In the matter of an arbitration:

Between:

Ontario Public Staff Services Employees Union
(Union and Grievor)

- and -

Ontario Public Services Employees Union

BEFORE	Reva Devins	**Arbitrator**
FOR THE UNION	Sarah Molyneaux	
FOR THE EMPLOYER	Mark Mendl Treasury Board Secretariat Legal Services Branch Counsel	
HEARING	June 29 and August 4, 2020 by video conference, written submissions on August 13, 26 and September 4, 2020 and conference call on November 9, 2020	

Decision

[1] There are two grievances before me, a policy grievance filed by the staff Union and another filed by an individual member. Both grievances challenge the current Application for Disability Benefit Form (the "STIPP Form") used by the insurer, SSQ, to determine eligibility for Short Term Income Protection.

[2] Despite efforts to resolve this matter, the parties ultimately sought an arbitral award. They agreed that the arbitration would proceed by videoconference, with written Will Say Statements, oral cross examination and re-direct and written argument.

Background

[3] The grievances were filed under the collective agreement that was in force from July 1, 2016 to March 9, 2019. Entitlement to short term sick benefits is governed by Article 23 of the agreement: the Employer is obliged to provide full income replacement for the first seven days of absence, known as the waiting period, and up to an additional 83 days, capped at 75% of the employee's wages, can be awarded during the subsequent "benefit period". Pursuant to a contract with the Employer, SSQ administers the plan during the benefits period, reimbursing the Employer to a maximum of $900 per week, with any balance owing to the employee paid by the Employer.

[4] Employees are required to provide a medical note after five consecutive days of absence during the waiting period; they must also submit medical proof of their ongoing entitlement to benefits during the benefit period. To assist it in determining an employee's entitlement, SSQ has created detailed forms, stipulating that claims will not be approved unless the STIPP Forms and associated consent are completed.

[5] There are a number of questions in the Forms that the Union and the Grievor maintain are inappropriate, including those that ask for:

1. Diagnosis
2. Current symptoms, dates of previous episodes
3. Medication details, including dosage
4. Test results, X-rays, ECG reports
5. Whether the symptoms have psychotic elements or is related to pregnancy
6. Personal information such as whether the absence from work relates to marital/family life issues, personal problems, or alcohol, drug or gambling abuse.

[6] The Union also takes issue with the breadth of the consent to release personal information, including the authorisation that information can be shared with the Employer.

[7] The Forms, in one variation or another, have been in continuous use for a number of years. Several current and former Union executives have completed the Forms personally, however, this is the first time that they have been challenged.

[8] The individual Grievor was off work from January 29, 2018 to February 18, 2018. He provided the Employer with a medical note advising of his need for sick leave and he was paid 100% of his wages for his first seven days of absence. He then received the disputed STIPP Form to complete and return to SSQ to obtain benefits for the remaining period of his absence.

[9] The Grievor was concerned about what he perceived as an overly broad consent for the release of his personal medical information and the invasive nature of some of the questions. Although he did not advise the Employer at the time, his concern stemmed from the highly personal circumstances surrounding his illness. He objected to completing the Form, citing his concern that it breached his privacy rights. He offered to provide a more detailed medical note as an alternative, but his offer was declined. Since the Grievor did not submit the required Forms, his file was closed by SSQ and the Grievor used other credits to cover his remaining time off. He returned to work as scheduled in February 2018. The Grievor stated that the inability to access benefits caused him additional stress during a difficult time in his life.

[10] Cheri Hearty, a steward and former member of the Joint Benefits Administration Committee ("JBAC") and Tim Mulhall, the current Chief Steward, both testified to their knowledge of the STIPP Form. Ms. Hearty stated that she was unaware of the content of the Form or extent of the release until the Grievor brought it to her attention. She had no evidence to refute the Employer's assertion that there had been over 450 Forms submitted prior to 2018. However, based on her experience with members seeking benefits, she believed that many of the applicants may have felt financial pressure to complete the Form to ensure they obtained income replacement when off sick.

[11] Mr. Mulhall, who has been Chief Steward since 2017 and was previously a steward for several years, acknowledged that he completed the Forms and signed the release in 2013 and again in 2016 in connection with two of his own applications for STIPP. He did not recall any objections to the content of the Form or turning his mind to the issues raised in these grievances at the time. The nature of his medical conditions

was not particularly stigmatising or embarrassing. Consequently, he was not especially concerned about his own personal or medical privacy. He was not aware of any concerns by OPSSU members with the content of the Form until January 2018.

[12] Stephen Giles, a Senior Advisor in Employee Relations, stated that the STIPP Form was created by the Insurer and that the Employer did not have any input into the form or content. Furthermore, although the consent allows SSQ to share medical information with the Employer, that does not happen in practice. On cross examination, he acknowledged that SSQ will provide information with regard to an employee's accommodation needs, including medical limitations and restrictions. He noted, however, that the Employer also asks employees to submit an accommodation package before returning to work that provides an alternate means of acquiring the necessary information for the accommodation process. Mr. Giles further admitted that JBAC had not vetted or approved the STIPP Forms and that he was mistaken when he had informed the grievor that the Forms had been reviewed at JBAC. Finally, he acknowledged that although the form was changed in early 2014, the old form continued to be used for some indeterminate period thereafter.

[13] Mr. Giles also reviewed the records maintained by Employee Relations back to 2008 and recorded 498 occasions where STIPP Forms were sent to employees. On cross examination he acknowledged that it was unlikely that the Form was sent to 498 different people and that there were probably instances where the same person received a form on a number of different occasions. He also determined that SSQ approved 447 STIPP claims from 2005 to the date the grievances were filed in 2018,

including several from current or former executive members of the Union. All the approvals required the member to complete and return the disputed Forms.

Submissions

[14] The Employer indicated at the outset of argument that it would limit its submissions to whether the Union waived its rights, was estopped from pursuing the grievances or unduly delayed the filing of the grievances. The Union largely focussed on those issues in making its submissions, however it also provided a brief summary of the arbitral jurisprudence in connection with the request for medical information to establish eligibility for short term sick benefits.

[15] The Union relied on *Hamilton Health Sciences*, 2007 CanLII 73923 (ON LA), noting that Arbitrator Surdykowski affirmed an employee's right to privacy with respect to personal health information, confirming that an employer's entitlement to information did not include the right to a diagnosis and was limited to information:

1. That an employee is unable to work due to illness or injury
2. The employee's expected return to work date
3. The employee's restrictions and abilities

[16] The Union submitted that Arbitrator Surdykowski further found that consent forms must be similarly limited and should not contain a "basket" consent authorising a broad release of confidential information. The Union maintained that the approach first articulated by Arbitrator Surdykowski has been routinely followed by other arbitrators. Moreover, the Employer, in its capacity as a trade union, has relied on the decision in *Hamilton Health Sciences* in multiple cases.

[17] Turning to the Employer's main argument, the Union submitted that the facts in this case do not establish waiver, estoppel or delay that would warrant dismissal of the grievances. In the Union's submission, an unequivocal affirmation, such as a fresh step, is required to establish waiver. Similarly, the law of estoppel requires a clear and unequivocal representation upon which the opposing party relied to their detriment.

[18] In this case, the Employer seeks to rely on the Union's silence to establish a representation. The Union agreed that silence can, in some circumstances, amount to a representation, however, it maintained that it did not in this case. Furthermore, at most, the silence upon which the Employer relies dates back four years, from 2014, when the consent was amended, to 2018, when the grievance was filed.

[19] In the Union's submission, the Employer's argument that the Union is estopped from pursuing the grievances should fail for a number of reasons:

1. Union knowledge cannot be imputed. A lengthy practice that goes unchallenged will not necessarily ground an estoppel and ought not to in this case.
2. The Employer has not led any evidence that it relied on the alleged representation to its detriment.
3. The doctrine of estoppel cannot be used to escape the application of statutory rights.
4. The Collective Agreement under which the grievances were filed has now expired and a new Collective Agreement has been negotiated and ratified. In the circumstances, any estoppel would be discharged and

the Union would be entitled to relief in respect of the ongoing breach of the current Collective Agreement.

5. There was no evidence that the grievor had previously applied for STIPP benefits or was otherwise aware of the contents of the STIPP form before the absence covered by this grievance. He grieved promptly.

[20] The Employer did not defend the Forms in their present format. Nor did it pursue arguments disputing jurisdiction to determine this matter. For the purposes of arbitration, the Employer conceded that the Forms and the required consent are not wholly consistent with arbitral case law and that the grievances are properly before me, subject only to arguments of delay, waiver and estoppel.

[21] Counsel for the Employer argued that these Forms have been in use for many years, with the full knowledge of the Union, its members and executive. No grievances had been filed, nor were any concerns brought to the Employer's attention. Given these facts, the Employer maintained that both grievances are barred based on delay, waiver or estoppel.

[22] The Employer contended that the Union had not complied with the requirements in the Collective Agreement for the timely filing and referral of grievances. It submitted that the Forms had been completed and signed by numerous Union executives from 2005 onwards, offering ample evidence that the Union had actual knowledge of the Forms and their impugned contents. Alternatively, the practice was so longstanding and notorious that knowledge should be imputed to the Union.

[23] Counsel maintained that whether the Union had actual or imputed knowledge, a grievance filed on February 17, 2018, many years after the Forms were first used, was well beyond the timeline required under the collective agreement. Correspondingly, the grievances are out of time for referral and an arbitrator has no ability to extend the timeline, irrespective of the reason for the delay or whether there has been prejudice. The Employer took the position that this should not be characterised as a continuing grievance. In the Employer's submission, while the use of the STIPP Forms may have had a continuing impact on employees who are required to sign them, the grievance relates to the Form itself and that gives rise to a single, non-continuing alleged violation.

[24] In the alternative, the Employer submitted that the grievances should be dismissed on the basis of the doctrine of waiver. It argued that it need not show reliance or detriment for the doctrine to apply. It was sufficient that the Union had knowledge of the Forms, was aware of the deficiencies and did not insist on its right to address them. The Union did not raise the issue of the STIPP Forms in collective bargaining and failed to address the alleged deficiencies for more than decade. The Employer argued that the Union has thereby waived any ability it had to grieve these issues.

[25] In the further alternative, for many of the same reasons, the Employer also argued that the Union is estopped from grieving that the Forms are deficient. The Employer submitted that more than twelve years of Union silence reasonably induced it to believe that the STIPP Forms were acceptable. It would therefore be inequitable to allow the Union to insist on changes, particularly since Article 22.04.01 of the Collective Agreement obligates the parties to negotiate changes. There is obvious prejudice to the

Employer in that it lost the ability to negotiate changes during the life of the collective agreement.

[26] The Employer took the position that the Union's silence conveyed acquiescence: bargaining parties communicate with one another through spoken word and conduct, including their silence. In this case, both the rank-and-file members and the elected members of the executive committee signed the STIPP Forms on 447 occasions from 2005 onwards. By their actions, the Union and its members clearly communicated that the Forms were acceptable.

[27] The Employer refuted the Union's position that there can be no estoppel against statutory rights. Counsel suggested that the Union in this instance is relying on the anti-discrimination provisions in the collective agreement and there is therefore no need to consider protections set out in the *Human Rights Code*. Moreover, there are many examples where arbitrators have found that estoppel can apply to statutory rights.

[28] In reply, the Union suggested that the Employer conflated the forms in use prior to February 2014 and those used previously. The Union notes that while there are undeniable similarities between the forms used in these two periods, they are not the same. In particular, it points to the consent that employees must sign, which it maintains changed significantly in 2014. Moreover, the earliest form produced by the Employer was dated 2012. Therefore, arguments with respect to delay should be limited to the period following 2014.

[29] The Union submitted that the issue of delay is distinct from timeliness. While the Employer previously raised issues of delay, it did not mention untimely filing or referral to arbitration until closing argument. By waiting until final argument to raise the issue,

the Employer denied the Union the opportunity to make argument or call evidence before it had closed its case. By its conduct over a period of two and a half years, the Union submitted that the Employer had waived its right to assert timeliness objections.

[30] The Union also took issue with the Employer's argument that the use of the Forms does not constitute a continuing grievance. Although the policy was only implemented once, there is a repetitive and ongoing breach every time a member is asked to complete a form that breaches their right to privacy.

[31] In the Union's view, the caselaw on estoppel distinguishes between long-standing employer conduct, such as providing a particular benefit, and non-grievance by a union over a lengthy period. Where an employer confers benefits on the union members, the union will come to rely on those benefits to their detriment. The same cannot be said of non-grievance, which confers no inherent benefit. In these circumstances, detriment to the Employer should not be presumed.

Analysis

[32] A good deal of the evidence that was called at arbitration pertained to issues that I have determined do not need to be considered, including whether this matter is arbitrable and whether the Forms are permissible. The Employer conceded these points in final argument, expressly accepting that I had jurisdiction to determine the matter in this instance and acknowledging that the STIPP Forms do not comply with the accepted legal standard pertaining to confidential medical information. Ultimately, the only live disputes that remained between the parties was whether the grievances should be dismissed on the basis of undue delay, waiver or estoppel and, if allowed, what remedy should be awarded.

[33] Most significantly, the parties agreed on the primary underlying issue that the STIPP Forms, as presently drafted, exceed the limits set out in the current jurisprudence for what information an employer can request when determining eligibility for short term sickness benefits.

[34] The leading authority on this issue is *Hamilton Health Sciences, supra*. At paragraph 25, Arbitrator Surdykowski adopted what he referred to as "the least intrusive non-punitive interpretive approach" that balances the competing interests of the employer and their employee. He goes on to conclude at paragraphs 27 and 28:

> The several layers of legitimate employer interests suggest that there is more than one stage to the process that is engaged when an employee seeks the benefit of the sick leave provisions in a collective agreement. It also suggests that the employer will generally be entitled to less information at the initial stage than at a subsequent stage. The employer's desire for more information, or its genuine concern for the employee's well-being or desire to assist the employee, do not trump the employee's privacy rights. Nor do questions of expediency or efficiency. In the absence of a collective agreement provision or legislation that provides otherwise the employer is entitled to know only that the employee is unable to work because she is ill or injured, the expected return to work date, and what work the employee can or cannot do. A document in which a qualified medical doctor certifies the employee is away from and unable to work for a specified period due to illness or injury is *prima facie* proof sufficient to justify the absence. Unless the collective agreement (or less likely, legislation) stipulates otherwise, it will also be sufficient to qualify for any applicable sick benefits for that period. To require more invites an unnecessary invasion of the employee's privacy. In order to obtain additional confidential medical information, the employer must demonstrate a legitimate need for specific information on a case-by-case basis. That is, for sick benefits purposes an employer has no *prima facie* right to an employee's general medical history, a diagnosis, a treatment, plan or a prognosis other than the expected date that the employee will be able to return to work with or without restriction.
>
> As a general matter there is nothing to prevent an employer from contracting out the information gathering or assessment of medical information as the Hospital has done in this case. But the party to

> whom the employer has contracted out this function stands in the shoes of the employer and has no greater rights to or need for information than the employer has if it performs the function itself. And the employer is responsible for the conduct of any third party that performs such function for it. However, the insertion of such a third party, which is a stranger to the workplace and beyond the direct reach of the collective agreement, may raise suspicions and increase an employee's reluctance to provide confidential personal medical information.

[35] Arbitrator Surdykowski also considered the scope of the consent that an employer can legitimately ask an employee to sign when they are seeking short term disability benefits. At paragraph 35 he found that:

> In the first instance for STD benefits purposes, therefore, in the absence of statutory or collective agreement authorization an employer cannot require an employee to consent to the release of more than the certification that she is absent and unable to work because she is ill or injured, the general nature of the illness or injury, that the employee has and is following treatment plan (but not the plan itself), the expected return to work date, and what the employee can or cannot do. The consent must be both focused on the particular purpose and limited to the particular medical professional. A consent that must be provided for the purposes of STD benefits should not include return to work accommodation considerations other than whether there are likely to be any restrictions on the anticipated return to work date. 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 notice to the employee) 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.

[36] Arbitrator Surdykowski confirmed and expanded his view in a series of cases[1], with a minor revision of his initial view that a separate consent was required for every contact. In *Canadian Bank Note Company Ltd. v. International Union of Operating Engineers, Local 772,* 2012 Can LII 41234 (ON LA) Arbitrator Surdykowski indicated that a fresh consent was not necessary for every communication with the same medical professional identified in the consent.

[37] These general principles guiding the access to confidential medical information have been widely followed in Ontario: *Toronto Hydro Electric Systems Ltd. v. Society of United Professionals*, 2019 CarswellOnt 12143 (Goodfellow). Most recently, in a case in which the Employer was acting in its capacity as a trade union, Arbitrator Kaplan found that the law in this area was by and large settled: *Legal Aid Ontario (Union Grievances re: APS) v. OPSEU*, issued February 4, 2019 (Kaplan).

[38] Applying the principles set out in *Hamilton Health Sciences, supra*, the Forms and Consent that are currently used to assess eligibility for STIPP benefits are clearly out of step with what is permitted. There are a number of excessively invasive questions, including requests for diagnosis, treatment details and information related to an employee's personal life. None of these questions come within the broadly accepted arbitral view that, while an employer has a legitimate business interest in ensuring the proper administration of its sick leave plan, employees have corresponding rights to privacy and confidentiality of their health information.

[1] *Providence Care, Mental Health Services v. OPSEU, Local 431*, 2011 CanLII 6863, *Revera Care Long Term Care Inc. v. ONA*, 2011 CanLII 73193 (ON LA); *Canadian Bank Note Company Ltd. v. International Union of Operating Engineers, Local 772,* 2012 Can LII 41234 (ON LA).

[39] The question before me is whether the Union waived its rights, is estopped from pursuing these grievances or is otherwise precluded from advancing the grievances due to delay. The Employer relied on the open and notorious use of virtually identical forms for many years to suggest that it would be unfair to permit the Union to challenge the Forms in these circumstances. The Employer did not allege any particular prejudice, beyond denial of an earlier opportunity to bargain for an acceptable resolution, asserting that it would nonetheless be unfair to allow these grievances to proceed.

Undue Delay/Timeliness

[40] I previously advised the parties of my ruling that the Employer could not argue that there was undue delay in filing the grievances or referring them to arbitration. The Union raised concerns that it would need to re-open its case in order to respond and that the Employer had waived the right to advance issues of timeliness. Because this was raised for the first time in closing argument, I issued a bottom-line decision and indicated that more detailed reasons would be included in the final decision.

[41] Throughout these proceedings, including a lengthy period where the parties attempted to reach a mediated resolution, the Employer objected to the grievances on the basis of ‘delay, waiver or estoppel’. Counsel conceded that a timeliness argument was not specifically advanced until final argument. Nonetheless, the Employer maintained that the policy grievance should have been filed years ago when the Insurer first began using the Forms.

[42] The Employer has taken several fresh steps over a lengthy period before raising a timeliness argument. It repeatedly referred to objections based on ‘delay, waiver or estoppel’ without ever articulating an objection that the grievances were not filed or

referred to arbitration in accordance with the collective agreement. These concerns were not identified before the hearing commenced, despite protracted discussions between the parties. Nor were they advanced in opening argument. The Employer has repeatedly conducted itself in a manner that suggested it did not intend to challenge the timeliness of the grievances. I therefore found that it had long since waived any right it might have had to raise a timeliness argument.

[43] The Employer argued there was a delay in referring the matter to arbitration, which goes to jurisdiction and cannot be waived. In my view, if there is a timeliness issue, it is only with respect to filing the grievance and not in connection to referral to arbitration. There was no evidence of delay in referring the matter once the policy grievance was filed. The Employer relied solely on the assertion that the Union was obliged to file a grievance when it, or at least union members and executives, first became aware of the contents of the Forms. On these facts, the Employer maintained that the matter should have been grieved *and* referred when the Union first reviewed the Forms at issue.

[44] Counsel did not provide any caselaw to support the argument that an untimely referral to arbitration could be established in this way. That is, that a delay in filing the grievance also, and necessarily, equalled a delay in referring the matter to arbitration. In my view this would lead to a troubling result. It would effectively convert every instance of a delay in filing into a case where there was also an untimely referral, which the Employer says cannot be waived. This would clearly be inconsistent with the settled jurisprudence. Complying with the timeline for filing a grievance and then referring it to

arbitration are distinct procedural steps. I am not persuaded that there is any basis to collapse them in the manner suggested by the Employer.

[45] In any event, even if delay could be established vis a vis the Union, there was no evidence that the individual grievance was untimely. Irrespective of when individual Union executives knew about the Forms, there was no suggestion that the individual grievor was similarly aware of the contents of the Form or required consent before he filed his grievance.

[46] The Employer suggested the 'complaint' crystallised when the Union became aware of the violation and that the individual grievance was therefore also untimely. This argument is in direct conflict with the express terms of the Collective Agreement. Article 8.01 directs an employee to initiate the grievance procedure within 30 working days "of the *employee* becoming aware of the grievance" (emphasis added). The Employer's position would ultimately preclude individuals from grieving any issue that could have been grieved as a policy grievance. I do not believe that this is what the parties intended.

Waiver and Estoppel

[47] In the alternative, the Employer submitted that the Union was either estopped from enforcing its rights or had waived its right to do so. The Union maintained that neither of these equitable remedies are warranted in this case.

[48] Typically, parties argue that the right to pursue a matter has been waived when there are alleged procedural irregularities and, alternatively, raise issues of estoppel for the non-enforcement of rights under the collective agreement. The Employer in this

case is advancing both doctrines and quite properly notes that the arguments invoke very similar reasoning: that fairness demands that it not be required to defend against allegations when it says the Union remained silent for many years.

[49] The SCC described the fundamentals of waiver as follows in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co*., 1994 CanLII 100 (SCC), at pp. 499-500:

> The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so must be ascertained.

[50] Similar questions are asked in considering whether there has been an estoppel: has one party made a clear and unequivocal representation that the other party has reasonably relied upon to their detriment? The representation may be established by word or conduct, including a lengthy silence, but it is ultimately a question of fact: *Canadian National Railway v. Beatty*, 1981 CarswellOnt 1137 (Ont. Div. Ct.); *Beatrice Foods Inc. v. RWDSU*, 1994 CarswellOnt 1331 (MacDowell); *Air Canda v. CAW*, 1994 CarswellNat 1661 (Brandt); *Insurance Corp. of British Columbia v. OPEIU*, 2002 CarswellBC 3320 (Hall); *MTD Products Ltd. and CAW (Machado)*, (2004) 129 LAC (4th) 313 (Schiff); *BC Ferry Services Inc. v. BC Ferry and Marine Workers' Union* (2013), 229 LAC (4th) 288 (Korbin).

[51] As acknowledged by the parties, despite some distinctions between the two doctrines, they are some key similarities. They both require an intentional relinquishing of rights, which, in this case, the Employer seeks to establish by relying on identical

factual assertions related to the Union's knowledge and silence. They also invoke comparable principles of fairness. Ultimately, I have determined that neither doctrine should be applied in this case. I do not think there was a clear and unequivocal representation or intention by the Union to relinquish their rights and, in the overall labour relations context, it is not unfair to allow the matter to proceed.

[52] I turn first to whether there was a clear and unequivocal representation or demonstration of intention by the Union that it would not assert its rights. Although there was some dispute about precisely how long the current STIPP Forms have been used, there is no doubt that they were used for at least a few, if not several years before these grievances were filed. In my view nothing turns on this distinction. It is apparent that several Union officials received and signed the impugned forms in their personal capacity a number of years before the policy grievance was filed.

[53] While I am satisfied that the current Forms were in use for a significant period of time before the grievances were filed, there is no evidence that the Union intended to give up the right to object to the Forms or the required consent to release medical information. They were not approved by the Joint Benefits Administration Committee, were not raised for discussion between the parties during bargaining or at any other time. Nor were copies of the Forms sent to the Union when application packages were forwarded to individual employees. Moreover, I accept the evidence of Tim Mulhall, the one Union executive who gave direct evidence on this issue, that while he had signed the form in the context of a personal application for STTIP benefits, he did not turn his mind to whether it might infringe employees' privacy interests.

[54] In these circumstances, I am not persuaded that the Union knowingly gave up its rights or intended to communicate that intention to the Employer. There was no overt decision by the Union not to pursue its' rights and no evidence upon which I can conclude that it even turned its mind to whether the Forms violated employees' privacy rights.

[55] The Employer submitted that the Union's intention to waive its rights can be inferred from its' silence. I disagree. Arbitrators have long been wary of accepting a Union's silence as a clear and unequivocal representation or demonstration of intention. An estoppel has been found where the union's silence arose in a circumstance that called out for them to make their position known, but there has been a reluctance to make that finding where significant rights are at stake or where there was no evidence that the union intended to communicate the representation being asserted: *Insurance Corp. of B.C., supra*; *Cornwall Community Police Services Board v. Cornwall Police Association*, 2016 Can LII 12626 (ON LA) (Snow); *Toronto Hydro-Electric System Ltd. v. Society of United Professional*, 2019 (CanLII) 67962 (ON LA) (Goodfellow).

[56] Despite the long term use of the Form, I do not think either party actively turned their minds to the privacy issues raised by these grievances. As I have already mentioned, the Forms were not the subject of previous discussions between the parties and the Employer did not assert that there were particular circumstances where they would have expected the Union to raise their concerns. In this case, the Union's silence ought not be construed as acquiescence to the existing Forms such that it gives rise to either waiver or estoppel.

[57] Nor am I persuaded that the Employer relied on the Union's silence or that it would have been reasonable for them to do so in all the circumstances. At a minimum, I find that there has been no *detrimental* reliance, a necessary pre-condition for estoppel. The Employer suggested that it was prevented from addressing this issue at the bargaining table. I have two reservations about the force of this argument. First, the Employer consistently argued throughout these proceedings that the Forms were prepared and controlled by the Insurer. They insisted that they could not demand a change in content. If that is true, then I fail to see how the Forms could have been the subject of bargaining.

[58] It is equally hard to imagine what they could have bargained for beyond acceding to the Union's request. Given the nature of the legal and statutory rights at issue and the Employer's admission that the Forms do not comply with privacy protections, it is difficult to comprehend what exactly the Employer has given up by not being able to raise this issue at the bargaining table. Neither side has the capacity to derogate from an employee's legal entitlements: they cannot contract out of their statutory obligations, nor bargain away employees' rights to individual privacy of confidential medical information. In my view, although not technically required to make out a successful case for waiver, the lack of prejudice or detrimental reliance also militates against the underlying goal of both waiver and estoppel, which is to prevent unfairness.

[59] Finally, I would add that I have serious reservations whether waiver or estoppel can be applied to rights to individual privacy. At a minimum, it would not preclude the individual grievance from proceeding. It would be antithetical to the objective of human rights and privacy protections to find that an individual grievor was precluded from

grieving about discrimination or a violation of their right to privacy simply because other, similarly situated individuals had not previously grieved.

Disposition and Remedy

[60] For all these reasons, the grievances are allowed. What then is the appropriate remedy?

[61] The Union requested a number of remedies:

1. A declaration that the Employer breached the Collective Agreement and the Code and, if applicable, PHIPA, PIPEDA and OHSA
2. An Order granting the grievance
3. An Order that the Forms be amended forthwith
4. An Order that any issues arising in respect of STIPP applications made between the date of the first grievance and the amendment of the Forms be remitted to the Parties
5. An Order that the Employer reinstate the Grievor's credits applied in respect of his sick leave
6. An Order that the Employer pay the Grievor $5000 in general damages

[62] Both parties recognised that the STIPP Form violates employees' privacy rights and is impermissible. Although there was some disagreement between them whether there has been a statutory breach of PIPEDA, PHIPPA and OHSA, there is no dispute that the Forms do not meet the standard set in the applicable arbitral case law. There was also substantial agreement on the limits on a request for medical information in

regard to receipt of short-term sick benefits. In the unique circumstances of this case, I have determined that no labour relations purpose would be served by issuing the declarations sought by the Union.

[63] Nor do I consider this to be an appropriate case for an award of general damages; in my view it is sufficient that the Grievor be made whole for his actual losses. The factors to be considered in making an award of general damages include an assessment of the extent, if any, of the humiliation, hurt feelings and loss of self-respect, dignity, self-esteem and confidence experienced by the individual subjected to a violation of their rights, as well as the seriousness of the conduct: *Weyerhaeuser Co. and CEP*, 2003 154 LAC 94th 3 (Sims); *Sanford v. Koop*, 2005 HRTO 53 (CanLII); *Arunchalam v. Best Buy Canada*, 2010 HRTO 1880 (CanLII); *Shaw v. Ottawa (City)*, 2012 HRTO 593 (CanLII).

[64] The Grievor in this case elected not to submit the information or consent to the disclosure of information that he felt would violate his privacy. The extent of his evidence on how the denial of benefits affected him was merely that 'it caused him further distress during a difficult time'. I accept that this would have been distressing, however, he did not disclose any confidential information, his income was not interrupted and there is virtually no evidence on the extent of his upset. In the circumstances, I am not inclined to award a further amount for general damages.

[65] To make him whole, the Grievor should be reimbursed for the credits used for the duration of his absence. The Employer submitted that the matter be remitted back to SSQ for a retroactive determination. I am not persuaded that would be a reasonable outcome. The Employer has already accepted the Grievor's medical note as sufficient to

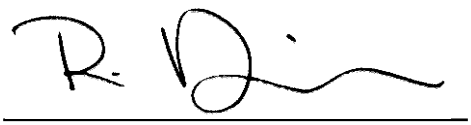
entitle him to benefits for the first seven days of his absence and has not identified any specific shortcomings or raised direct questions related to the Grievor's ongoing eligibility to receive benefits. In the circumstances, there is no basis to remit his entitlement for the remaining 8 days of absence for further review.

[66] The grievances are allowed and I make the following Orders:

1. The STIPP Forms are to be amended as soon as practicable to comply with the law as summarised in this decision.
2. All related issues arising from the use of the disputed Forms from the date of the first grievance are remitted to the Parties for resolution.
3. The Employer reinstate the credits applied in respect of the Grievor's denied STIPP benefits.

[67] I will remain seized in the event that the Parties are unable to fully resolve the matters that have been remitted back to them or if any other issues of interpretation or implementation of my award arise.

[68] Dated at Toronto, Ontario this 31st day of March 2021.



Reva Devins, Arbitrator