IN THE MATTER OF AN ARBITRATION

Between:

Unifor Local 27 Unit 17 (the “Union”)

and

Accuride Canada Inc. (the “Employer”)

Regarding the Grievance of Pedro Almeida (the “Grievor”)

Decision date: July 28, 2016

Before: Arbitrator Brian McLean

Appearances:

For the Union: Fergo Berto et al

For the Employer: Jeremy Schwartz et al.

This is a discharge grievance. The Grievor was hired by the Employer on or about April 20, 2015. On October 30, 2015 the Grievor left work, claiming an injury and did not return. The Employer disputed the Grievor's absence and on March 10, 2016 terminated the Grievor's employment for violations of the Employer's attendance policy.

The Union filed a grievance on behalf of the Grievor and, when the parties were unable to resolve the grievance through the grievance procedure under the parties' collective agreement, referred the matter before me on consent.

From the outset, it was apparent to the parties that a central issue in the case would be the legitimacy of the Grievor's absence from work and the medical issues he claimed. Accordingly, as a pre hearing matter, the Employer sought production of the Grievor's medical information as contained in his workers compensation file and the files of his physicians. The Union did not dispute that these materials were relevant to the matter and were properly produced.

On April 27, 2016, after hearing from the parties, I issued a written award directing the Grievor to forthwith provide his consent to the production of certain records. The goal was that the documents be produced in advance of the hearing of the matter scheduled for June 16 and 28, 2016. In making the award I stated:

> In other words, in theory, the grievor may have the right to keep his medical records confidential. However, there may be consequences to exercising that right, including the fact that the union may be precluded from advancing the grievor's grievance because it would be unfair to make the employer proceed without access to the grievor's relevant medical records.

The Union provided the Grievor with my award and gave him until Friday, May 6 to provide the consents to the release of his medical information.

The Grievor advised the Union on May 6 that he signed the consents and was forwarding them to the Union. Had this actually been the case, the parties would likely have received all materials from the various health professionals comfortably in advance of the June 16 and June 28 hearing dates.

In fact, the Grievor provided the Union with documents from his WSIB file, documents it and the Employer already had, but no consents.

The Union met with the Grievor on May 9, and he signed consents at that time. Those were given to the Employer on May 10. The Employer objected because the consents did not comply with my April 27, 2016 award and wrote the Union on May 12 identifying the issues with the consents and how they failed to comply. At that time, the Employer provided a version of the consents that was compliant and demanded that Mr. Almeida provide those consents signed by May 17. Again, had he done so, the parties would likely have received all materials from the various health professionals in advance of the June 16 and June 28 hearing dates.

The Grievor refused to sign the award-compliant consents. He also (likely mistakenly) improperly completed the WSIB form to permit the file to be released to the Employer. The WSIB case manager advised the Employer on June 14 that she wrote the Grievor on May 12 advising that he had not properly completed the form - and that he had failed to respond to her letter. In any event, no properly completed consent was forwarded to the WSIB and the Employer did not get the file in advance of the hearing.

The Grievor's delay tactics frustrated the Employer's ability to act on the consents and prepare for hearing. The parties convened a conference call before me in which the Employer asked me to dismiss the grievance because the Grievor had violated my award and had not produced the documents or provided his doctors with the consents as I had required him to do. As a result, the Employer indicated it was not in a position to start its case on the first hearing date and likely not on the second hearing date either.

I declined to dismiss the grievance. I indicated it was appropriate to hold the first hearing date and explain to the Grievor the importance to him of doing as he was required to do *vis a vis* the medical information.

Accordingly, the parties and the Grievor appeared before me in London on June 16, 2016. At that hearing I ruled orally that the consents he provided were not compliant with my order. Together we revised the form of consent, and I handed him the form of consent he was being directed to use. He agreed to use that form to prepare the consents and agreed to deliver them to all the applicable medical offices and to the WSIB. He assured me that he would comply with my order; in turn I warned him that if he failed to do so it was entirely possible that his grievance would not be allowed to proceed.

On June 17 the Grievor provided signed consents that were in a completely new form, rather than in the form I had directed him to use. On June 20 the Employer prepared and provided the Union with draft consents for each medical professional in the agreed form. All the Grievor had to do was sign and deliver them.

On June 21 the Grievor met with the Union. He signed the consents and the Union provided them to the Employer. The Employer delivered the consents to the various medical offices and the parties prepared for the hearing originally scheduled for June 28 (which was cancelled for reasons unrelated to the matter at hand). Notwithstanding the cancellation, the revised consents would surely have generated the production of documents as required and requested by late July.

The Employer waited for the medical documents to arrive. After two weeks passed, the Employer began to follow up and discovered that within days of the various medical offices receiving the consents the Grievor had finally provided, the Grievor delivered written directions to at least some of them revoking consent.

Recipients of the revocations included South London Urgent Care, and Dr. Tomas Jimenez. In particular, according to the Employer (and not disputed by the Union), Dr. Jimenez is likely to be a key witness and his documents are central to the case.

Moreover, not only did the Grievor secretly revoke his consent, but in his correspondence he took the opportunity to attempt to persuade the physicians who may review the revocation as to his version of the “facts”.

On Monday, July 18, the Employer informed the Union that the Grievor had sent the letter revoking consent. In response to these revelations, the Employer advised that it was prepared to bring an immediate motion to have the grievance dismissed.

On July 19, Mr. Berto of the Union, asked the Employer to wait so he could contact the Grievor and try to resolve the situation. That morning, Mr. Berto provided the Grievor with notice by email that he had 48 hours to retract the revocations and renew the consents. That evening, the Grievor sent Mr. Berto an email asking about future arbitration dates. Mr. Berto sent him a reply with the dates. The Grievor responded in the morning on the 20th.

Right after receiving that email on July 20th, Mr. Berto attended at the Grievor's house. There was a car in the garage and he could hear a young girl's voice and an adult male's voice. No one would open the door. So he taped the email to the door. Mr. Berto next sent a follow up email with a copy of the email again and advised he had attended at his house.

On Friday, July 22, Mr. Berto advised the Grievor of the motion conference call scheduled for Tuesday evening, July 26, 2016 and that the Company was going to seek dismissal. Mr. Berto urged him again to comply to avoid that happening and warned him that it likely would happen if he didn't comply right away. The Grievor did not respond to Mr. Berto.

As of the date of the motion, July 26, 2016, the Grievor has not complied with the requirements of my award nor has he said he intends to. The Union advises that it has no reason to think the Grievor will comply with my award and, in fact, the Union believes the Grievor has ceased to communicate with it altogether.

Decision

The parties do not dispute that an arbitrator has the authority to dismiss a grievance because the Grievor is not cooperating with the hearing process by refusing to produce documents. The Employer cited *Budget Car Rentals Toronto Ltd. and U.F.C.W., Local 175* (2000), 87 L.A.C. (4th) 154 (Ont. Arb.) (Davie). There, after setting out the facts, it was noted:

> An arbitrator has jurisdiction to "require any party to produce documents or things that may be relevant to the matter and to do so before or during the hearing" (see section 49(12)(b) of the Labour Relations Act, 1995, cl, S. O. 1995.)
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> An arbitrator also has the power "to make interim orders concerning procedural matters" (see section 49(12)(i) of the Labour Relations Act.)
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> Pursuant to these powers, I made an interim order adjourning the proceedings and requiring the grievor to provide the reasons for his nonattendance at the December 13, 1999, scheduled hearing date. I also ordered the grievor to produce certain documents relevant to the hearing and the issues in dispute. Logic dictates that, if arbitrators have the power to make these types of orders, there must also be authority to enforce the orders made. Arbitral jurisprudence indicates that as part and parcel of the authority to enforce, an arbitrator has jurisdiction to dismiss a grievance where there has been noncompliance with an order. Thus, a grievance may be dismissed or held to be inarbitrable under the "abuse of process" rubric, where a party fails to produce documents or matters ordered to be produced by an arbitrator (Re. Thompson Products (1970), 22 L.A.C. 85 (Roberts); Re National Standard Company of Canada (1994), 39 L.A.C. (4th) 228 (Palmer)), or where a grievor refuses to participate in the grievance/arbitration process, or refuses to otherwise accept the authority of the arbitrator or arbitration process (Re. Beacon Hill Lodges Inc. (1990), 15 L.A.C. (4th) 323 (Craven)).
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> In my view, an arbitrator should not lightly dismiss a grievance by reason of any "abuse of process", and outright dismissal of a grievance by reason of an alleged abuse of process should only occur in the clearest cases. In exercising the jurisdiction or discretion to dismiss a grievance by reason of an abuse of process however, it must also be remembered that the grievance and arbitration process was established to settle employment related disputes in a relatively expeditious and inexpensive manner. Within this context, it is reasonable to expect that the grievor, who is a party to that process, cooperate with reasonable requests made of him by his union, attend and participate in the hearing set up to deal with his grievance, and comply with the directions or orders of the arbitrator. In this case, the grievor's failure to attend, and his subsequent failure to comply with the order made in the interim award, has resulted in additional time and expense, to both the Union and the Employer.
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> In all of the circumstances of this case I have concluded that it is appropriate to dismiss this grievance.

> The grievor knew what was expected of him — first, that he attend the hearing, and thereafter that he provide certain documents, and an explanation for his failure to attend the December 13, 1999, hearing. He also knew the consequences which would flow if he did not meet these expectations. He has been given every reasonable opportunity to comply, but has failed to do so. This failure amounts to an abuse of process which should not be condoned by putting the Employer, and the Union, to additional expense and effort by requiring them to arbitrate the grievance filed, when the grievor himself has shown no interest in communicating with the Union, or in cooperating with the arbitration process established in the collective agreement.

Similarly, I find that in this case, the Grievor knew what was expected of him- I told him what was expected both in a written award and in person. He also knew what consequences might flow if he did not meet these expectations. He has been given every opportunity to provide the information and consents required of him, initially to the Union, and thereafter, to the Employer. He has failed to comply with my award, and has failed to provide any reason, let alone a satisfactory reason, for that failure. He has not cooperated in meeting the reasonable requests made of him by his Union and, indeed, has stopped communicating with the Union's representatives. Through his failures to comply, he has shown he is not interested in appropriately participating in this arbitration — an arbitration proceeding established specifically to address the matters and issues he has raised. I have no confidence that even if the Grievor were given another chance to comply, that he would do so, or would not act to frustrate my award and the hearing process.

In the result therefore, and having regard to all of the circumstances of this case, the motion is granted and the grievance is dismissed.

Brian McLean

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Brian Mclean

Toronto, Ontario