IN THE MATTER OF AN ARBITRATION

BETWEEN

Nova Scotia Government and General Employees Union

-and-

Canadian Union of Public Employees, Local 1867

(the "Unions")

-and-

Province of Nova Scotia as represented by the Public Service Commission

(the "Employer")

AWARD

Grievance – Short Term Illness Benefits

Adjudicator:	Lorraine P. Lafferty, Q.C.
Representing the Unions:	David Wallbridge
Representing the Employer:	Kevin Kindred
Written Submissions Received:	Unions – May 21, 2021 Employer – June 11, 2021 Unions – June 18, 2021
Date of Award:	September 14, 2021

1. The Employer provides short-term illness ("STI") benefits to employees including those who belong to NSGEU and CUPE, Local 1867 (the "Unions"). The Unions each filed a policy grievance grieving changes the Employer introduced to the administration of STI benefits. I was appointed by the Minister of Labour to adjudicate the NSGEU grievance. The parties then agreed I should act as mediator/adjudicator for both the NSGEU and CUPE grievances jointly and agreed that where the parties were unable to settle a grievance through mediation, I should determine the grievance by adjudication. The parties organized the administrative changes grieved by the Unions under four distinct headings: information requested on the STI benefits application form; use of an initial telephone assessment; repayment of STI benefits overpayment; and STI program guidelines. There were multiple issues to address under each heading.

2. The parties engaged in mediation over three consecutive days in October 2019. Another mediation day was held in May 2020 and a subsequent day held in July 2020. By agreement of the parties, this Award is issued to adjudicate two specific areas of contention that remained outstanding after the mediation days and not subsequently resolved. The parties provided written submissions on these issues. One issue relates to an optional long-term disability ("LTD") medical information consent as well as return to work information the Employer included as part of the STI application form. The other issue relates to the Employer's use of an initial telephone assessment for STI benefits entitlement. Each issue has two sub-issues.

3. Both parties acknowledged in their written submissions general principles that govern employee sick leave benefits. First, employees must demonstrate their entitlement to the benefits. Second, an employer may, within limits, acquire access to an employee's personal health information to support entitlement to the benefits. Third, employer business interests and employee privacy interests with respect to the release of confidential medical information must be balanced appropriately. Fourth, the interests of the parties are subject to any applicable provisions of the collective agreement or legislation. Both parties referred me to *Hamilton Health Sciences Corp. v. O.N.A.*, 2007 CarswellOnt 9197 (Surdykowski)

("Hamilton Health Sciences") where the arbitrator set out these principles as follows (at para. 24-25):

> As a general matter, the employer is entitled to sufficient "proof" of the employee's assertion that she is unable to attend work due to illness or injury and entitled to benefits. . . . .What information is the employer entitled to and what information must the employee provide?
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> As a matter of general principle in that latter respect, what is required is sufficient reliable information to satisfy a reasonable objective employer that the employee was in fact absent from work due to illness or injury, and to any benefits claimed (see Arbitrator Swan's comments in *St. Jean de Brebeuf Hospital v. C.U.P.E., Local 1101* (1977),16 L.A.C. (2d) 199 (Ont. Arb.) at pp. 204-206). As a general matter, the least intrusive non-punitive interpretative approach that balances the legitimate business interests of the employer and the privacy interests of the employee is appropriate. But what the employer is entitled to, and concomitantly what the employee is required to prove, will first and foremost depend on what the collective agreement or legislation provide in that respect.

Issue 1: The STI Benefits Application Form

4. A large part of mediation time was spent addressing what information the Employer could require on the initial application form used by employees to apply for STI benefits. At the conclusion of the first three days of mediation, much progress had been made on the format and content of this initial application form. The Employer maintained however that all of the grievance issues under each of the organized headings would have to be resolved in order to reach settlement and dispense with adjudication. In other words, agreements achieved along the way on some grievance issues were conditional on eventual agreement and settlement of all grievance issues. As it happened, at the end of the first three days of mediation, the parties asked me to rule on one issue relating to repayment of STI benefit overpayments where their respective positions could not be mediated. After receiving written submissions, I delivered an Award dated January 31, 2020. The effect of this Award was to adjudicate a specific issue regarding repayment of STI benefits overpayment separately from other grievance issues which were not settled and remained outstanding.

5. One day of mediation was next held on May 13, 2020. Additional time was spent on the STI benefits application form. At the end of the day, after much give and take on both sides, the parties arrived at an application form that was acceptable to all. On June 11, 2020, the Employer forwarded to the Unions a copy of the application form as agreed on May 13, 2020 with the following words: "Attached is the STI Application Form as agreed to during mediation . . .". At the time, although the format and content of the STI application form had been agreed, other grievance issues were unsettled and remained outstanding.

6. Subsequently, without notice to the Unions, the Employer introduced amendments to the STI application form that had been agreed to on May 13, 2020. There were two amendments. One amendment added an optional LTD consent the employee could sign permitting disclosure of their STI medical information to the Employer's long-term disability benefits insurer. The other amendment added a request for information from the employee and the employee's medical practitioner regarding factors that might delay the employee's return to work or affect the period of impairment. The Unions objected to these amendments on two grounds: (a) the parties had already reached agreement on the format and content of the STI application form; and (b) the substance of each amendment was not permissible. The Employer dissented on the basis that (a) there was no binding settlement on the issue of the STI application form unless and until all outstanding grievance issues were settled; (b) the amendments were permissible and appropriate.

(a) Was there agreement on the format and content of the STI benefits application form?

7. The Unions maintain that during mediation the parties engaged in negotiations that resulted in an agreement on the format and content of the STI benefits application form. The Unions point to the Employer's email of June 11, 2020 as evidence that at the end of the day on May 13, 2020 there was a meeting of the minds between the parties regarding the application form. The Employer argued there was no meeting of the minds to constitute a binding agreement since the Employer had made it clear early in the mediation process that resolution of all the issues in dispute was needed to settle the

grievances. At the time when the STI application form was agreed to, other grievance issues remained unsettled which in the Employer's view negated a binding agreement with respect to the content of the STI application form.

8. The parties agreed that the arbitral award in *Ontario (Ministry of Children and Youth Services) and OPSEU* (Coelho), 2013 CarswellOnt 14287 (Lynk) sets out principles for determining whether settlement has been reached. That award refers to the classical principles of offer, acceptance and consideration. The key determinant, applying an objective test, is whether the parties intended to achieve resolution (at para. 33).

9. During the mediation process the parties engaged in the give and take of negotiation that led to the format and content of the STI benefits application forwarded to the Unions by the Employer on June 11, 2020 and relied on by the Unions as representing agreement between the parties. Various offers and acceptances on the content of the application form were exchanged during the course of mediation. Concessions and trade-offs were made by both sides and every concession and trade-off made was a form of consideration that led to achieving agreement on the form. The parties agreed to the form of the document on May 13, 2020 and indeed the Employer's email of June 11, 2020 forwarding the document to the Unions was consistent with that agreement between the parties. Objectively, the parties intended to reach resolution on that issue. The Employer's decision to proceed unilaterally to amend the STI application form in the face of that agreement was surprising when so much time and effort had been put into achieving a result that the parties could accept. It is also true though that the Employer had asserted early in the mediation process that resolution of all issues in dispute was required to settle the grievances and at the time when the STI application form was agreed to, other grievance issues remained unsettled. I am reluctantly compelled to find that the agreement reached on May 13, 2020 was not final but was conditional on all of the grievance issues in dispute being resolved, which did not happen. Consequently there was no binding agreement on the parties regarding the format and content of the STI application form. Even though the Unions were no longer going to pursue changes to the application form after May 13, 2020, my conclusion would have been the same had the Unions, not the Employer, decided to introduce amendments to the STI application form while other grievance issues remained unsettled.

(b) If there was no binding agreement on May 13, 2020, are the Employer's amendments permissible?

(i) Amendment #1 - Optional LTD Consent

10. The Employer's first amendment to the STI application form added an optional LTD medical consent which an employee could sign to permit disclosure of their STI health information to the Employer's LTD insurer should the employee later apply for LTD benefits related to the STI. The consent, as written, stated as its purpose to "facilitate administrative efficiency in support of an LTD application if that becomes necessary." In other words, the consent would have not have a present use in relation to STI benefits administered by the Employer but possibly a future use in relation to LTD benefits administered by a different agency.

11. The Unions opposed this "prospective" consent to release information to a third party citing Arbitrator Surdykowski's decision in *Hamilton Health Sciences* that it is not appropriate to require an employee to sign a prospective consent because it excludes the employee from the "confidential medical information loop" (at para. 35):

> A "basket" consent that purports to authorize anyone who the employer may ask to release confidential medical information is not appropriate. Nor is it appropriate to require an employee to sign a forward-looking consent that may exclude her from the confidential medical information loop. The overwhelming weight of the arbitral jurisprudence takes a dim view of consents that purport to give an employer prospective permission, particularly where the consent purports to permit the employer to unilaterally (with or without employee approval) initiate direct contact with a doctor or other custodian of confidential medical information. Every contact should be through or at the very least with the knowledge and consent of the employee, a separate consent should be required for every contact, and every consent should be limited to the completion of the appropriate form or the specific information required, as appropriate.

12. The Employer acknowledged that it cannot *require* an applicant for STI benefits to provide the requested LTD consent prospectively but submitted it can provide an applicant with an option on the STI application form to *voluntarily* provide the prospective consent. The

Employer submitted that the LTD consent as proposed is clearly printed on the STI application form under the heading "Optional Consent" consistent with guidance provided by the arbitrator in *Hamilton Health Sciences*, at para. 37:

> What an employer can require of an employee should not be mixed into the same form or same section of the form as what it can ask an employee to volunteer. If a single form used, it must clearly distinguish between what information is required (i.e. what the employer or its agent is entitled to) and what the employee is being asked to volunteer (i.e. what information the employer or its agent would like to have if the employee is willing to allow the employer to access).

13. The Employer also argued that the optional LTD consent is solely in the applicant's interest as it reduces the possibility of delay in payment of benefits to an employee who may later have to transition from STI benefits to LTD benefits. The Unions submitted the Employer cannot present the LTD consent to an employee in the initial STI application form but could reasonably present the LTD consent at a later time when it appears the employee is likely to require LTD benefits which would achieve the Employer's stated purpose of reducing the possibility of delay in payment of benefits.

14. Regarding the arbitrator's comments on consent in *Hamilton Health Sciences,* I understand the arbitrator was primarily addressing situations where an employer asks an employee to consent in advance to the employer obtaining disclosure of additional employee health information from a doctor or other third party in order to assess ongoing benefits entitlement. In this context, the arbitrator states that the employee may volunteer to consent in advance to the release of more health information than is immediately required at the time when the consent is given. The arbitrator's comments do not appear to address directly the situation where the employer asks an employee to volunteer consent to release confidential health information the employer has or may have in its possession to a third party recipient such as an LTD insurer at a later time for the purpose of the employee obtaining a different sick leave benefit, although similar privacy considerations regarding the release of health information would apply.

15. In *Hamilton Health Sciences* one of the issues that arose was related to the employer's decision to include in its sick leave benefits application form a consent to allow it to receive information from the Workplace Safety Insurance Board ("WSIB"), a third party agency which had its own consent forms and its own return to work process. The employer sought the information so that it could coordinate with the WSIB on the employee's return to work efforts. The arbitrator held there was no basis to include the consent in the benefits application as the WSIB process was a separate matter with its own forms and adjudicative process.

16. The stated purpose of the optional LTD consent proposed by the Employer is not related to obtaining STI benefits but is to assist the employee in obtaining LTD benefits. The release of information could also assist the LTD insurer although the LTD insurer is likely to have its own forms and adjudicative process. I find that because the optional LTD consent is not required for the purpose of administering the Employer's STI benefits it is not appropriately included in the STI application form in the first instance notwithstanding the employee's consent may be given voluntarily and the apparent convenience and efficiency of doing so prospectively. This does not rule out the possibility, as the Unions suggest, that an LTD consent could be presented prospectively to an employee on a case-by-case basis with proper indication of voluntariness at a later stage in the benefits process when there is some indication of a likely need for LTD benefits. At the initial application stage for STI benefits however the situation fits with the Arbitrator Surdykowski's comments in *Hamilton Health Sciences* on convenience and efficiency balanced with giving due consideration to what is required for the particular purpose of the benefits application (at para. 38):

> The fact that a new focused consent is required every time an employer seeks to acquire confidential medical information from someone other than the employee may appear to be inconvenient or inefficient, but convenience or efficacy do not modify an employee's privacy rights. This approach will also both encourage the employer to act reasonably and with due consideration of what it really requires for the particular purpose, and offer some comfort to an employee who may already be feeling vulnerable and exposed.

17. Based on the foregoing, the Employer's first amendment to the STI benefits application form to include an optional LTD consent is disallowed.

(ii) Amendment #2 - Request for Return to Work Information

18. The Employer's second amendment to the STI application form asks the employee and the employee's medical practitioner for information on factors that may delay the employee's return to work or affect the period of impairment. The Employer submitted that obtaining this information aligns with its interest in returning the employee to work as soon as possible with reasonable accommodation, acknowledging in its written brief that the information is not asked for the purpose for determining entitlement to STI benefits.

19. The Unions objected on the basis that this information is not necessary to establish entitlement to sick leave benefits at the initial STI application stage. The Unions cited *Hamilton Health Sciences* as authority that information required at the application stage is limited to the general nature of the illness, that the employee is following a treatment plan, the employee's expected return to work date and the duties an employee can and cannot perform. Requesting information on factors that may delay the employee's return to work or affect the period of impairment, in the Unions' submission, is an unreasonable infringement of the employee's very significant and acknowledged right to privacy regarding health information and is unwarranted at the initial application stage of determining STI benefits entitlement.

20. The Unions' argument depends heavily on the fact that the STI benefits application form is used by employees at the initial stage of applying for STI benefits. It is an application of first instance when at this initial stage of application applicants are for the most part all treated alike until benefits entitlement is established. This is important because as described in *Hamilton Health Services* there is more than one stage to the process of obtaining STI benefits and an employer is entitled to less information at the initial application stage than at later stages. At the initial stage, the information does not include "return to work accommodation considerations other than whether there are likely to be any restrictions on the anticipated return to work date" that would require accommodation

at the return to work date (at para. 35). A requirement for longer term work accommodation considerations may well be appropriate but at a later benefits stage and on a case-by-case basis.

21. The Employer argued in part that the STI application form does not represent the initial application stage of the STI benefits process. This argument is tied to the Employer's introduction of an initial telephone assessment ("ITA") for determining entitlement to benefits which takes place when an employee first makes a claim for benefits. The ITA, which may or may not settle an applicant's entitlement to benefits, was also grieved by the Unions and will be addressed later in this award. The parties were agreed however that the scope of the ITA is limited to what can be requested on the STI application form in the first instance.

22. I find that the STI benefits application is an application of first instance that is used to determine entitlement to benefits, whether or not an ITA is engaged. I also find that the additional information requested by the Employer's amendment to the STI application form regarding factors which may delay the employee's return to work or affect the period of impairment is not reasonably necessary to determine benefits at the initial application stage although the information might later be beneficial to the Employer in some cases. Arbitrator Surdykowski in *Hamilton Health Sciences* had the following to say about an employee's privacy right to health information when applying for benefits in the first instance (at para 45):

> A right that cannot be exercised is no right at all. Although early broad disclosure might prove to have been useful in a particular case, this does not mean such broad disclosure is necessary or appropriate in the first instance in every case as a matter of general policy.

23. The Employer referred me to *Canadian Bank Note Co. and IUOE, Local 772*, 2012 CarswellOnt 10489, a later award also issued by Arbitrator Surdykowski. There the arbitrator refers to situations involving an employee's ongoing absence where information on accommodation may be required (at para. 27):

> In the case of an ongoing absence, the employer is also entitled to an indication of when the employee is likely to be able to return to work safely, and in appropriate circumstances to any restrictions or accommodation that may be required in that respect.

The arbitrator also addressed the sensitivity of confidential medical information which necessitates a conservative approach to disclosure limiting it to no more than is reasonably necessary to establish the employee is unable to work due to illness or injury (at para. 29). I apply a conservative approach to the disclosure requested by the Employer in relation to the initial application for STI benefits and disallow the Employer's second amendment to the application form requesting information on factors that may delay the employee's return to work or affect the period of impairment. It is possible this information would be appropriately requested at a later stage of the benefits process in the case of an employee's ongoing absence due to illness.

Issue 2: The Initial Telephone Assessment

24. The initial telephone assessment ("ITA") introduced by the Employer involves a telephone conversation between a representative of the Employer's STI administrator and an employee that takes place when an employee first applies for benefits. During the telephone call, the administrator will ask the employee for information to assess the employee's entitlement to benefits. The parties agreed that the administrator is restricted to asking only for information that is within the scope of the STI benefits application form. If, based on this ITA, the administrator is satisfied of the employee's entitlement to benefits, the employee is not required to provide a medical certificate to support the application. If entitlement is not satisfied, the employee will have to provide a medical certificate with the application for further assessment of entitlement.

25. The Unions grieved the ITA process on a policy basis objecting to what they described as the Employer's policy to refuse to accept or consider an employee's completed STI application form with a supporting medical certificate unless the employee participates in an ITA which could result in the employee not receiving entitled benefits. The Employer responded

submitting this issue is not proper subject matter for a policy grievance and should not be heard until a grievance is filed with specific facts to adjudicate. The Employer also submitted that using the ITA as a means of assessing benefits entitlement at the initial application stage is within the scope of its management rights.

(a) Are there grounds for a policy grievance?

26. The collective agreements of both Unions provide for policy grievances: see NSGEU, Article 29.09 and CUPE, Local 1867, Article 1.03(22). I accept the modern approach to policy grievances as submitted by the Unions that a union may bring a policy grievance on a matter of general interest to the membership whether or not an individual union member is seeking a remedy at the time of the policy grievance and also that policy grievances and individual grievances are not mutually exclusive: see Brown & Beatty, *Cdn. Labour Arbitration*, 5th ed., at 2:3124.

27. I find the Employer's administrative change introducing an ITA to determine an employee's STI benefits entitlement raises a matter of general interest to the Unions that potentially affects all of its members which is whether the Employer can require employee Union members to engage in an ITA as a matter of course failing which the employee could be denied benefits. Thus the administration of the ITA is proper subject matter for policy grievances filed by the Unions and it was not necessary for the Unions to have a specific factual situation pertaining to an individual Union member to grieve the Employer's change in administrative policy requiring participation in an ITA when applying for STI benefits.

(b) Is an employee required to participate in an ITA?

28. The Unions did not object to the Employer's telephone assessment process *per se* acknowledging that the ITA has value and may further the interests of employees in many circumstances since the ITA may dispense with the need to provide a supporting medical certificate with an application for sick leave benefits. The Unions expect that most bargaining unit members will participate in an ITA when asked. The Unions objected to what

they described as the Employer's policy to refuse to accept or consider a completed STI benefits application form with a supporting medical certificate if an employee does not participate in an ITA. They maintained that an employee cannot be required to engage in an ITA. Some employees may have personal concerns related to privacy, or a medical condition (e.g. anxiety), or have had a previous poor experience with telephone calls, preferring to submit an STI application form with a medical certificate without participating in an ITA. The Unions maintained that the collective agreement permits these applicants to bypass the ITA, if they wish. If the Employer refuses to accept a completed application form with a medical certificate confirming illness in lieu of a telephone assessment, employees may be wrongfully denied benefits to which they are rightfully entitled.

29. The Unions submitted based on previous arbitral authority that short-term illness benefits while worded in the Unions' collective agreements as discretionary by way of the phrase "may be granted" (NSGEU Article 25.02 and CUPE Article 22.02) are nonetheless enforceable as of right by employees and cannot be withheld at the discretion of the Employer. The Unions cited *NSGEU and Civil Service Commission (Re Grievance of Alexandra Blue)*, September 1, 1987 (unreported), an award delivered by Arbitrator Outhouse later referred to with approval by Arbitrator Kydd in *NSGEU and Department of Human Resources (Re The Grievance of "J"*), February 16, 1998 (unreported). Each of these cases concerned an employee who was discharged due to innocent absenteeism and in each case the arbitrator overturned the grievor's discharge on the basis that an employer cannot discharge an employee for innocent absenteeism where the employee has not exhausted illness or disability benefits due under the collective agreement. The Unions argued from these cases that the Employer cannot refuse to pay STI benefits due under the collective agreements if an employee submits a completed application form with a satisfactory medical certificate in lieu of participating in the ITA.

30. The Employer disagreed with the Unions that it has a policy to refuse to accept or consider an employee's STI application and medical certificate unless the employee participates in an ITA. Rather, the Employer asserted that it has a policy to require an employee's participation in the ITA as part of the initial stage of an application for benefits to determine whether a supporting medical certificate is required and exercises discretion to waive the

ITA where appropriate. The Employer stated it would waive participation in the ITA for example where an employee was physically unable to speak for some reason (e.g. in a coma) and, in any case where an employee could not participate in an ITA due to disability, it would have a duty to accommodate. If the Employer did not accommodate, a Union grievance could follow. The discretion to waive ITA participation rests however with the Employer, not with the employee. The Employer's position is that it must administer the ITA reasonably and if it does not exercise its discretion reasonably to waive an ITA based on specific circumstances in any particular case, the Unions may grieve. Where an employee is able to participate in the ITA, the Employer will expect the employee to do so.

31. From the Employer's perspective the ITA is an efficient way to process an STI benefits application because it generates savings in time and cost for both the employee applicant and the Employer when a supporting medical certificate is not required. The employee who has to provide a medical certificate often has to incur a cost to obtain the certificate. The Employer incurs greater cost if its STI administrator has to review medical documentation. There is as well a cost to the overall health care system when physicians have to use their time to complete these certificates. Further, the Employer submits the ITA is a less intrusive means of assessing an application for benefits than requiring a medical certificate in every case.

32. The Employer relied on *Re Columbia Forrest Products and USW Local 1-2010 (Weekly Indemnity Forms)*, 2017 CarswellOnt 15495 where the union argued that the only requirement for an employee to access benefits in the first instance was to provide a "doctor's slip" since a doctor's slip was the only reference in the collective agreement for confirming medical reasons for absence. The issue was whether the employer could also require employees to provide information on a standardized form to apply for benefits. The language of the collective agreement read:

> 14.03(b) . . . It is also agreed and understood that where an employee is unable to return to work, he will be required to show proof to qualify for the above.

The arbitrator found, based on this language, that providing proof of inability to return to work was a pre-condition for an employee to qualify for the benefits. Apart from this language however there was no other language in the collective agreement to preclude the employer from requiring employees to complete a standardized form as a pre-condition to qualify for benefits. The arbitrator held that it was a reasonable exercise of the employer's management rights to require an employee to complete a standardized form providing information that could be reasonably requested at the time of application (at para. 34). Thus the employer was permitted to require employees to complete a standardized form as a pre-condition for obtaining benefits.

33. I do not disagree with the Unions that sick leave benefits are enforceable as of right by employees, subject however to the principle that employees must first demonstrate their entitlement to benefits. The arbitral jurisprudence on innocent absenteeism cited by the Unions established that sick leave benefits are not discretionary; that is, where an employee establishes entitlement, the benefits cannot be denied. The question here, which was not addressed in those cases, is how employees apply for their entitlement to STI benefits in the first instance. The Unions did not challenge the Employer's pre-grievance requirement that an employee must apply for benefits and submit a completed STI benefits application form to obtain the benefits. The Unions challenged only the Employer's additional application requirement that employees participate in an ITA and challenged this requirement only for employees who wish to submit a completed application form with a medical certificate in lieu of engaging in an ITA, even though the ITA might dispense with the need to produce a medical certificate.

34. Although the Unions presented as their case that the Employer will refuse to consider an application for STI benefits from an employee who, for whatever reason, refuses to engage in an ITA, I accept and find that the Employer's ITA policy, as described by the Employer, requires participation in an ITA as part of the initial stage of application for STI benefits with Employer discretion to waive the ITA where appropriate and that such discretion must be exercised reasonably. The Unions maintained however that the Employer "cannot, in any

circumstance, refuse to accept and consider an application for sick leave, particularly when a medical certificate is provided, simply because an employee did not engage in an ITA."

35. The Unions referred to *Cypress Health Region and SEIU-West (Chess)*, 2014 CarswellSask 429 (Ish) which similarly addressed a policy grievance where the union grieved the employer's administration of sick leave benefits. The employer's policy in that case mandated a follow-up telephone call between a manager and an employee whenever an employee reported an absence from work. The purpose of the call was to determine what work the employee could do in order to remain at work. There was no managerial discretion to waive the telephone call where the manager knew, without a telephone call, the employee could not return to work, even though in practice a telephone call was not always made in these circumstances. The arbitrator held there should be no blanket policy requiring a telephone call by a manager to every absent employee but rather a manager should exercise discretion on a case-by-case basis when deciding to make a telephone call (at para. 90). The Unions relied on this case to argue against a blanket policy of the Employer requiring an ITA as part of an application for STI benefits because the Employer can obtain the same information from the STI application form. I note though that the Employer's ITA is intended to occur before a completed STI application form is submitted to determine whether or not there is need to provide a medical certificate to support the STI application. Further, unlike the situation in *Cypress Health Regional*, *supra,* where a telephone call was mandatory, the Employer here has stated it will exercise discretion to waive the ITA where appropriate.

36. The fundamental position of the Unions is that an employee can opt out of the ITA part of the Employer's application process for sick leave by submitting a completed application form with a medical certificate. Whether an employee is able to opt out requires interpretation and application of the relevant provisions of the collective agreements. What did the parties bargain? Because the collective agreements of the respective Unions are not identical, they will be considered separately.

(i) NSGEU – Article 25 Sick Leave

37. The relevant provisions of the NSGEU agreement are Articles 25.02 (Short-Term Illness Benefits), 25.08 (Proof of Illness), 25.09 (Sick Leave Application) and 25.13 (Deputy Head Approval). These Articles read as follows:

> **25.02 Short-Term Illness Leave Benefit**
> **(a)** Subject to Article 18.05, an employee who is unable to perform his/her duties because of illness or injury for a period of absence exceeding three (3) consecutive work days, may be granted leave of absence at full or partial pay for each incident of short-term illness in accordance with the following: (1) for employees with less than one (1) year of service, ... ; (2) for employees with one (1) or more years of service, ...
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> **25.8 Proof of Illness**
> An employee may be required by the Deputy Head or delegated official to produce a certificate from a legally qualified medical practitioner for any period of absence for which sick leave is claimed by an employee and if a certificate is not produced after such a request, the time absent from work will be deducted from the employee's pay. When the Deputy Head has reason to believe an employee is misusing sick leave privileges, the Deputy Head or delegated official may issue to the employee a standing directive that requires the employee to submit a medical certificate for any period of absence for which sick leave is claimed.
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> **25.9 Sick Leave Application**
> Application for sick leave for more than three (3) consecutive work days but not more than five (5) consecutive work days, shall be made in such manner as the Employer may from time to time prescribe and when the application for sick leave is for a period of more than five (5) consecutive work days, it shall be supported by a certificate from a medical practitioner.
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> **25.13 Deputy Head Approval**
> An employee may be granted sick leave with pay when he/she is unable to perform his/her duties because of illness or injury provided that he/she satisfies the Deputy Head or delegated official of this condition in such manner and at such time as may be determined by the Deputy Head, and provided he/she has the necessary sick leave credits.

38. Article 25.02 describes the ratio of sick leave pay to years of service. Article 25.08 which applies to all absences due to illness provides that an employee may be required to produce a medical certificate as proof of illness for any period of sick leave absence. Article 25.09 states that an application for sick leave of any duration of absence shall be made in such manner as the Employer prescribes. It also distinguishes between absences of four and five consecutive work days and absences of more than five consecutive work days. Applications for absence of four and five work days do not have to be supported by a medical certificate whereas applications for absence of more than five consecutive work days are required to be supported by a medical certificate. Article 25.13 applies specifically to paid sick leave. Paid sick leave is granted provided an employee satisfies the Deputy Head or designate regarding illness or injury in such manner as may be determined by the Deputy Head, and the employee must have the necessary sick leave credits.

39. The Unions submitted they do not advocate that the Employer must ask for a medical certificate in every case of absence greater than five days and they agree that employers generally must reduce their reliance on doctors' notes. They argue strenuously however that pursuant to Article 25.08 (Proof of Illness) the parties have agreed that a medical certificate is satisfactory proof of entitlement to sick leave and therefore the Employer cannot in any circumstances refuse to consider a completed application form with a supporting medical certificate if the employee does not engage in the ITA process.

40. Article 25.09 (Sick Leave Application) is the most pertinent provision for purposes here. This Article outlines that an application for sick leave is required for absences of more than three consecutive work days. The Article expressly permits the Employer to prescribe how an application for sick leave should be made. Drawing on *Re Columbia Forrest Products and USW Local 1-2010 (Weekly Indemnity Forms), supra*, I find that applying for sick leave in the manner prescribed by the Employer is a pre-condition to receiving sick leave with pay under Article 25.02 and Article 25.13. Prior to the introduction of the ITA, the manner of application for sick leave prescribed by the Employer, which the Union has not challenged, required employees to use an approved STI benefits application form. Article 25.09 also permits the Employer to revise the prescribed manner of application from time to time. The Employer has now revised the prescribed manner

of application to also require employees to participate in an ITA. Where the employee's application is for sick leave of more than five consecutive workdays, the Article states that an application shall be supported by a medical certificate. A medical certificate is a supporting document to whatever manner of application the Employer may prescribe under Article 25.09. The Union submitted that the Employer does not have to require a medical certificate in every circumstance and welcomes the Employer's position that an ITA may serve as satisfactory proof of entitlement without a medical certificate.

41. I find that the manner of application for sick leave prescribed by the Employer pursuant to Article 25.09 includes participation in an ITA, the purpose of which is to assess whether there is need to provide a supporting medical certificate with the application. Dispensing with the medical certificate spares the employee, the Employer, and the health care system in general time and cost. The Employer is restricted during the ITA to seeking information that is covered by the STI application form and the STI application form is limited to seeking only information that is reasonably required on an initial application for benefits. The Employer has discretion to waive the ITA where it is reasonable to do so. The Union may grieve in any case where the Employer does not exercise its discretion reasonably. Although the Union expressed concern that an employee entitled to receive STI benefits due to illness or injury may not receive those benefits, an employee will not be denied benefits if he or she applies for benefits in the manner prescribed by the Employer and satisfies the Employer of illness or injury. It lies with the employee to comply with the Employer's application process as a pre-condition to access benefits. Compliance applies equally to an ITA and an STI benefits application form. The Employer's right to prescribe the manner of application under Article 25.09 is subject to reasonableness. I find that the Employer's prescribed manner of application, which includes a requirement to participate in an ITA that will be waived by the Employer in appropriate circumstances, is reasonable. The Union's objection to the ITA is therefore dismissed.

(ii) CUPE, Local 1867 – Article 22 Sick Leave Provisions

42. The relevant provisions of the CUPE, Local 1867 agreement are Article 22.02 (Short Term Illness Benefits) and Article 22.10 (Proof of Illness). The Articles read:

> **CUPE, Local 1867**
> **22.02 Short Term Illness Leave Benefits**
> A regular employee who is unable to report for work because of illness or injury for a period of absence exceeding three (3) consecutive work days may be granted leave of absence at full or partial pay for each incidence of short-term illness in accordance with the following . . .
>
> **22.10 Proof of Illness**
> An employee may be required to produce a certificate from a medical practitioner for any period of illness and shall be required to produce a certificate from a medical practitioner for any period of illness in excess of three (3) days.
>
> A certificate from a medical practitioner shall be in a form prescribed by the Employer.

43. Article 22.02 provides that STI benefits are available for sick leave exceeding three consecutive work days. Article 22.10 provides that the Employer may require a medical certificate for any period of illness and shall require a certificate for absences in excess of 3 consecutive work days.

44. The collective agreement is silent on how application for STI benefits should be made. In light of this silence, I find that the Employer may rely on its management rights to prescribe the manner of application for benefits. Pre-grievance, the Employer required employees to complete an application form to apply for benefits and the Union has not challenged this requirement. The Employer relying on its management rights has now added an ITA to the application process for STI benefits. The information the Employer seeks as part of the ITA is limited to information covered by the STI application form which is limited to information that can be reasonably required on an initial application for benefits. The Employer has discretion to waive participation in an ITA and must exercise that discretion reasonably. The Union may grieve in any case where discretion is not exercised reasonably. Considerations noted previously regarding time and cost to the employee, the Employer and the health care system in general are also applicable here. I find that the Employer's prescribed manner of application for STI benefits which includes participation in an ITA that will be waived in appropriate circumstances is reasonable and permissible under the collective agreement. The Union's objection is to the ITA is dismissed.

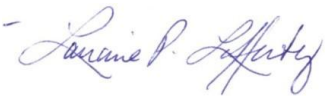
Conclusion

45. In conclusion, I find and declare as follows:

(1) The Unions' objections to the Employer's STI application form amendments introduced after May 13, 2020 succeed. The Employer is not permitted to amend the STI application form to include an optional LTD medical information consent and is not permitted to add a request to the application form that the employee and the employee's medical advisor identify factors that may delay the employee's return to work date or affect the period of impairment.

(2) The Unions' objection to the Employer's use of an initial telephone assessment ("ITA") when assessing an application for STI benefits does not succeed. The Employer does not violate the respective collective agreements when it requires employees to engage in an ITA at the initial stage of the application for benefits. The Employer must however use reasonable discretion in waiving the ITA requirement where circumstances warrant. If the Employer does not exercise its discretion reasonably to waive the ITA, the Unions may grieve accordingly.

DATED AT Halifax, Nova Scotia, this 14th day of September, 2021.



Lorraine P. Lafferty, QC
Adjudicator