at the time. And it suggested that she was going to go on the trip, whatever.

Asked whether, speaking in general terms, an employee can travel, but still be unable to work, Ms. Ryan said: "I cannot answer that. I'm not a doctor." Ms. Ryan confirmed that she has had experience of people unable to work but able to travel for medical treatment. Asked whether the Employer was saying that the Grievor could work despite the evidence of the medical certificate Ms. Ryan said:

I can't speak to what the doctor understood and what Kim said. I can only speak to the denial of the leave. She did not tell us the truth on May 3 at the meeting, and she did tell us it was cancelled. That is what the Employer knew.

Asked if an accusation of the misuse of sick leave implies that the Employer's view is that the Grievor could work, Ms. Ryan answered, "The misuse relates to the suspicions we had." Asked whether she had requested the Grievor provide clarification from her physician, Ms. Ryan said,

"Absolutely not. A diagnosis is not required." Asked if she had been concerned as to whether the note was truthful, Ms. Ryan said:

I can't speak to what Kim told Dr. Walker. I can only speak to inaccurate information from Kim. So there was suspicion.

Asked whether she thought the Grievor had booked a trip knowing that she could not travel, and then fraudulently produced a medical certificate, Ms. Ryan said: "It was very suspicious." Asked why she had not sought clarification at that point, Ms. Ryan said: "That was the purpose of the May 3 meeting. We asked Kim to provide it." When it was pointed out that Ms. Ryan had testified that they had not asked for medical information, Ms. Ryan said:

We did not ask for medical information. We asked her to address our sense of the suspicious circumstances surrounding her untruthfulness over the cancellations, and of the inconsistency of the documents. She had ample opportunity to clarify.

Asked if Dr. Walker had phoned Carole Dalton in mid-May 2010, she said. "I don't know."

Ms. Ryan confirmed that the documents showed the Grievor had initially booked for a departure on April 7, but that, on 6 April, she had changed that departure to 9 April.

Asked who receives sick notes for the Employer, she said: "They go to the Manager, and if there any questions, I would speak to my Supervisor... We do not accept 'off sick' notes."

ON REDIRECT EXAMINATION, Ms. Ryan confirmed that, on March 25 there was nothing that prompted the Employer to take issue with the medical certificate.

Asked whether in her view there is a difference between a an employee taking a vacation and travelling for medical attention during sick leave, Ms. Ryan said,

Yes. If it's for medical attention, then that's different from taking a vacation that was previously denied to you.

Asked whether there had been any mention made by the Grievor of medical issues or of her doctor, Ms. Ryan said, "No, there was not."

THE SECOND EMPLOYER WITNESS was Ms. Lori Combden. As Manager of Human Resources, Ms. Combden reports to a Director who, in turn, reports to a Vice-President, who reports to the Chief Executive Officer of the Central Health, which employs approximately 3300 employees. Ms. Combden testified that attendance is managed by the Disability Division to ensure that policies are observed. Asked for her understanding of how suspected cases of misuse

sick leave are administered, and to describe her involvement with the instant matter, she said:

It's an insurance, I guess, that provides for continuing salary if one cannot work... Each matter is individually investigated. I became aware of the circumstances because I was contacted by the Director of Nursing... She said that one of her Managers had called her from an airport. She had reported that Kim had been denied annual leave, and had been seen taking the leave she had been denied at the time she was off sick by her physician... We set up a meeting with Kim, on her return for work, on May 3.

Present were myself, Tonya Ryan, Carole Dalton, Kim, and Joanne Griffin ... We discussed the fact that she'd requested annual leave in October for vacation in April, and that the leave was denied; and even though it was denied, a vacation was booked and happened... and the medical certificate took Kim off work for the period. She had not had discussion with her Manager to tell her Manager she was taking the vacation. We found it suspicious; and we gave Kim the opportunity to speak to that. Kim indicated she was not abusing sick leave, and that she had a medical certificate. She said she wasn't performing to her full ability at that time.

We asked her when the vacation was booked and Kim first said that was booked on April 7, and then on another date, the 2nd, and that it was booked and cancelled. Kim said it was initially booked for April 5, and in March that the trip was cancelled, and then she booked the trip for April 9. We asked her for some documentation to support that... She provided the flight itineraries. It was shortly after the meeting, probably the next day.

Asked whether the Grievor had mentioned any discussion with her doctor about the vacation and this trip, Ms. Combden said "No". She confirmed receiving the itineraries (LC #1 and LC #2) from the Grievor herself. LC #1, an itinerary from Air Canada, showed that the booking for departure on Wednesday April 7 and returning April 22, was made on January 7, 2010, at 5:25 PM.

LC #2, another itinerary from Air Canada was for a booking made on April 6, 2010 at 9:37 PM. This time the departure was scheduled for April 9 at 5 AM from St. John's, returning to St. John's at 12:07 AM Thursday, April 22. LC #2 also shows change fees of approximately \$1500.00 were charged. Asked what the Employer concluded from this information, and how the Employer's position was determined by it, Ms. Combden said:

It did not confirm the flight had been cancelled, as we were told on May 3. I saw that the flight was not for April 5th, as we been told, but for April 7th. She told the group on May 3 that she changed the flight on April 7, but that happened on April 6. She had indicated that the trip was cancelled, and she did not intend to go; but this shows that there was every intention to go...

I discussed it with Carole Dalton and Tonya and my Supervisor, Mark Gill, and with Sean Tulk, who is Carole's supervisor. We felt, based on the information and the discussion on May 3, that there was a high suspicion, and the documentation did not do much to dispel the suspicion. We felt it was a misuse of sick leave, and that discipline was warranted. We set up the second meeting for May 12. Present were myself, Tonya, Kim and Joanne ... All the same from the first meeting except for Carole Dalton... We wanted to let Kim know how the Employer saw this as misuse of sick leave, and that the documents did not support her claim that the trip was cancelled. She had booked the vacation knowing that the leave was denied. She had not discussed taking the vacation with her Manager. And, as well, she is in a leadership role as a Nurse II. This did not sync with what we'd expect of a leader.

Kim said that she did not cancel her vacation, (which was not what she had said at the first meeting), but had 45 minutes prior to the trip to cancel. People had advised her not to cancel. Her parents had a trip booked for the same time, and they cancelled their trip. They'd encouraged her to go, and she made a last-minute decision to go. But she did not have time to pack when she made that decision, and had to change the date.

She was told of a four-week suspension, and that the sick leave would not be paid for the duration of the vacation.

Ms. Combden's attention was directed to the letter of discipline (Consent #3), and was asked why the reference to the Employee Family Assistance Program (EFAP) was included. She said: "A suspension can have an emotional as well as a financial toll, so we usually mention the EFAP as support." Ms. Combden also confirmed that Articles 31.01 - 31.03 were pertinent to the Employer's decision, as well as Article 4.01.

ON CROSS EXAMINATION, Ms. Combden testified that, prior to the May meeting ...

I had not observed the Grievor at all up until I was contacted in April 2010. I was not aware of her, personally. It was following Tonya's call to Carole Dalton.

Asked whether the Grievor had mentioned the medical certificate during the first meeting, Ms. Combden answered "yes". Asked whether, from the Employer's point of view, a misuse of sick leave means that the Grievor should not have been away, or might travel have been appropriate, if she was sick? Ms. Combden answered,

I can't confirm whether she was sick or not... I can not confirm the accuracy of sick leaves; but based on the facts we were aware of, there was a better chance she was abusing sick leave. We gave Kim the opportunity at the meeting to reduce our suspicions of misuse of sick leave.

Asked if, on May 3, the Employer had asked for fuller... medical information, Ms. Combden answered, "Not that I recall. I did not ask for further medical input." Asked whether she is aware of a conversation between Carole Dalton and Dr. Walker, she said:

I can recall her saying she'd got a call about an employee, and a physician... It is possible she did get a call. I can't recall the name of the employee or the doctor.

The witness was asked whether, at the May 3 meeting, there was any discussion about the fact that the date of departure stated in LC #1, April 7, did not correspond with the date requested for the beginning of the vacation period in TR #1 (April 9), Ms. Combden said: "No, but there was a big gap before the booking." Asked whether, at the May 3 meeting, the Employer understood that the Grievor had changed the date of her travel from April 7 to April 9, she answered:

... She said her parents wanted her to go, and that she had 45 minutes prior to departure to cancel, and at the last minute she decided to go, but there was no time to pack.

Asked whether the Employer had been aware of the fact of the last-minute decision prior to receiving LC #1, Ms. Combden said: "She indicated she cancelled in March." Ms. Combden testified that the Employer had been aware of the "changes" provision (p. 4 of LC #1, and on LC #2 at p. 3). Asked whether there had been any discussion at the meetings held with the Grievor of the change fees involved, Ms. Condon said, "No". Asked whether there had been any discussion of the leave that had been approved, of the Grievor's having cancelled it, Ms. Combden said, "Not to my knowledge." Ms. Combden also acknowledged she is "sure there are occasions when employees have had to travel for medical reasons" when on sick leave. She added:

I cannot comment on ...the medical certificate. All the circumstances at the time combined to raise suspicion... It was more probable than not that it was invalid... The physician might have been using subjective information. That's a possibility.

Asked whether she could confirm that the discipline was for travel, and that the Grievor could have been at work, Ms. Combden answered: "All the circumstances made it more likely than not that it was suspicious." Asked whether the Employer had followed up on this issue at the time, Ms. Combden answered, "It did not follow up with the Grievor's doctor. The Grievor was given an opportunity ..." Asked what the Employer would do if an employee's doctor were to confirm an employee was medically cleared to travel but not to work, Ms. Combden said:

We would have to investigate it, as we do each case... If it were approved up front, it is quite possible we would be okay with that. It would certainly be investigated, and it would involve confirmation of the medical information.

ON REDIRECT EXAMINATION, Ms. Combden confirmed that it was the Employer's view that the Grievor had intended to go on vacation, and that LC #1 appears to confirm it. She also testified that the discrepancy in the time noted on TR #2 and LC #1 are not relevant. "It covers the same time."

THE FIRST UNION WITNESS was Ms. Kim Peyton (formerly Roberts), the Grievor, who graduated as a Nurse in 2001, and has been an employee of Central Health since then. She is currently working in Diagnostic Imaging. In 2010, she was team leader in the medical unit 3B. Ms. Peyton described the various general duties she performed in that role, including "taking report on the 17 patients and administering the unit clinically".

Ms. Peyton identified TR #3, with which she said she had been aware in general terms. "It was sent has an e-mail." She testified she knew she should have leave approved prior to booking a vacation. She also acknowledged having been aware of TR #1 prior to the hearing.

I knew that if any trip or vacation was booked, and it was denied, you would suffer the loss of the trip and the financial aspect of it.

The Grievor testified it was her handwriting writing on the two forms comprising TR #2, and that she submitted the request for leave from April 1st to 9th on August 7, 2009, and signed and submitted the request for leave from April 19th to 23rd on October 30, 2009. Asked to explain the "(Not Replaced)" notation on each of the requests, and why she had requested the April 1 - 9 period, she said:

When I came on as Nurse II on 3B in September 2007, I was team lead for the medical unit. It was then more of a waiting area for long-term care. When I went into it, the Nurse II was not replaced if they were to be off for short periods. To my knowledge, I was not to be replaced on 3B specifically, for short leaves. For the other seven units, there are also Nurse IIs, not all of whom are replaced. But in some units they are replaced, so I put 'not replaced' as a reminder... I requested April 1 - 9 because there was a wedding in Jamaica that I was to attend... I did not attend... Circumstances changed with respect to the early April 2010 request. I later notified Staffing that I did not need that leave and to cancel it... I was not notified it was cancelled, to my knowledge, but a message was left with Staffing. I was approved... I don't know the exact day, but it was before Spring schedules

came out. You were eventually called in to see if you were approved or denied. Sometimes you did *not* get informed until the actual schedule comes out.

The Grievor was reminded that Ms. Ryan had testified she was informed of the denial. The Grievor responded:

Yes, there was a conversation at the nursing station, that one leave was approved, and that the second request was denied. At that time the slips were submitted, ... the Nurse II is not always considered core staff. There was a different time for the two submission dates for the Nurse Is and Nurse IIs. I did not know that the first would be looked at differently from the second.

Asked why, on October 30, 2010, she had requested leave (TR #2) for April 9 - 23, 2010, the Grievor said:

There was a family conversation about a spring trip. Extended family members' schedules would have to be co-ordinated, and we could not get family travel fixed at that time. I expected to travel with my two children and my parents, a brother and his wife and their two children, another brother and his wife and two children, and an uncle... I was separated on October 30; that had happened on August 25.

Asked to describe what was going on in her personal life in late 2009 and early 2010, she said:

I was sole care for my aunt who was suffering from cancer and was palliative. She was admitted to hospital, and released in May 2009. She was released because I am a Nurse and could give her needles as needed, and meds as in the hospital. She passed away on May 5, 2009. On August 25, 2009 I decided not to be mentally and emotionally abused with my partner, and I left. From then I was up in Botwood with the two children until their father agreed to move out, and I'd be in here with the children.

I was the sole provider. There was no support from him. I was responsible for babysitters... The everyday events of a child. That separation went on into January 2010. It was a legal separation. There was turmoil from August until January when the papers were signed. Personally, I was emotionally stressed. I did my best for the kids. I was preoccupied with phone calls from the father: nasty calls, threats. It led to anxiety in my eldest child, 7 years old, who was fearful of my leaving and was coming into my room to be sure I was there and not asleep so I'd protect her. She had fears in school activities with baby-sitters. I'd get calls at work. She was fearful I'd not pick her up. It was a lot of stress on me and on the children and on my family members. I did not know then whether these were normal stresses. I was just puzzled, and it dragged on for over a year. In January, February, and March 2010 work was a place I'd go. I tried to provide the patients safe care. Mentally, I was not 100%. As team lead, you're responsible for physicians' orders, transcribing orders, medications and so on. In January I was off, perhaps a week, with the Norwalk...

Also in August, on the 25th I left and on the 31st I was in emergency with shortness of breath. After two days testing, it was discovered I had a medical condition that required daily blood work

Asked whether she was aware that her request for April 9- 23 leave was denied when, on January 7, 2010, she booked her reservation for the April 7 Florida trip the Grievor said, "No".

Asked when she had been informed of that denial the Grievor said: "I'll say sometime in the January 6 - 7- 8 - 9 period. I don't know exactly."

Asked why, if she did not know the leave was approved, she had booked the trip it on January 7, 2010, Ms. Peyton said:

It was a good price, and changes can be made. I booked the flight, and then paid the change fees.

Asked why she had booked for April 7th to 22nd, when the leave request (TR #2) had been made for April 9-23 Ms. Peyton said:

At that time I knew changes could be made. Initially there was one for Jamaica and that was not cancelled until March; so I still had time to manipulate flights.

Asked why she had not cancelled the request once she'd been informed of the denial, she said:

Because others had to decide on the change. Until the family decided, those dates were just there. Dates for the family... Things were confused. Within February or March there were discussions with family. The children were really looking forward to the trip. Their father also had to agree and sign papers allowing it. It was decided the children would travel with family members... He verbally agreed around February they would travel and I'd stay back... I had no reason to cancel. I was unstable mentally. The \$1500 did not mean that much. My main concern was that the children enjoy themselves as much as possible.

Asked If she had discussed her health issues with Ms. Ryan at this time, Ms. Peyton answered, "No, I kept personal things personal, and work in the work environment." She confirmed she had been under medical care since the summer of 2009 and into the spring of 2010...

for my medical condition and yearly checkup with the family doctor. Dr. Sheridan treated my medical condition ... and checkups were with Dr. Margot Walker. She's my family physician, and has been since I was 17. I am 33 now.

The Grievor confirmed she had seen the medical certificates, dated March 25 and May 4, 2010 (TR #4) before this grievance hearing.

When I went and saw Dr. Walker the form was filled it out and I submitted it to my Manager on March 25. I had an appointment with Dr. Walker for March 26. On March 25 my child was sick, and required medical treatment, so I went to the clinic and Dr. Walker was at the clinic. While I was there at the clinic with my son, I explained my feelings and my circumstances since May, 2009 up to March 25. She understood how I was not functioning to full capacity. When I told her that I had the appointment for the 26th and asked whether we could discuss it on the 25th, that was my breaking point. I was not functioning or thinking correctly. I was afraid of things that could happen if I continued without medical help. On March 25, Staffing was told of my son's appointment and that I'd be in after it.

The Grievor does not recall seeing Dr. Walker about this issue prior to March 2010, and confirmed that the medical condition was ...

under control as far as the symptoms was concerned. They still did not know what caused the condition itself. Dr. Sheridan was still the main provider. I did see Dr. Walker about the condition sometime in March 2010.

Asked if she could recall any discussion about leave in March 2010 she said:

I did tell her about the trip to Jamaica. It was decided no, in view of the treatment for the condition. She was not sure what they could provide if anything happened. She did make the comment that, if the travel was in North America, she would not have a problem with travelling in relation to medical needs... After that, I went home.

I got a call on my voicemail asking where I was and how much longer I'd be... Then, before I had a chance to call, Carole Dalton said that my behaviour was "unacceptable... Not to notify the hospital about being late, and not to show up: it was unacceptable as you are a leader."

I was in full agreement with her. I knew she was right. Carole Dalton did know that there'd be a sick note to be submitted to her Manager. I could tell she was upset. I submitted it under Tonya's door, either on the 25th or the 26th. It was important she receive it.

No one needed to know why I was off sick. It was confidential. I made an attempt to phone the Manager that the sick note was submitted, and I wanted to be sure she got it, and if she could call me at home and I left my number. I did not speak to her then. Two days later I made a second attempt, but did not get to speak to her, and did not receive any calls from Tonya.

The Grievor confirmed that the sick leave was approved. Asked to explain the travel she took in April, and the circumstances surrounding it, the Grievor said:

In April, I still had no plans or intentions to go myself. Then as it got closer, the anxiety in my eldest child became worse: panic attacks, and could not breathe... This added to my stress. I mentioned to Dr. Walker about the family trip. I phoned

and asked for her thoughts on the telephone. That was perhaps April 5, 2010 or the 6th. I am not exactly sure. Many of the family members did travel at that time. Because I was so unsure, my parents did not go. They did not know how I would function with all my support missing. So with that, they did change their plans and did not travel on the 7th.

Asked to explain the meaning of the April 9th Air Canada itinerary (LC #2), she said:

After speaking with Dr. Walker and her response – she said that it was therapeutic for me to be with my family in Florida where they were going – the LC #2 arrangements were made, so I could travel with my family. We departed from St. Johns. A change was required. My parents also made changes. They travelled on April 9.

The Grievor confirmed that she had seen Ms. Ryan at the airport. Asked if she had tried to avoid Ms. Ryan, and whether she had been nervous, as Ms Ryan had testified, she said:

No. I did not see her until we spoke in the lineup. Given my situation, I was very uptight about the entire situation in general. We were in the lineup. We exchanged travel plans. I did say we were going to Florida, and it was a last minute decision. My plans had changed, and I was now going. I did not need approval of annual leave. I only decided after the conversation with Dr. Walker on April 6th. We were in Florida until the 23rd...

Asked when she had gone back to work, and how she had felt personally after trip, she said:

I returned to the unit on May 3rd... During the trip there were conversations with my family, and the children's father had his financial situation sorted out. Things were getting back on track... a load off my shoulders. Prior to returning to work, I tried to make contact. I left a phone message on Tonya's phone. I did not hear from her until April 29, 2010, when I was told that I needed to meet with Human Resources with a Union representative. I asked what it was about, and was it about the sick note, and she said, "Ys".

Asked why she had inquired about the sick note, the Grievor said:

There was nothing else to do with HR other than the sick note... The meeting was late in the afternoon. I was at work, as best I could. I met with Joanne Griffin, and explained what this meeting was to be about.... (At the meeting) I was asked if I did travel to Florida during time when I was denied leave. I agreed that I did travel. That was the conversation... Ms. Dalton asked whether I wanted to be called Peyton or Roberts. She did not ask any other question about personal issues, and nor did anyone else.

The Grievor was reminded of earlier testimony that there was conversation during the May 12 meeting about what she had reported at the May 3 meeting about the flight booking. She said:

I provided the documents that were requested at the May 3rd meeting. I was asked about when the booking was made, and I said 'in January'. That's when the bookings were made. They asked if the vacation was intended, and I explained the situation about my children going. I was not. They were travelling without me... 'til the last moment on April 6th.

Asked if there was any discussion about the medical certificate, Ms. Peyton said:

It was never questioned, even though it was supposed... I was shocked and upset. I could not understand how it could get to this. I thought I was back on track emotionally. I was being accused of misusing sick leave. I explained I did not misuse sick leave, as my attendance record showed. ...The trip was cancelled, not the flight, (witness' emphases) until after discussion with my family doctor.

Asked if she felt she was able to work as Nurse II or other nursing position at the time, she said:

No, I was still emotionally charged and figuring out about the children and the lack of financial support... I was still overwhelmed with my personal issues.

Asked whether she had fraudulently accessed sick leave because she could not get Florida vacation time, Ms. Peyton answered, "No, I did not." Asked whether she had disagreed with Ms. Ryan about her needing to be replaced, she answered:

I did question why now I needed to be replaced when previously Nurse IIs were not initially done with Nurse Is, and were together in the Nurse II group.

Asked to describe the May 12th meeting, Ms. Peyton said:

I'd submitted the documents they asked for (LC #s 1 & 2), and they were discussed at the meeting. They said they believed I misused sick leave. I was told there would be four weeks suspension, as well as withdrawal of the two-week sick leave.

Asked if she had discussed the May 3rd meeting with Dr. Walker, the Grievor said:

Yes, that the Employer thought I had misused sick leave. She was shocked. 'Are they questioning me as a physician?' She was upset, and asked me if she could contact Carole Dalton to see if things could be clarified. I agreed for her to make contact with Carole.

When it was pointed out that Employer witnesses had testified that she had not offered to elaborate on her medical situation, Ms. Peyton said: "I was not asked about the medical. It was just *travel* during sick time." (witness' emphasis). Asked why she had agreed to Dr. Walker's attempt to contact Ms. Dalton, Ms. Peyton said: "To make every effort to make any clarification needed ." Asked how she had received the letter of discipline (Consent #3) she said:

I received that in the mail... I was shocked, upset, and surprised at being regarded as a misuser... Just starting to get back on track, and now hit by this surprise!... I was mentally unstable and not able to work. I felt I was not misusing sick time.

Asked whether there was anything she wanted to add to her testimony, Ms. Peyton said:

I think my main issue is how disappointed that it came to this level. There were various attempts to clarify the medical issues I was having. I'm upset I was given no opportunity to clarify prior to now.

When it was pointed out that Employer witnesses had testified that opportunities were provided her on May 3rd, and on May 12th, the Grievor answered:

It was never brought to my attention to speak of the medical condition – what I was enduring...

ON CROSS EXAMINATION, the Grievor testified she had been aware of the memo from Sean Tulk about annual leave during peak periods. She also confirmed her testimony that she had not paid much attention to the booking change fees, but agreed there were additional charges involved in the amount of around \$1500.00, "For the three of us, yes". She also testified she had ...

put 'not replaced' on the form to clarify for Staffing. There have been times, where leave is concerned, when I have put it on for clarification for staffing... Yes, there should be another one there with 'not replaced' on it. I could go get them. I have photocopies from 2007 on. She would say 'I don't have a replacement for you', and it was only at the end of my Nurse II duties that it became clear I needed to be replaced. I was not told that was an issue until the last year or two of my being there. I was not aware of that at the time of my conversation with Ms. Ryan.

The Grievor again confirmed that, initially, she was not replaced, but came to be aware that, while Nurse IIs were not replaced for short term leaves, replacements were needed for long-term leaves.

The TR #2 leave request was initially submitted to allow her to attend a wedding in Jamaica,

... but circumstances changed. We had booked the trip to Jamaica in August 2009. It was cancelled in March, after seeing Dr. Walker. It was in early March, not the later visit to Dr. Walker. During that conversation... I can't recall if I mentioned Florida. There was a lot of conversation at that point. A general conversation about my condition, and the trip Jamaica, and her feeling that Jamaica was not a place for me. Anywhere in North America would be okay, but going to Jamaica was quite different if there was a problem.

Asked whether she considered the particulars of her personal situation in 2009 relevant to this arbitration, the Grievor answered, "Yes ." Asked if she had informed the Employer of the particulars of her personal situation at the time, she answered: "No, it was personal." Asked if she

had told the Employer these facts during the May meetings, the Grievor answered:

I was asked if my name was Roberts or Peyton. That showed they were aware of what was going on.

Asked about the periods of sick leave noted on TR #2, she answered:

If that was an issue for them, being confidential – and not being asked about the medical certificates – I don't know. When the Grievor was reminded that she had just testified she felt her personal situation was relevant to the matter at arbitration, the Grievor responded:

Yes. I felt if the certificates were an issue... If they required further information about the cause of my dysfunction, then I would certainly provide the information.

The Grievor testified that, prior to her visit with Dr. Walker in March, she had not sought assistance from the Family Employee Assistance Program or other help for her situation.

I was aware it existed. I was unaware if that's what I needed. In March, I decided things had built up. I was ready to speak to others about it. In January, the legal separation had taken place. It was a problem... Suddenly a spark – there were verbal threats. And then the pressure. It was a combination of all the stressors, my personal health, and my children. I needed help.

Asked whether she had sought help as a result of the threats, the Grievor answered: "Yes, through the RCMP. It was sometime in March, 2010. I can't recall the exact date."

The Grievor testified that the initial booking for the Florida flight was made at about 5:25 PM on January 7, but that she was unable to remember the exact date when she was told the leave had been denied. Asked whether it was possible she knew her leave had been denied, she said, "No, I'm almost sure." Reminded that she had testified on direct examination that she recalls being told it was denied on January 5, 6, 7 or 8, and asked whether it was therefore likely she had known, the Grievor answered: "I don't know the exact date. It's possible. It's possible... It was not an issue for me to make changes if needed." When asked whether that was true even if it were to require a doubling in the cost, she said, "Yes." Asked if she was surprised that the Employer suspended her, the Grievor said:

No. What surprises me is that it was not dealt with earlier. Two attempts were made to deal with any questions Ms. Ryan might have... One was a message left with Ms. Ryan (during working hours on her work phone) , saying the note was submitted and inviting her to call... I did not hear from her ... "And another, (also on her work phone) two days later roughly, saying it was submitted and to be sure it was received, and if there were any questions. I did not hear back, so I assumed

that the note was okay.

Asked whether it was customary when she submitted a sick note, that she would feel she needed to hear back from Ms. Ryan, the Grievor said: "If there were questions or concerns, yes." Asked if she had felt she needed to speak to Ms. Ryan, the Grievor said: "I felt if there were any problems." The Grievor also testified she had not made the calls to discuss her personal situation or the planned trip.

No. Just the sick note, and, if there are problems, call me at home. And I left the phone number.

Asked if she had concluded that Ms. Ryan had no issue with the sick note, she said, "Yes."

The Grievor confirmed that "staffing was notified" about the Jamaica trip cancellation, "but not until March". Asked whether she had reported this during the May 3 meeting, she said, "I can't recall." Asked if she could confirm that she had booked the Florida trip in January, probably knowing that the leave was denied, but also aware that changes could be made and that the family was going as well, the Grievor responded: "The family confirmed, in February and March, that they were going, yes." She also confirmed that the children wanted to go, and that there was a problem with her not being with them. In January, she had told the father the children would not be with her, but she had not received approval for the children to travel without her at that time.

It was verbally agreed in February that the kids would travel without me... Verbally... Yes, he was okay. Yes, I got the written consent later. It was a signed letter. I'd have to check my files (to see if I have a copy). I can't remember when the letter for the kids to go without me was signed. It was signed by me and him and witnesses... When it was decided that I was going, another signed letter was needed. That had to be signed after April 6; so it was between the 6th and the 8th that I had to write up the letter and get it signed by him and myself and witnesses... (The flight change) was because I could not make it to St. John's (by the time I'd decided to go), and I wouldn't be able to travel without that letter... That's correct, (I could not have travelled on the 7th without the letter.)

Asked about her visit with Dr. Walker on March 25, the Grievor said "It was not a concern for me going or not going to Florida at that time," so "Yes I maintained the flight booking." Asked if she had cancelled the flight booking for Jamaica after the decision not to go had been made on March 25, the Grievor answered:

There were forms from the travel agent that she had to fill out for the refund. So I can't recall the exact date of the cancellation. They would be at the agency.

When it was suggested that she would probably remember such a thing, given the resulting rush involved, Ms. Peyton said:

It was in early March that the discussion of the Jamaica trip took place, not at the later March appointment. In early March I was not going to Florida, and the children were going without me.

Asked if something happened between March 1 and 21 to account for her dysfunction that became clear at the March 25 appointment with Dr. Walker, the Grievor said:

Again, it was the stressors of the father, in addition to the stress of my children, especially my eldest, and my not knowing how to help her... Yes, I spoke to Dr. Walker about the stress. I didn't know if it was normal anxiety they were experiencing... My *child* was getting more anxious and stressed, which further stressed myself.

The Grievor was reminded of her earlier testimony that she could not recall the date of the conversation about the family trip to Florida with Dr. Walker, and was asked whether it was possible she had not, in fact, discussed the matter with the doctor. Was it possible the doctor knew about the trip from the Grievor's mother. The Grievor answered: "No. It was discussed. I can't remember the exact date."

The Grievor confirmed that her parents had changed their plans again, and rebooked for the flight to Florida "So I would not be alone." Her parents had changed the booking at the same time as she had, and at that point she had not received the new letter from the children's father. "The letter was not obtained from the father until after talking with Dr. Walker; and she said I could go." The Grievor also confirmed that, when she saw Ms. Ryan at the airport, she had not tried to avoid her. "I did not recognise Tonya until in the lineup." She also testified that any nervousness Ms. Ryan testified she'd observed was due to the dysfunction she was suffering.

The Grievor was asked whether all the passports for the children and herself were ready on April 5 or 6. She answered:

There was a problem with my son's passport. It was outdated as of 2009. It was only good for two years. I discovered that in April, before he left for Florida. It was not a concern at the time for me. The passport was obtained in April. There were changes made to the flight. I can't recall if he got the new passport on the 7th or 8th or 6th. I can't recall exactly.

Asked what led to her feeling better after the trip, the Grievor answered:

It was the time being off sick ... and conversation with the father during the trip; he got his life somewhat organized, and there was more support for the children ... or so he said. That was in the time frame I was off . The conversations with the father were positive.

The Grievor confirmed she had tried to contact Ms. Ryan prior to returning to work:

On April 27 I left a message saying that I was planning to return to work at the end of the time frame on the medical note... There was no response from Tonya, and no further attempts to call her. Her voicemail said to call someone else, and I called. I can't remember who. I mentioned the sick note I left with her, and she said to leave a message for Tonya, which I did.

Noting that, at the May 3 meeting the Grievor had admitted travelling and was told that it was suspicious, Employer Counsel asked the Grievor whether she had told the Employer anything about her personal issues at that time. She said: "Not that I can recall directly. I knew I was upset in the meeting." Asked how the employer might know if she had not told them, the Grievor said: "They would not; but they did not have a problem with the note." Asked whether there had been mention of the doctor giving her permission to travel, the Grievor said: "no". Asked whether the Grievor had thought that was relevant, she answered:

Not at that meeting... I was shocked. I heard what they were saying. It was a blow. Looking back, would it have changed their position if I did give every detail?

Asked whether she had discussed the charge during the May 3rd – 12th period, the Grievor said:

It was discussed with Joanne Griffin, the Union representative. I was encouraged to see what the Employer had to say, and not to provide any information unless I was asked.

Asked whether she herself thought that the circumstances were suspicious, going on a trip after the leave was denied, the Grievor said:

"Absolutely; and I'd certainly want to question it... the events: clarification was needed, with the medical certificate. It needed addressing."

Asked why she had not told the Employer about her doctor's advice, she said:

Tonya called back on the 29th, and she said 'Yes, about the sick note'. (witness' emphasis). I asked, 'Do you need clarification?' and she said, 'We will wait until the meeting.'

Asked whether she had volunteered any explanation of why she was on vacation when the leave had been denied, the Grievor said: "Absolutely not!" Asked if she had said nothing, and allowed the Employer to come to their conclusions, she said:

I knew the Employer did not know... I felt the Employer would ask! If they needed the medical certificate clarified, ask! It would be provided.

Asked if the Grievor had left the Employer in the dark, even though she had the opportunity to speak during the meeting, when presented with the notes and the facts about the trip, she said:

Yes... If I were in the Employer's position, yes I would be suspicious too. Yes, I had an opportunity ...

Asked whether she had ever informed the employer that the Florida trip was on, the Grievor said:

What I do on sick leave, and what I do to recuperate and recover, is not an issue for the Employer. Dr. Walker did not think so.

Employer counsel asked whether the Grievor did not think it might have been helpful to let the Employer know in order to diminish its suspicions, the Grievor answered: "I would have asked questions. I was not asked for any from the Employer." Asked if it is her view that anything she does on sick leave is off limits to the Employer, the Grievor answered: "Unless they tell me we need updates." Noting the Grievor had allowed the Employer's suspicion to continue, Employer Counsel asked how the Employer might be expected to know about the travel if Ms. Ryan had not observed the Grievor at the airport, the Grievor answered: "They would not; but they do not require it."

Noting that evidence shows the Employer had conflicting information, the Grievor was asked if she had told the Employer at the May 3rd or May 12 meeting that she had cancelled. The Grievor answered: "No. I didn't have to cancel... No, the flight was not cancelled, but the personal trip was." Asked if there is a difference between a "trip" and a "flight", the Grievor said "Yes", but acknowledged that she had not explained the difference to the Employer. Asked if she had tried to clarify it, the Grievor said,

It is possible that the Employer would feel confused in my saying 'cancel, and then no cancel...

Asked whether she had felt the Employer's confusion at that time, the Grievor said, "No."

Asked the date of her conversation with Dr. Walker about the Employer's belief that she had misused sick leave, the Grievor said it had been on May 14, after the termination. Asked if she had then requested clarification by Dr. Walker or asked her to supply further documentation, she said: "That was my earliest appointment... No, (I never asked her to put it in writing)."

Asked whether she had been provided the opportunity to clarify matters after the meeting of the 12th the Grievor said:

If I was asked for medical information, yes the meetings would have been otherwise... Yes, I feel I was not asked the direct question.

Asked to explain what "attempts" she feels she made to straighten matters out, the Grievor said: "The phone attempts to contact the Manager prior to the...." Asked if, even though she was "clearly on a denied vacation", she had not indicated in those phone messages why the Employer should have any questions, the Grievor said, "No."

Asked what she would have done with the Florida ticket if she had not become sick, the Grievor answered: "I can't speculate." Asked whether accommodations and similar matters had been booked for the Florida trip, the Grievor said, "No", and confirmed that the other family members had travelled on the 7th.

ON REDIRECT EXAMINATION, the Grievor testified there were not two reasons for the change in flight booking from May 7th to 9th, but just one: "It was a last minute decision that I would travel with the children." Asked what influence the passport problem and the need for the new letter from the father played in that decision, and whether the delay was because they were not ready, the Grievor said: "They were not an issue. No." Asked why the \$1500.00 change fee was not a concern, and why the new note was needed, the Grievor said:

Because I had no intention to go on April 7... The document from the father was needed because the children were now travelling with me, not their grandparents.

Asked about her awareness, on January 7, of the denial of leave, the Grievor said: "I'm unaware if I knew from Tonya the leave was denied."

Asked whether Ms. Ryan normally responds to voicemail messages, the Grievor said, "Yes". Asked if Ms. Ryan had responded to the voicemail messages she'd left on her phone on March 26 and March 28, the Grievor said, "No."

When asked how her personal circumstances, which she had not disclosed, related to the medical certificate, the Grievor referred to the

stressors and conflict and my child's anxiety and the medical condition I am still being treated for. The medical and the personal were related.

The Grievor also confirmed that she raised the Employer's issues with Dr. Walker...

at the lengthy appointment on May 14. The May 4th appointment was just a meeting, and what they required from me. Not in great detail, as I didn't know where it was going. Just brief.

Asked if Dr. Walker's intervention with Carole Dalton had changed anything, she said, "No."

IN RESPONSE TO A QUESTION FROM THE ARBITRATOR, the Grievor said that, before going into the May 3 meeting she had ...

expected them to ask any questions that medically clarified things about the trip. They did not ask questions that I expected.

THE SECOND UNION WITNESS was Dr. Margot Walker. (To accommodate her schedule, Dr. Walker testified after the Grievor's direct and before the Grievor's cross examination.) Dr. Walker described herself as a family physician with a clinic in Grand Falls-Windsor, where she has worked for 32 years in general practice and family medicine. She explained that, due to lack of some specialities in the region, general practice can include a broader scope that includes certain areas of speciality. Dr. Walker did not rely on her medical records in testifying, except as noted below. She confirmed that Ms. Peyton has been ...

my patient from the age of 17 on... for yearly examinations and through two pregnancies. In 2010, there was an appointment in early March, I think the 1st. It was a medical problem. There were several. She was being seen by the hospital. There was a problem about a trip to Jamaica she'd booked. I felt it was not a good idea. She required regular blood work and, not having services available in North America, I had that concern. I know I said it would be therapeutic to have a trip, but I'm not sure it was at that time. Her condition at that time did require regular monitoring of her blood. It was life threatening . It was a bit risky.

Asked about US travel the doctor said: "I'd think it was safe enough for North America." Asked if she recalls another appointment in the middle of March with the Grievor's son, Dr. Walker said:

... 'From that chat I said, 'Kim, take time off work.'... I made the decision. The diagnosis was cognitive dysfunction... that is a large term. It arises through physical or mental symptoms or problems. A person becomes unable to function in the family or on a job. There are several levels, either physical or mental....Yes (TR

#4) is my handwriting... March 25, that's the date. I wrote that the day I saw her.

Asked whether she would have recommended modified work, she said:

No. She was not capable of participating in any employment at all between March 25 and April 30. I took a check of the signs. My clinical impression, and my read of it. Kim and I have known each other for a long time. I would say, 'You know where I am, and you know what to do to take care of yourself.' I determined the period of March 25 to April 30... There may be negotiation. I leave the door open for 'If you feel better...'

Asked if she recalls any "negotiation" about dates having taken place on this occasion with the Grievor, Dr. Walker said: "No... I'd have recorded it, and I don't recall any notes saying that."

Asked when she expected to hear from the Grievor again, Dr. Walker said:

Many times I don't want to waste time. I'll say, 'If you're not better, come back.' I did not know if I'd see her in a crisis or well. If this were a stranger, I'd say: 'I want to see you in 10 days.'

Asked if she recalls seeing the Grievor later in March or in April, she said:

No, I really don't. I do remember Jamaica is out but I do know a conversation about travel to Florida... not remember ...

Asked if she is familiar with the Grievor's trip to Florida in April, Dr. Walker said: "I'm familiar with that, yes." Asked if the Grievor was able to work at that time, she said: "No, because of the cognitive dysfunction." Asked how cognitive dysfunction manifests itself, she said,

Patients would have insomnia, eating problems, fatigue, headaches, inability to concentrate, memory loss, that type of thing.

Asked if travel to Florida was possible, she said:

I'd see no problem in travelling, but not forgetting the place. It's not stressful. A cognitively dysfunctional person would know how to get on a plane safely. I'd suggest not being alone, but if travelling with trusted people. I'd have no problem.

Noting that the evidence shows the Grievor did take a family trip to Florida, Union Counsel invited Dr. Walker's comment. She said:

A wonderful thing to do. Spot on. Excellent thing to do. Excellent from a medical point of view, with the trusted friends and relatives going. There's sun, not like here in Newfoundland. A therapeutic exercise – rehabilitative I thought.

Dr. Walker also identified the second page of TR #4. "Yes, it's in my handwriting." Asked if she recalls having seen the Grievor on May 4, 2010, Dr. Walker said, "I don't know what precipitated

this note." Asked if she is aware of the reason for this hearing today, Dr. Walker said:

No. Trouble with her Employer on her return from Florida... In rereading my notes, I saw she filled me in during the visit about her troubles she was having... That an issue was being made ... that she was suspended because she took a trip during her sick leave. It seemed to say that I'd said she was sick, and Was my note being questioned ...

Asked if she had any observations after her trip to Florida, she answered: "She seemed to be rejuvenated... seemed very good."

Asked whether she could comment about a conversation with representative from Central Health, she said:

I asked who was involved at the hospital, and was told Carole Dalton. I had her telephone number and she called me back and said, 'No, we are not questioning the note.' I wanted to say 'This is legit... she's under active care.' I wanted to let her know I wrote this note, and to back it up – I did not want to go into the medical history...

Asked whether the sick leave was inappropriate or fraudulent, Dr. Walker said:"Not at all. It was therapeutic ... and it worked."

ON CROSS EXAMINATION, Dr. Walker was asked about the duration of discussion during the meeting in March with the Grievor at her son's appointment. Dr. Walker said:

I have no idea, but it could not have been a short one. I did an assessment of her demeanour and her physical and mental state at that time... Most of it is verbal / symptomatic, and there is a functional inquiry. And you get specific about other symptoms.

Asked when the discussion concerning the Jamaican trip had occurred, and whether the comment that North America would be more suitable was made at the same point, or during the March 25 appointment, Dr. Walker said:

No, I don't think it would have come up, and I did not record it. I would have said it around the Jamaica trip... the one before.

Asked about her knowledge of the Florida trip, Dr. Walker testified that there was ...

nothing specific... It was just a casual, off chance .. Although there was another contact ... I don't know... 'This woman needs that' is what occurred to me.

Asked who was the source of her hearing about the Florida trip, and whether she would need to be aware of what the Grievor planned to do during the trip, Dr. Walker said:

I really don't know... I should add that Kim's mother is also my patient, and it's possible I knew from her, but I did not look that up. I really can't remember if she inquired about going to Florida before going... Kim is an RN. She's well familiar with what is going on. I'd not have concerns ... unless she was going on her own.

Asked whether she knew Ms. Peyton was going with others, Dr. Walker said: "I knew at *some* time, but I don't know when." (witness'emphasis)

Asked to describe normal treatment for cognitive dysfunction, and the treatment used with the Grievor, she said:

You need to look at the patient and ask 'Is this PTS?.. What has she been through?' You look at the patient and negotiate with her on the same basis, on level ground. It's mediation; so there is an art to it, and you work it out with the person... For Kim it was ... rehabilitative things... We discussed things she should and should not do... This is not a new person to me. We have a long history, and this is part of a continuum of discussion with her: that she should be looking after herself – part relaxation therapy – her physical self sorted out. There were other treatments that would follow over into ...

Asked why she had ticked "no" to each of the questions on the Medical Certificate (TR #4) about the possibility of the employee's participation in modified work, easeback, or light duties, Dr. Walker said that these options were not appropriate "in the acute situation." Asked whether it is common that a patient be off work, and then, a few weeks later, ready for work, she said:

For some people, yes; for others, no. I'm not surprised by this. She does not have to be perfect, but it's good to get back into the swing of things... The second (TR #4) certificate may have been the result of a phone call. In my busy practice and for a person whom I know, who I know wants to go back to work. I knew I'd see her shortly in the clinic. She might have called my secretary. It's not unusual. We could not work otherwise. Kim is well aware of her situation.

Asked whether the procedure would be the same if the request were for being put off work, Dr Walker said: "No" and agreed the Grievor did not need to see her to be cleared to return to work.

No, I very rarely stop people from going back to work, and Workers' Comp agrees with me...

ON REDIRECT EXAMINATION, Dr. Walker was asked to consult her file with respect to a May 4th appointment. She did so and said: "Yes, there was a big long visit, actually. I did see her that day. (Further cross examination on this new evidence was waived.) Asked whether there is any indication in the file note that her condition was not genuine, Dr. Walker said: "Not at all. Only legitimate. There was never a thought it was not real."

ARGUMENT

FOR THE EMPLOYER, Employer Counsel argued the evidence has demonstrated that the Employer had just cause to discipline the Grievor as it did. As noted at the outset, it is more probable than not that the Grievor did abuse sick leave, and, on the balance of probabilities, the Employer has met its onus and shown that there was misuse of sick leave.

The Union has argued that the Employer did not have information to sustain the discipline. That is true. The Employer did not have information it needed, and the information now available is post-grievance. It should not now have a bearing on the Arbitrator's finding on the validity of the discipline.

The Employer had every reason to be suspicious when she was observed at the airport. These suspicions were aggravated during the meetings on May 3 and May 12 by the Grievor's inconsistent statements and the information not provided the Employer even though it is relevant and acknowledged as such. It is a misuse of the benefit. The Employer acted in light of the facts it had, including the Grievor's responses.

The Employer must be fiscally responsible in administering just and legitimate claims. Sick leave is a huge financial cost. As an organisation, the Employer must address sick leave use and misuse in order to protect those who are ill. How the Employer addresses this sends an important message to employees. The Employer relies on employees to be trustworthy, and employees are obligated to be honest with the Employer. The Arbitral Jurisprudence shows that employees should inform the Employer of issues relevant to sick leave. Trustworthiness is key.

The case law will illustrate that situations like this often result in termination. Some terminations are overturned; but the other fact is that disciplines are justified when the employee is not forthcoming with the Employer. The Collective Agreement is clear at Article 31 and at Article 4.01. Management retains the right to direct the workforce.

Ms. Tonya Ryan's testimony was clear in her description of the procedures for approving Spring leave requests. It is a complex undertaking. Everyone wants leaves. The testimony shows that 64 of the 110 employees in the building wanted leave in Spring 2010. She described how the list of requests is divided between those who were approved in the previous year and those who were not. In this case, the Grievor was one of those who had been approved for Spring 2009.

Ms. Ryan also testified that the Employer alerts employees to their responsibility not to book trips prior to approval of leave. In the Employer's view, it is probable that Ms. Peyton did book the Florida trip after she had learned that the leave was denied. The evidence also shows the Grievor was unhappy about the denial, and had discussions with Ms. Ryan, about the need to be replaced as noted in the handwritten "not replaced" that appears in her leave requests (TR #2).

It is also clear that a sick note was provided. There was no issue with that note. However, Ms. Ryan testified to seeing the Grievor at St. John's airport. The Grievor's demeanour was fidgety, and it was not a normal encounter.

The Grievor's information, provided at the May 3rd meeting was disingenuous. She spoke about the trip as cancelled, but the documentation (LC #s 1 & 2) showed that the trip was never cancelled. The departure date was changed. This did not reduce the Employer's suspicions. No information was provided to address that suspicion. There was no attempt on the Grievor's part to contact the Employer about the trip to Florida. The Grievor herself agreed it looked suspicious.

The Grievor's testimony shows that she did not give full information because, on her account, the Employer did not directly ask for it. But the Grievor was confronted with the Employer's suspicions, and given an opportunity to clarify the relevant circumstances. A reasonable person would have provided the information at that time.

Ms. Combden confirmed Ms. Ryan's testimony. The documentation did not support the Grievor's testimony, yet no explanation was given by the Grievor. Dr. Walker's account confirms her approval of the trip; but Dr. Walker could not accurately confirm when the Grievor told her about the trip. She is not even certain whether she was told by the Grievor or by her mother. In the Employer's view, it is possible – and even likely – that the doctor's approval was not sought before the trip. So the Employer is left to assess the evidence about the Grievor's conversation with Dr. Walker. Dr. Walker testified she spoke with Carole Dalton to see if there was a problem *about the note* (Counsel's emphasis), and the Employer said there was no problem with the note. Dr. Walker did not discuss the trip, or her diagnosis, or any of the circumstances that have been put in testimony here. Therefore all that testimony is post-discipline, and not pertinent to this arbitration hearing.

The Employer's questions have not been answered. It is not reasonable to book the ticket knowing – as the evidence shows is likely – that the leave has been denied. It is more probable than not that the trip was intended to be taken. The Employer also notes that, while the Grievor discussed the Jamaica trip with her doctor, she did not, in that conversation, refer to the Florida trip. Dr. Walker cannot confirm when, or even if, there was a discussion of the Florida trip prior to her taking it. The suspicious circumstances remain suspicious.

The Grievor would have us believe that she called her doctor and then changed the flight departure date. But we then have the problem of her securing the father's approval letter and the son's passport renewal. The Grievor denied these issues played into the change in travel plans. But that is not possible. There is no trip if there is no passport and no letter. The question must be asked: Was the trip ever not-to-be-taken? The Grievor visits her doctor prior to the Florida trip and the sick note is provided. After the Florida trip, issues seem to be resolved. But the Grievor did not feel it necessary to offer an explanation in face of credible suspicions of sick leave misuse!

The Grievor said she inferred from Ms. Dalton's question about her preferred name, that the Employer knew about her personal situation. That inference is supposed to ground her refusal to explain the suspicious circumstances unless asked very direct questions. That is not reasonable. The Employer can not foresee all possible circumstances. It was also unreasonable of her, in the Employer's view, to speak about cancelling "the trip" but not "the flight". The Grievor herself acknowledged the confusion, but did not explain it.

The Employer argues that this amounts to cause for discipline. The Grievor acknowledges the circumstances as suspicious, but feels no need to explain. The case law will show that there are responsibilities that employees must discharge. The Grievor also said she was given no opportunity to clarify the circumstances. That is not correct. She was given an opportunity, but chose not to provide the information.

The Grievor also testified that she tried to contact Ms. Ryan about the sick note. But Ms. Ryan said there was no problem with the sick leave note. The Grievor's message was to call "if there is a problem". But no call was actually needed, since the suspicions only arose after the airport encounter; and it was then that the employer called meeting to discuss the issues.

Employer Counsel referred the Arbitrator to Brown and Beatty *Canadian Labour Arbitration* (4th ed.) particularly at paras 3:2500 on the "Standard of Proof" and 7:3300 - 3310 on "Dishonesty" & "Theft". She also provided Jurisprudence in support of the Employer's position, as follows: *Re Kenroc Tools Corp. and U.S.W.A.*, 17 L.A.C. (4th) 416 Arbitrator M.G. Picher 1990; *CUPE v. City of Mount Pearl*, Grievor Sherri Colbert, Arbitrator James C. Oakley, 1997; *NAPE v Newfoundland & Labrador Health Care Association*, Grievor "GJ", Arbitrator Dennis M. Browne, QC, 2003; *NAPE v Hoyles Escasoni Complex, Newfoundland & Labrador Health Care Association*, Grievor Millie Hedderson, Arbitrator David G.L. Buffett, QC; *General Electric Canada v. CAW, Local 524 (Humphries Grievance)* Arbitrator Gail Brent, 2009; *Perley and Rideau Veterans' Health Centre v. CUPE, Local 870 (Onwuachi Grievance)* Arbitrator Kathleen G. O'Neil, 2010; *Supreme Court of Canada, Cie minière Québec Cartier v. Québec (Grievances arbitrator) V. USWA Local 6869 Lamer C.J, La Forest, L'Heureux-Dubé, Sopika, Gonthier, Cory and Iacobucci JJ. 1995.*

Relying on *Re Kenroc Tools*, Employer Counsel urged the Arbitrator to recognize that the Grievor did not disclose to the Employer what the Employer had a right know. In the case of the Sherri Colbert grievance the termination was overturned, but replaced by a three month suspension. In the Employer's view, this shows that the present Employer exercised restraint in the discipline imposed in the instant case.

Is very important, in the Employer's view, that employees not be given a wrong message about misuse of sick leave and similar dishonesty.

The Employer noted the *Québec Cartier* decision of the *Supreme Court of Canada* as grounds for dismissing post-discipline evidence as inadmissible.

Employer Counsel summarized the Employer's position that it has the right to manage and to ask the Grievor questions when faced with circumstances that require explanation. Her responses were unclear, and her demeanour toward Management gave cause for concern.

In the Employer's view its position must be sustained on the balance of probabilities. Dr Walker's testimony is not the end of the matter. The Employer has the right to expect trustworthy behaviour, but the Grievor saw no need to tell the Employer what it needed, and had a right, to know. The Employer acted on what it knew, and imposed appropriate discipline, knowing nothing

of the doctor's advice or the Grievor's personal circumstances. Evidence on these matters is now, therefore, post-grievance in nature.

The Employer again urged the Arbitrator to send the right message in his decision. The Employer did not terminate the Grievor, but did discipline her appropriately. The Agreement was not violated. The grievance should be denied in its entirety.

FOR THE UNION, Union Counsel noted that the grievance concerns a four-week suspension and a two-week denial of sick leave. The letter of discipline (Consent # 3) is what prompted the grievance (Consent #2). In the Union's view, the issue is how to reconcile the apparently inconsistent evidence. The Union suggests this becomes possible by looking simply at what happened, and keeping one question in mind: Can Employees who are medically unable to work nonetheless be medically able to travel?

The evidence is clear that the Grievor knew of the memo (TR # 3) warning employees not to book travel vacations until leave is approved. The evidence is also clear that the Grievor is uncertain if the flight was booked before or after learning that the leave she'd requested was denied. Around October 20, 2009 she received the memo (TR #1) from Carole Dalton, Director of Nursing, asking that requests for leave planned to be taken during February, March and April, 2010 be submitted "by October 30, 2009."

The evidence is uncontradicted that the Grievor had a horrible year in 2009, marked by the death of an aunt for whom she provided care in the summer of 2009, and by a separation from her husband, which then ended in divorce. On August 7, 2009, just before the separation, she submitted a leave request (TR #2) for the trip to Jamaica. Then, later in August, her marriage began to come to an end. There was then discussion of a family vacation trip, and on October 30, 2009, right on the deadline, she made the request for vacation leave for April 9 to 23rd, 2010. These dates are relevant to what happened subsequently.

The Grievor did not broadcast her personal circumstances. There was no obligation on her to do so. Everyone is free to live a private life. Her private difficulties were not brought to the Employer's attention, and her Manager, Ms. Ryan, did not notice any changes in her.

Early in 2010 a question emerges. There is a seat sale on tickets. Did the Grievor book the flight to Florida when she knew, or before knowing, that the leave had been denied? The Grievor

says she is not sure. Ms. Ryan's evidence is that the meeting of the management group was held on January 6th, and she informed the Grievor either on that day or the next. The memo about the decisions actually came out on Friday, January 8. So was it on January 6 that the Grievor learned her request had been denied, or was it on the 7th or 8th? The question remains a question.

But if the Grievor intended to travel in defiance of any denial of leave, why would she not have just booked the flight in 2009? It is clear that the dates booked in January 2009 (LC #1, p. 2) April 7 - April 22, actually differed from the dates requested (TR #2, p. 2) April 9 - 23. The flights were subject to change, and tickets were also booked for the children on January 7 (LC #1, p. 3). The children's plans did not change. They were always going to travel. Quite reasonably, the Employer asks, Why did she not cancel her own booking, if she was not intending to travel? The Grievor's response is: I could cancel at any time, and the kids were going anyway.

The evidence then shows that, in early March, the Grievor met with Dr. Walker. There was discussion about travel and, the decision made not to go to Jamaica for medical reasons. The ticket to Jamaica was later cancelled. Dr. Walker tells her that Jamaica travel is not safe for her medically, but that travel in North America is OK. That is verified by Dr. Walker. From Ms. Peyton's perspective at that time the trip to Florida is off. The Union acknowledges that that is not the same as saying that the Florida ticket was "cancelled". That led to confusion in the meetings.

On March 25, Ms. Peyton jumps the queue at Dr. Walker's clinic. Dr. Walker puts her off work. She testified that the Grievor did not request that medical certificate, or the period it covers. Dr. Walker herself chose the dates on that certificate. The Employer wants the Arbitrator to find that the Grievor wanted specific dates, but the evidence does not support that view.

A further question arises at this point. Is the employee responsible for following up with the Employer in such circumstances? Here is where the relevancy issue arises, however. The Grievor actually tried to get Ms. Ryan's attention on March 26 and again on March 28.

The events of early April are particularly significant for what happened later. Even if one were to presume a deliberate plan to travel in defiance of denied leave, why then incur the huge change fee last minute? It does not fit the Employer's allegation. LC #2 shows that the Grievor's trip was not going ahead. Only a genuinely last minute change of plan can explain the change fee.

To be fair, it was this last minute decision that also led to the suspicion. Ms. Peyton says that she spoke to Dr. Walker about the Florida trip. But she said that the conversation was by phone, and might not have been recorded in the doctor's records.

The chance encounter at St. John's airport was just that. The Grievor was forthright about her travel. There was no attempt to lie. If there were some fraud intended, then why did the Grievor not attempt to secure a letter from the doctor. Yes, it is suspicious. Yes, the Employer has a right to be suspicious. But whole thing was clear and unproblematic to the Grievor.

The travel to Florida and back takes place, and then there is the May 3 meeting. And what the Employer asks for is confirmation of the travel arrangements. The Grievor provides that confirmation. The Employer claims that is the point at which the Grievor should have described her personal circumstances, including her medical situation.

The Employer indicates (in Consent #3) that the issue is misuse of sick leave. But the Employer did not ask her if anything in her personal medical situation required travel. It is true that the Grievor did not volunteer that information.

But the Employer now holds that against her. On May 4th there is a lengthy visit with Dr. Walker. Was that when Dr. Walker decided to contact Carole Dalton, or was it on the 14th as the Grievor testified? Dr. Walker did contact the Director of Nursing. Dr. Walker was, and is, supportive of the Grievor's travel. The Director of Nursing tells her there is no problem with the medical certificate. So the question must be asked: Should Dr. Walker have provided information about the Grievor's personal medical condition? The Employer did not request any information. And when Dr. Walker did contact the Employer, the Employer says "That is not an issue." The Employer cannot now blame the Grievor for its own lack of information. Dr. Walker insisted that there was no fraud. The travel was therapeutic, appropriate, recommended, and effective.

At the May 12th meeting, the booking documents (LC #s 1 & 2) were examined. The Grievor's explanation was confusing to the Employer. That is partially understandable. Yes, it was confusing. It was last minute but booked in January!?! The Grievor spoke to the last-minute decision, but the Employer skipped a step. The Employer did not tell the Grievor that the medical certificate was problematic. The Employer did not ask to speak to the Grievor's doctor. That is the missed step.

Dr. Walker had already – or was able to – clarify matters for the Employer. There was medical information; but the Employer denied any problem with the medical. Yes, the Employer had a basis for suspicion. Yes, it required information. But it cannot now blame the Grievor for not providing that information when they said there was no problem in that regard.

Union Counsel then reviewed the Employer's Arbitral Jurisprudence, noting that, while each case is dependent on its particular fact situation, there are some themes that should be noted. The Employer carries the onus to demonstrate just cause for its discipline. The Jurisprudence shows that the Employer has a right to request information pertinent to its decision. But the Jurisprudence also shows that, in discharge of its onus, the Employer must seek the information. The Grievor did not stonewall on the requested flight information, but co-operated at all points

In support of the Union's position, Union Counsel then introduced arbitral jurisprudence as follows: *Arnfinson and Treasury Board (Revenue Canada, customs & Excise) Alberta, 1983*, Arbitrator, C.A. Edwards; *Canadian Union of Postal Workers v. Canada Post Corp. (Somerton grievance)* 1994 Arbitrator Thistle.

Relying on *Somerton*, Union Counsel argued the Employer's obligation to request the information it needs. In the *Somerton* case, as in the Employer's *GJ* case, there was stone-walling that is not in evidence in the instant matter. It isn't enough that the Employer say to an employee "resolve our suspicions". The Grievor gave the Employer what it requested. Commenting on the Employer's use of the *Sherrie Colbert* case, the Union pointed out that the instant matter is distinguishable in view of the overwhelming evidence that the travel was therapeutic.

On the bar to post-grievance evidence that the Employer relies on in its argument, the Union pointed out that the question here is not What did the Employer know? but What should the Employer have explored in terms of the medical circumstances? In the instant case, the Employer actually said they did not want to know about the medical circumstances. The medical information was pertinent and was forthcoming at the time, as is established in Dr. Walker's intervention with Ms. Dalton, and in the Grievor's repeated calls to Ms. Ryan.

The Union asked that the Arbitrator look at Article 16.04 which expressly provides an Arbitrator the power to "... to set aside or modify a decision of the Employer." In the Union's view that is what the Arbitrator must do in this matter.

The Employer charged the Grievor with being inconsistent in what she said during the May 3 meeting. She was not inconsistent, but was led astray by the Employer's chasing a red herring rather than enquiring into her situation, and asking whether she was medically free to travel. She was. She was trustworthy and honest. She had nothing to hide, and met her obligation to the Employer.

In the Union's view this is an unusual and unfortunate case. The Employer bears the onus, and clearly has failed to discharge it. The Employer can not shift the blame to the Grievor for failing to provide what it did not request.

IN REBUTTAL ARGUMENT FOR THE EMPLOYER, Employer Counsel challenged the Union's view that the onus lies exclusively with the Employer to investigate all possibilities in order to determine if any discipline is warranted. The Union is relying on the single fact that the Grievor was not directly asked question about her medical situation. The Employer disagrees with this approach. What did the Grievor think the May 3rd meeting was about? The Grievor was confronted with the Employer's suspicions, and she testified that she felt the information she provided at the hearing was relevant. But she chose not to supply it to the Employer at the meeting. That was not reasonable. Silence is not being "up front", not being reasonable. In a disciplinary meeting, with Union representation present, the Employer is entitled to an explanation. The Employer twice gave her an opportunity to give the relevant information. She declined to do so.

The Union argues that the Employer did not get the information and ignored information that was provided and offered. That is not true. Dr. Walker's contact with the Employer was about the note. The Employer did not get relevant information; and what has been brought forward at the hearing is post-grievance. The Grievor was not willing to give any of the story. That was unreasonable. She admitted it was confusing. But she was not within her rights to remain silent over specifics of which the Employer was unaware.

The evidence shows there was a deliberate plan. She was planning to take the trip. She could not go without her son's passport or the father's letter; that caused the change of flight and change fee. The Employer's management authority, confirmed in the Collective Agreement, was diminished in these circumstances. The facts were laid out. The Grievor was required to respond. The Shop Steward was present. The Grievor was not trustworthy. She was silent and the

Employer's confusion and suspicion was not resolved by her. The case law makes it clear that she does not have the right to act as though "What I do on sick leave is my business." The Union's cases themselves demonstrate that the message is clear. Employees do have responsibilities. They have an onus in respect of sick leave to communicate with the Employer.

The Employer's action was justified and the grievance should be denied. Abuse of sick leave is not acceptable, and, in this case, the Grievor did not discharge her responsibilities.

CONSIDERATIONS

At issue between the Parties is the Union's complaint that a four week suspension (and denial of two weeks sick leave) as discipline for "misuse of sick leave" (Consent #3) was without just cause and in violation of the Collective Agreement..

The onus to show just cause for the discipline lies with the Employer.

The Standard of proof is the civil standard of "balance of probabilities" as set out in Brown and Beatty *Canadian Labour Arbitration* 4th ed. at para. 3:2500.

The standard of proof specifies the degree of probability that must be established by the evidence, before the party who bears the burden or onus of proof is entitled to succeed. The two standards of proof most commonly utilized are the civil standard of "balance of probabilities" and the criminal standard of "beyond a reasonable doubt". In most grievance arbitrations, however, arbitrators apply the civil standard of proof, as described in the following terms:

It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "we think it more probable than not", the burden is discharged, but if the probabilities are equal, it is not.

Positions of the Parties:

The Employer led evidence and argument in support of its view that it is more probable than not that the Grievor's having "continued to take... vacation while on sick leave from (her) employer" despite being "denied vacation" was a "misuse of sick leave" and, as such, provided just cause that warranted the discipline imposed.

The Union led evidence and argument in support of its view that, while the circumstances were unusual and confusing, there was no abuse of sick leave whatsoever. In the Union's view, the Employer acted in ignorance of basic facts that it should have known, and which the Grievor and her doctor had tried to provide.

Review of the evidence: The somewhat unusual facts and issues are set out in the recital of evidence and argument above. In summary, the undisputed evidence establishes that the Grievor applied in October of 2009 for vacation leave to be taken beginning on Friday, April 9, 2010. That leave was denied, and she was told of the denial by Ms. Ryan, her Manager, in early January 2010. She appeared unhappy with that news, and questioned Ms. Ryan about it on more than one occasion. During the same early January period, and possibly just hours after receiving news of the denial, the Grievor booked a flight (LC #1) for herself and her two children that was scheduled to depart for Florida on Wednesday, April 7, 2010 with other members of her extended family.

In late March 2010 the Grievor's physician, Dr. Walker, placed her on sick leave for the period of March 25 until April 30. On April 6, 2010 the Grievor changed the flight reservations, incurring approximately \$1500.00 in change fees, so that she and her children would now depart from St. John's, not on April 7, but on April 9. On April 9 the Grievor and her Manager, Ms. Ryan, who also happened to be travelling to Florida at the same time, met in the lineup at the Airport. The Grievor told Ms. Ryan she was going to Florida on vacation. Ms. Ryan telephoned the Employer to report her concern that the Grievor was travelling to Florida on vacation during the time frame when vacation leave had been denied her and while on sick leave.

The Employer met twice with the Grievor about its suspicions on her return to work after the trip to Florida. During these meetings the Grievor did not provide sufficient factual information to allay the Employer's suspicions. The discipline letter (Consent #3) was issued after the second meeting.

Complicating Confusions:

The Employer did not know the Grievor's personal circumstances. From a question asked at the first of the two meetings, the Employer appears to have been aware, at least in a general way, of the Grievor's marriage breakup and divorce, but not of the difficulties the Grievor and her children experienced during the January to March 2010 period, some details of which were put in evidence at the hearing.

Compounding her marital difficulties was the Grievor's own physical health and her compromised mental condition, about which the Employer also knew nothing. In September 2009 she had been diagnosed with a medical condition for which she was being closely monitored and

was undergoing continuing treatment. In late March, Dr. Walker diagnosed her as suffering from "cognitive dysfunction", and issued a medical certificate (TR #4 p.1), which required her to be off work from March 25 to April 30. The Employer approved this leave without asking the Grievor to supply clarification of it either when it was submitted in March – at which time the Grievor twice offered to provide clarification about the sick note if required – or subsequently, when suspicions arose as a result of her travel to Florida becoming known. The Employer's lack of informed awareness of the Grievor's personal circumstances and medical situation, is at the core of the confusing complications in this matter.

The Employer strongly contends that the Grievor unreasonably withheld relevant and pertinent information to which, the Employer submits, it had a contractual right that is confirmed by the case law. The Employer further submits that it acted properly in imposing discipline, based on the information it had at the time, and that the Arbitrator is unable, under the *Supreme Court of Canada's* Decision in *Québec Cartier*, to sustain a grievance based on post-discipline evidence.

The Union points to unchallenged evidence showing that both the Grievor (on March 24 and 26) and Dr. Walker (after either the May 3 or the May 12 meeting) made timely attempts to engage the Employer's attention and to provide whatever clarification it might need in respect of the Grievor's medical situation. The Employer did not take these opportunities to inform itself, and proceeded to discipline without the crucial information.

Is the Employer right? The Grievor's silence about her medical situation during the May 3rd and 12th meetings needs to be explained. The Employer found her description of her changing travel intentions inconsistent with the documentation she provided; and the Grievor herself agreed it was confusing. As the Grievor acknowledged in her own testimony, the suspicion and further questions were appropriate. So is the Employer right in its view that the Grievor was being unreasonable? Did she violate her contractual responsibilities to be forthright with the Employer? **The wrong message...** In making a finding in these matters, I must address the Employer's legitimate concern that I not "send the wrong message". To that end, I state clearly that sick leave is a crucial element in a collective bargaining environment, not only because of the high costs involved, but in order to ensure that such insurance is available for those, like the Grievor in the instant case, who actually need it. There must be no fraud. An employer is right to take every care

to prevent misuse of the benefit. I applaud this Employer's vigilance on this front, even though, in this particular instance, errors may have been made in the actual exercise of that vigilance. An employer is required to exercise its contractual Management right in the administration of all benefit plans, including the provisions governing vacations as set out in Article 17.

Important questions:

The questions raised by this case are therefore important both for the Employer and for the Union and Grievor. The Employer stressed repeatedly, and correctly, that management of sick leave is an important, complex, and demanding responsibility that requires full trustworthiness from all participants. The issue is not just the huge cost involved, significant as that is. As the Employer pointed out, sick leave is a vital benefit, on which all employees rely to protect them if they truly need it. It is vital to employer-employee relations that sick leave be managed with respectful care and full attention by all involved.

For the Union and Grievor the issue is not just the loss of pay and benefits arising from the discipline imposed. In this case, the alleged violation of the Collective Agreement involves very serious allegations of fraudulent behaviour, potentially involving others beyond the Grievor. Dr. Walker's testimony shows that she was concerned for her professional integrity and anxious to dispel any suspicion of misuse. The evidence also shows Union involvement, in that it advised the Grievor on how to act.

Questions surrounding the Grievor's silence, therefore must be explored very carefully.

The instruction to attend the May 3 meeting:

I note unchallenged evidence of Ms. Ryan's call to the Grievor on April 29, instructing her to attend a meeting on May 3, 2010, at which the Union representative was to be present. On Direct Examination, the Grievor testified (cf. p 22-23 above):

Prior to returning to work, I tried to make contact. I left a phone message on Tonya's phone. I did not hear from her until April 29, 2010, when I was told that I needed to meet with Human Resources with a Union representative. I asked what it was about, and was it about the sick note, and she said, "Yes".

Asked why she had inquired about the sick note, the Grievor said:

There was nothing else to do with HR other than the sick note...
The meeting was late in the afternoon. I was at work, as best I

could. I met with Joanne Griffin, and explained what this meeting was to be about.... (At the meeting) I was asked if I did travel to Florida during time when I was denied leave. I agreed that I did travel. That was the conversation... Ms. Dalton asked whether I wanted to be called Peyton or Roberts. She did not ask any other question about personal issues, and nor did anyone else.

On this account, which is generally confirmed by Ms. Ryan (*e.g.*, p. 10-11 above) and Ms. Combden (*cf.*, p. 16-17 above), the Employer focussed on the perceived abuse of vacation leave entitlement ("... if I did travel to Florida during time when I was denied leave..."), as is clear from its request for travel documentation and from evidence on particulars of the booking times and changes. The Grievor, however, was focussed on the sick leave, and had twice (March 26 & 28) left messages offering to clarify if there were any questions about the sick note. (The evidence actually shows a third call without direct response, if the April 27th call the Grievor made to Ms. Ryan after the vacation (*cf.*, p. 28 above) is included.) The Grievor's focus on the sick leave is also clear, in the passage quoted above, from her explanation of why she had raised the sick note with Ms. Ryan during the phone conversation in which she was instructed to appear at the May 3 meeting: "There was nothing else to do with HR other than the sick note... "

The evidence is that Ms. Ryan confirmed for the Grievor that the meeting was, at least in part, to address the sick note. On this point I note that on cross examination (*cf.*, p. 29 above), when asked why she had not had told the Employer about her doctor's advice, she said:

Tonya called back on the 29th, and she said 'Yes, about the sick note' (witness' emphasis). I asked 'Do you need clarification?' and she said, 'We will wait until the meeting.'

But, despite the Employer's confirmation of the "sick note" issue, and deferral of discussion about it "until the meeting", that is not what happened at the meeting, according to all the witnesses' accounts. The Grievor's travel during denied leave time is what emerged as the Employer's concern, and no questions were asked about the sick note or the sick leave despite the explicit question on that point raised by the Grievor with the Employer just a few days before when she was called to the meeting.

It is true that the Employer did not know facts that the Grievor knew. But the Grievor also was surprised, on her testimony, and was confused about the Employer's concerns, having been

told that the sick note was to be discussed. Ms. Ryan's testimony on Direct Examination (*cf.*, p. 11 above) is revealing in its account of the Employer's focus and of its "suspicions".

Asked what the Employer's main concern at this meeting was, Ms. Ryan said:

The circumstances leading up to my seeing her at the airport. There were multiple conversations because of the denial. There were conversations about her not needing to be replaced, and I explained that the building needed to be covered. And there was the fact that it looked like she booked the trip after she knew about the denial. And as far as I knew she was still off, and I was shocked... when I saw her. It looked like a misuse of sick leave.

In the Employer's suspicions, as here evidenced in summary of its focus during the May 3 meeting, concerns about possible violation of vacation entitlement meld imperceptibly into concerns over "misuse of sick leave". I note that the same melding is evidenced in Ms. Ryan's account of the May 12th meeting (*cf.*, p. 11 above). It is Management's responsibility to inform the Grievor of its concerns in a such a way that the Grievor can answer them accurately and specifically and truthfully. But, in this case, the Employer's "suspicions" were imprecise.

Faced with questions about matters other than the sick note, which, based on Ms. Ryan's confirmation, the Grievor had reason to believe was on the Employer's agenda, she dealt with the questions the Employer put to her reasonably. She did not venture into areas which the Employer seemed not to be interested in discussing, about which she had communicated with Ms. Ryan on three occasions now, once directly. On cross examination, when asked whether she had thought that the information of her medical and personal situation was relevant, the Grievor said:

Not at that meeting... I was shocked. I heard what they were saying. It was a blow.

Looking back, would it have changed their position if I did give every detail?

The Grievor was placed in a situation where the rights of all involved were best protected by answering the questions that the Employer asked, which she did.

The precarious imprecision of the situation in the meeting is confirmed by the discipline actually imposed, which compounds the irony of this case. The discipline was actually issued, as set out in the second paragraph of the discipline letter (Consent #3), not for a violation of leave entitlement, which was what the Employer appears actually to have investigated, but for "misuse of sick leave", which the Employer appears to have ignored in its investigation, despite repeated

initiatives by the Grievor, and by her doctor, specifically on the issue of the sick note.

Was the Grievor acting unreasonably in the responses she made – and did not make – in the meetings on May 3 and May 12? I find that the Grievor was not acting unreasonably. I base this finding on: (a) the imprecision and confusion in the focus and presentation of the Employer's concerns and its questioning; (b) the Employer's inattention to the facts of Grievor's medical situation prior to, during, and after the May 3 & 12 meetings.

But was discipline, nonetheless, warranted? The matter does not quite end there, however.

There is no doubt that the Grievor was denied leave for which she had applied under a management process carried out in keeping with the Collective Agreement. There is also no doubt that she nonetheless ended up taking a vacation that the evidence shows was initially booked to be taken within very nearly the same calendar period as that of the leave that had been denied. That same calendar period also very nearly coincided with sick leave time ordered by the Grievor's doctor. Thus, the Employer had circumstantial grounds to suspect the Grievor had contrived to circumvent the denial of the vacation time by using sick leave to let her take the Florida trip.

That suspicion would likely have been confirmed, and the discipline perhaps justified, if the sick leave had been proven to have been procured fraudulently. That turns out, on the basis of the evidence presented at the hearing, not to be the case. Dr. Walker's medical evidence shows that the sick leave was legitimate, and that the Grievor's travel was therapeutically appropriate to her medical condition and her recovery.

But a question or two remain. It is clear that the Letter of Discipline (Consent #3 para #2) cites "misuse of sick leave" as the cause of the discipline. "Your actions represent a misuse of sick leave and discipline is warranted." The Letter does not say that the Grievor was disciplined simply for taking a vacation that had been booked for a leave period she had been duly denied. Nor does it say that she was actually disciplined for violating a contractual obligation to be forthright. Nonetheless, the Letter of Discipline does, by way of context, refer to the Grievor's having been "denied vacation, yet continued to take the vacation..." I must therefore ask:

1. Did the Grievor actually act in a manner that, formally at least, invited discipline simply by taking the vacation that had been booked for the leave period she had been duly denied?

And I must also ask the following question as well, since, as noted above, it obviously underlies the issue before me.

2. Did the Grievor, despite acting reasonably, violate contractual obligations to deal in a forthright manner with the Employer by failing to advise the Employer, either prior to taking the Florida trip or as soon as she was challenged about it, so as to allow the Employer its right to make administrative decisions?

I find that the answer to these related questions is No, for the following reasons.

1. The denied vacation? I note that the discipline letter uses a phrasing that may be helpfully revealing in the context of the instant confusing circumstances. It says that the Grievor was "denied vacation, yet continued to take the vacation..." The implication is that, because the Grievor was in Florida at more or less the same time she would have been vacationing, that she was defying the Employer's right to schedule "vacations". The relevant Employer's right is concerned with vacation *periods* or *dates* as addressed in Articles 17.03 and 17.04.

That implication fails because it ignores the logical and actual possibility that calendar times may accommodate different activities. That time period was still legitimately available to the Grievor as sick leave despite denial of the vacation period. There is no actual or logical bar to sick leave time being spent vacationing in Florida, as Dr. Walker's evidence confirms.

Logically and actually, therefore, the Grievor did nothing to warrant discipline by taking the vacation that had been booked for the leave period she had been duly denied. The fact that the same period of time was legitimately approved as sick leave makes the co-incidental "vacation" issue moot *in these very particular circumstances*. (I note that the Agreement actually addresses a somewhat parallel set of circumstances at Article 17.12.)

2. The Grievor's contractual obligations?

But the Employer cited considerable Arbitral Jurisprudence in arguing that the Grievor did not have the right to withhold the relevant information she had withheld. I note again, that the discipline that is before me in the instant grievance was not imposed for withholding relevant information. Nonetheless, I address this issue since it bears directly on questions raised by the Parties in Argument. Did the Grievor "violate her contractual responsibilities to be forthright with the Employer" (cf., p. 47) by acting "in ways that put (her) ... trustworthiness in question." (Brown and Beatty *Canadian Labour Arbitration* at para 7:3300 p. 7-53? In this context, I note with

concern an element aspect of the Grievor's position as presented in her testimony. When asked if she had ever informed the Employer that the Florida trip was on, the Grievor said:

What I do on sick leave, and what I do to recuperate and recover, is not an issue for the Employer. Dr. Walker did not think so.

Is the Grievor right? No. The Grievor is not correct to claim that "What I do on sick leave, and what I do to recuperate and recover, is not an issue for the Employer". Employees carry a clear and real responsibility to inform employers of matters that affect an employer's ability to make the management decisions that are its right and responsibility.

That responsibility is discharged, however, once real and reasonable efforts are made to inform the Employer of relevant facts that would clarify what is going on and no attempt is made to deceive or mislead the Employer.

On this issue, the Employer asked that I be guided by the reasoning in *Re Kenroc Tools Corp. and U.S.W.A.*, 17 L.A.C. (4th) 416 Arbitrator M.G. Picher 1990, in which Arbitrator Picher holds that the Grievor is under "a minimal obligation to clear in advance with ... his employer any contemplated activities which might have been unusual in the circumstances..." (p. 1) The facts of *Kenroc* relate to a regular annual hunting trip.

The fact situation in the instant case is of a last-minute change of plan. But the Employer did not know that. In fact, the Employer strongly suspected that Ms. Peyton was implementing a plan that had been initiated in October 2009, and firmed up on January 7, 2010, in defiance of the Employer's contract-based denial of leave. The evidence also shows that the Employer strongly suspected the Grievor was further violating the Collective Agreement by misusing her sick leave, and disciplined her in respect of sick leave. But the evidence, as reviewed above, has shown that those suspicions were not valid. At *Kenroc* p 3, Arbitrator Picher writes:

"... the parties to the Collective Agreement did not intend that an employee who receives the benefits of the medical indemnity plan could, at least without some authorization from his physician and his employer, engage in an away-from-home vacation trip during the course of a medical leave... The grievor was under a minimal obligation ... to clear in advance with both his physician and his employer any contemplated activities which might have been unusual in the circumstances..."

I endorse Arbitrator Picher's view, and assume that I would make the same finding in the fact situation before him, based on that Collective Agreement. I note however that, in the instant matter before me, the Grievor twice called her Manager about the sick note in the week before her

decision to travel was taken. She received no response from the Employer. In my view, the Grievor discharged that "minimal obligation" given the particular circumstances in evidence, including Dr. Walker's energetic approval of the travel and despite some question of precisely when and how she learned of the trip.

To be clear, I fully endorse Arbitrator Picher's position, as it is echoed in Arbitrator Oakley's decision (at p. 30) in *Sherri Colbert*, and in Arbitrator O'Neil's in *Perley & Rideau* (at para 75) and as that principle animates the Board's reasoning in *CJ*, and Arbitrator Buffett's in *Millie Hedderson*. Employees certainly owe their Employers adequate advance information so as to ensure the environment of trust is maintained and to prevent needless confusion, suspicion, disruption, and cost. But it is crucial that the means for sharing that vital information safely must be secured and maintained. That failed to happen in the May 3 and May 12 meetings.

The key distinguishing feature of the instant case is clear evidence that the Grievor and her doctor made various interventions precisely related to the sick note both prior to the travel and also proximate to the discipline, which the Employer seems simply to have ignored. I note Ms. Combden's testimony (*cf.*, p. 17) that tends to provide some corroboration of Dr. Walker's account of the conversation she had with Ms. Dalton. It throws light on the Employer's assembly and integration of facts it was actually given that are pertinent to the instant situation before me.

The Employer also invoked the *Supreme Court of Canada's* Decision in *Québec Cartier* on the issue of post-grievance evidence. With respect, I do not find that the evidence tendered in this case fits the definition required under *Québec Cartier*, since it is my view that the Employer could and should have accessed the evidence within the period of its imposing the discipline.

I find, therefore that the evidence shows that it is more probable than not that the Grievor did not misuse sick leave.

DECISION

In light of the foregoing evidence and considerations, I find that

THE GRIEVANCE IS SUSTAINED.

The suspension is set aside. The Grievor is to be paid the withheld sick leave, and all references to the discipline are to be removed from the Grievor's personnel file. She is to be made whole for all lost benefits.

Respectfully submitted as the decision of the Arbitrator.

John A. Scott, Ph.D.
Arbitrator

November 29, 2011