

*Crown Employees*  
**Grievance Settlement  
Board**

Suite 600  
180 Dundas St. West  
Toronto, Ontario M5G 1Z8  
Tel. (416) 326-1388  
Fax (416) 326-1396

**Commission de  
règlement des griefs**  
*des employés de la  
Couronne*

Bureau 600  
180, rue Dundas Ouest  
Toronto (Ontario) M5G 1Z8  
Tél. : (416) 326-1388  
Télééc. : (416) 326-1396



GSB#2010-2420  
UNION#2010-0585-0018

**IN THE MATTER OF AN ARBITRATION**

**Under**

**THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT**

**Before**

**THE GRIEVANCE SETTLEMENT BOARD**

**BETWEEN**

Ontario Public Service Employees Union  
(Spicer)

**Union**

**- and -**

The Crown in Right of Ontario  
(Ministry of Labour)

**Employer**

**BEFORE**

Barry Fisher

**Vice-Chair**

**FOR THE UNION**

Adrienne Lei  
Dewart Gleason LLP  
Counsel

**FOR THE EMPLOYER**

Susan Munn  
Ministry of Government Services  
Legal Services Branch  
Counsel

**HEARING**

April 22, June 24, 2013

## Decision

[1] Although this grievance was framed as harassment and poisoned work environment claim, at its core it is really a claim that a previous Memorandum of Settlement was violated by the Ministry and as a result the Grievor suffered mental distress and a wage loss of one week's pay. The Grievor is also claiming punitive damages.

[2] The Grievor has been an employee of the Government since 1989. Since December 13, 2004 he has been an Occupational Health and Safety Inspector for the Ministry of Labour.

[3] On August 13, 2010, the Grievor, OPSEU and the Ministry of Labour settled a GSB case by means of a written Memorandum of Settlement ("MOS"). This grievance related to an allegation that the Grievors' disability was not being properly accommodated. The settlement contemplated that after working out a process of agreed accommodations, the Grievor would obtain a letter from his doctor clearing him for return to work. The relevant provision in the MOS stated as follows:

"5. Should the Grievor's family physician clear the Grievor to return to work under the conditions proposed, the Grievor will report for work on the next working day following receipt of the physician's note by the Employer"

[4] The Grievor was scheduled to see his doctor, Dr. Rosen, on August 20<sup>th</sup>.

[5] On August 19<sup>th</sup>, Jane Meagher was working at the office of Dr. Rosen as his medical secretary, a position she had held for 16 years.

[6] She testified that she received a phone call from a male who identified his name and where he was calling from. She did not recall the details of the identification. However she did clearly recall the content of the call because she was later reprimanded by her employer for her actions in relation to this call. The male caller asked for information regarding when the Grievor had seen Dr. Rosen. Ms. Meagher then looked up the dates on her computer by checking the OHIP records and provided that information to the male caller. She recalled that she relayed back to the caller about 5 or 6 appointments. The caller did not say that he had a medical consent from the Grievor. The call lasted about five minutes.

[7] The next day the Grievor came for his appointment with Dr. Rosen. Ms. Meagher told the Grievor about the phone call regarding his appointments. He was upset and told her that that caller had no authority to make that call. At a later time, he also had her listen to his cell phone and asked her if the voice that he played back to her was the same voice. She said that the voice on the cell phone was similar to the one from the male caller the day before.

[8] Dr. Rosen was upset with Ms. Meagher as she had broken a critical part of her job to maintain client confidentiality.

[9] At this point in hearing it became evident from the questions of Ministry counsel that it was the theory of the Ministry that the male caller may have been from the WSIB, not the Ministry of Labour. I therefore ordered the Union to obtain and produce the Grievor's WSIB file because if

there were such a phone call, there would most likely be a notation in the WSIB file. I told Ministry counsel that if the WSIB file contained no reference to such a call, then it would be her task to lead evidence that WSIB makes calls of this nature and does not make a record of such calls. Ministry counsel also indicated that if the call were not made from the WSIB, they would not call evidence to show that the call came from someone outside the Provincial Government.

[10] After the WSIB file was produced, there was no notation of the phone call on August 19<sup>th</sup> to Dr. Rosen. Furthermore, the Ministry called no evidence in this case.

[11] Much of the Grievors' evidence related to why he believed a certain manager was out to get him and why he firmly believed that it was that manager who called Dr. Rosen's office. I am not going to set out the nature of this evidence as it is not necessary for me to decide the issues in this case as there is no dispute that someone in the Provincial Government, other than the WSIB, made the call and improperly obtained the information from Dr. Rosen's office. I arrive at this conclusion because:

- a) Ms. Meagher's evidence on this issue was highly credible and in fact not attacked.
- b) The call did not come from the WSIB, there was no notation of this call noted in the WSIB file.
- c) The call did not come from someone outside the Provincial Government as the Ministry undertook to lead no evidence on this contention.
- d) Realistically the only possible persons who would want to check on whether or not the Grievor had actually attended a doctor's appointment as he said he did was either someone in management or in human resources at the Ministry of Labour.
- e) The Employer presented no evidence as to any legitimate need for this information. I even gave Ministry Counsel leave in her closing argument to now call evidence as to who made the phone call. She declined my invitation to call evidence on this issue.
- f) The Grievors' theory as to why this call was made was that someone was trying to build a case of fraud against him, as he had obtained reimbursement from the Ministry for these expenses. This theory seems quite plausible.

[12] The Grievor testified that when he got to see Dr. Rosen on August 20<sup>th</sup> he told the doctor about the phone call between his secretary and the male caller. Dr. Rosen immediately apologized for what his office had done and called Ms. Meagher into his office and made her apologize to him. Dr. Rosen then said the time was up even though did not deal with the return to work issue. The Grievor mentioned that he was losing money if he did not have the certificate. Dr. Rosen said that he would deal with it in the next appointment, which was scheduled for a week later.

[13] The Grievor went for the appointment a week later, got his fitness certificate and returned to work the next day. Because of the issue about the phone call and Dr. Rosen's rescheduling of his appointment, he lost a week's wages.

[14] He testified that upon finding out about this phone call he felt disgusted.

[15] In the labour relations world, honoring settlements is extremely important. Moreover, given the nature of settlement agreements, it is neither possible nor desirable to write out every possible aspect of how that agreement will be carried out. In other words, when it comes to carrying out the terms of a settlement, there is a mutual duty to do so in good faith.

[16] I have found that someone in the Provincial Government, and most likely from the Ministry of Labour, made an unauthorized call to the Grievors' personal doctor and obtained information to which he had no right whatsoever and which seriously breached the Grievors' privacy rights. This action resulted in the Grievor returning to work one week later that was anticipated by the MOS. Were it not for the improper phone call, the Grievor would have returned to work one week earlier and therefore would have received wages for that week.

[17] This is a clear breach of the Employer's duty to carry out the terms of the MOS in good faith. I therefore order that the Grievor be compensated for that lost weeks wages.

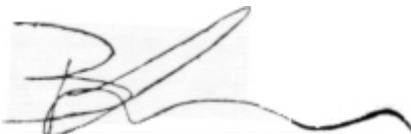
[18] However the Grievor is also entitled to a further remedy for this serious breach of the MOS. I am deeply troubled by the fact that Ministry apparently made no attempt to ascertain who in fact made this improper phone call. One would think that the Ministry would have some interest in trying to determine who in fact made such an inappropriate phone call, but apparently they did not.

[19] The Grievor indicated that these series of events caused him distress and that he felt disgusted by the actions of the person whom made the call to his doctor without his consent. The Grievor is entitled to monetary damages for his distress. Although he did not receive any medical attention for this distress, it does not mean that his distress was not real.

[20] I award \$2,500 to the Grievor for the mental distress that he suffered as a result of the improper phone call by an employee of the Provincial Government to his doctor. As these damages are not in the nature of replacement income, my understanding is that these damages are not subject to tax withholding nor are they to be considered as taxable income on the Grievors' T4.

[21] I remain seized of any matter relating to the interpretation and/or application of this award.

Dated at Toronto this 25<sup>th</sup> day of September 2013.

A handwritten signature in black ink, appearing to read 'Barry Fisher', is written over a light grey rectangular background. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Barry Fisher, Vice-Chair