IN THE MATTER OF AN ARBITRATION
Pursuant to the Ontario *Labour Relations Act*

BETWEEN:

ST. PATRICK'S HOME OF OTTAWA INC.
(the "Employer")

- and -

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 2437
(the "Union")

Re Grievance of B.A.
Grievance # 2014-07-17

A W A R D

Paula Knopf - Arbitrator

Appearances:

For the Employer: Marie-France Dupuis, Counsel
Tracey Simpson
Paul Harris

For the Union: Tony Cristiano, Counsel
Carly Sloshower, Student-at-Law
Margaret Venzina
Shawleen Robinson
Barlin Ahmed

The hearing of this matter was held in Ottawa on February 19, 2016.

This is a grievance claiming damages on behalf of the Grievor[a] because the Employer released confidential medical information about her to another employer without authorization or her consent. The Union asserts that this was a breach of the Collective Agreement and the Employer's Confidentiality Policy, as well as a violation of the *Occupational Health and Safety Act* and the tort of "Intrusion on Seclusion" or breach of privacy. This Employer has admitted that the disclosure of some of the information was inappropriate and acknowledges a breach of the Collective Agreement and of its own Confidentiality Policy. The primary point of this Award is to determine the appropriate remedy for this situation. The parties presented this case by way of the following Agreed Statement of Facts:

> 1. The Employer operates a long term care facility (the "Home" or "St. Pat's"), for adults who are affected by physical and/or cognitive losses and who require 24-hour care in a professional setting. The Employer also provides a short stay respite program that offers relief to caregivers and provides care and activities for clients. The Home, originally founded in 1865, now has 286 beds, 2 respite beds and provides services for 288 residents.
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> 2. The Home is funded through a combination of government funding, resident fees and private funds collected through the St. Patrick's Home of Ottawa Foundation.
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> 3. The Union represents all "full-time and part-time employees of the respondent in the City of Ottawa, save and except professional medical staff, graduate nursing staff, undergraduate nurses, supervisors, persons above the rank of supervisor, office and clerical staff, technical personnel, Manager, Spiritual and Religious Care, Co-ordinator of Volunteer Services". Those employees that fall within the bargaining unit include those working as cooks, housekeepers, and dietary aids to name a few.
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> 4. The union has represented employees at the Home since 1980 and the bargaining unit is currently comprised of approximately 350 employees.

[a] The Grievor's name is being omitted to protect her privacy.

5. For the purposes of the present arbitration, the relevant collective agreement is the collective agreement expiring December 31, 2014 (the "Collective Agreement").

6. Articles 3.02 and 7.02 of the Collective Agreement provide as follows:

> **3.02 Personal Harassment**: Personal harassment shall be defined as: any behaviour which denies and or undermines individuals their health, dignity and respect, and that is offensive, embarrassing and humiliating to said individual, therefore, personal harassment of another employee in carrying out the duties or in the provision of their services in any form and at any level, whether it be colleague to colleague, supervisor to subordinate, or subordinate to supervisor, constitutes a disciplinary infraction. Personal harassment shall include within its meaning sexual harassment.
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> **7.01 Management Rights:** . . . . . the Union acknowledges that it is the exclusive right of the Employer to: . . .
> **(e)** make, enforce, and alter from time to time reasonable rules and regulations to be observed by the employees, which are not inconsistent with the provisions of this Agreement
>
> **7.02** Management rights as set out in this agreement must be exercised fairly without discrimination and in accordance with the Collective Agreement.

7. On July 17, 2014 the Union filed a grievance on behalf of Ms. B. A. (the "Grievor"), alleging that the Employer violated several articles of the Collective Agreement and breached its statutory obligations by "releasing personal information in excess of the Basic Job Description to another employer without the consent of Ms. A." (the "Grievance").

8. The Grievor is employed by the Employer as a Regular Part-Time Dietary Aid working 30 hours bi-weekly on the evening shift. Her duties in this capacity include washing dishes, washing pots, sweeping and mopping kitchen floors, taking out garbage, putting clothing protectors down the laundry chute, pushing a utility cart, setting up the dining room, preparing and delivering beverages, snacks, etc. for 32 residents. She was employed in this capacity at the time of the Grievance. Her current wage is $18.64 per hour. At the time the

Grievance was filed she was earning $17.65 per hours plus 13% in lieu of benefits. The Grievor has been employed by the Employer since November 24, 2012.

9. In or about August, 2013, the Employer requested that the Grievor provide a medical certificate indicating her fitness and ability to perform her position at St. Pat's. This request was made in response to the Grievor's comments that she required an accommodation in her other position at a different long-term care facility, West End Villa – Extendicare ("West End Villa"), due to medical reasons.

10. The Grievor provided the employer with a medical certificate dated September 3, 2013 from Dr. Kathryn Barron-Klauninger which indicated as follows: "pt is able to perform the duties of Dietary Aid at St Pat's home".

11. Paul Harris ("Mr. Harris") was the Grievor's manager at St. Pat's at the relevant time. St. Pat's contracts out the management of its Nutrition Services to a third party, Sodexo MS Canada Ltd. ("Sodexo"). Mr. Harris was employed by Sodexo and his title was General Manager, Sodexo.

12. On October 8, 2013, Mr. Harris was contacted by Kelly Cloutier ("Ms. Cloutier"), West End Villa's Administrator. The Grievor was also employed at West End Villa as a part-time Dietary Aid/ Dishwasher at the time.

13. In the context of her employment with West End Villa, the Grievor provided several medical notes, indicating either her inability to work or making a variety of requests for workplace accommodations. Among the restrictions outlined in some of those notes were that a) she was unable to do late dishes, b) that she was unable to lift large objects, such as pots and c) that she could do no lifting from the shoulder as well as no pushing and no pulling. These facts are outlined by Arbitrator Keller in his decision in the context of a grievance arbitration held between, CUPE L1307, the Grievor and West End Villa; [*West End Villa and CUPE, Local 1307,* Unreported, November 23, 2015; hereinafter referred to as the *West End Villa* decision.]

14. In or about, October, 2013, West End Villa, knowing that the Grievor was employed in a similar position at St. Pat's, began to question whether the medical restrictions she was presenting to them were legitimate. In light of this, Ms. Cloutier contacted Mr. Harris by

email and requested certain information concerning the Grievor's employment at St. Pat's, including whether the Grievor had worked her regularly scheduled shifts, whether she had requested any workplace accommodations or provided any work related restrictions, her hours of work and length of shifts and whether St. Pat's had in fact been accommodating her.

15. Upon receipt of the email, Mr. Harris was uncertain whether it was appropriate for him to respond to Ms. Cloutier's inquiries. As such, prior to answering, Mr. Harris approached Lauren Moore, St. Pat's then Manager, Human Resources & Staff Development, to inquire whether he could provide the requested information, including the medical note that St. Pat's had received confirming the Grievor's fitness to work. Ms. Moore advised Mr. Harris that in her view, given that the answers to the inquiries and the note did not reveal any information about a health condition or restrictions on the Grievor's ability to perform her duties, the information could be provided as it did not constitute a disclosure of any personal information.

16. In light of those discussions, on October 8, 2013, Mr. Harris provided answers to Ms. Cloutier's questions, confirming that the Grievor was not currently being accommodated by St. Pat's, had no work-related restrictions and that she was working her regularly scheduled shifts.

17. In addition, on October 9, 2013, Mr. Harris provided Ms. Cloutier with a copy of the medical note that the Grievor had provided to the Employer earlier that fall.

18. Although at the time Ms. Moore genuinely believed that there was nothing inappropriate about the disclosure of the information, as she did not believe it disclosed any medical condition or limitations, and Mr. Harris provided it under the good faith belief that such a disclosure was permissible, the Employer now acknowledges that such information should not have been disclosed without the Grievor's consent and that the disclosure was in breach of the Grievor's rights. Sodexo, Mr. Harris' employer was also made aware of this incident.

19. St. Pat's regrets that such a disclosure occurred and apologizes to the Grievor for any stress that she may have suffered as a result of the disclosure.

20. The Grievor feels offended, embarrassed, humiliated and

disrespected as a result of St. Pat's disclosure of this personal information.

21. The Employer does have policies in place to attempt to ensure that employees' privacy rights are protected. The employer had a Confidentiality Policy in place at the time of the incidents in question. That policy was most recently revised in October, 2013 and all employees are required to sign a Confidentiality Agreement.

22. To this day, the Grievor remains a valued member of the Employer's staff.

The Employer's Human Resources Policy Manual contains a Confidentiality Policy. It reads as follows:

POLICY

Residents, employees and volunteers have the right to privacy and confidentiality of all their personal information. All employees, volunteers, students and contracted service providers are to exercise utmost discretion and retain as confidential any and all personal and business information that comes to them through their duties and responsibilities with the employer. Breaches of privacy and confidentiality place the resident and organization at risk, and will result in disciplinary action up to and including termination of employment with cause.

PROCEDURE

1. All employees are required to complete, sign and abide by a Confidentiality Agreement. The agreement is to be attached to the Employment Offer or Contract and the employee cannot commence employment or services until it is completed.

2. All employees, volunteers, contracted service providers, students and anyone else with access to resident personal information, or confidential business or employee information, will sign a confidentiality agreement.

3. This agreement will be renewed at regular intervals, i.e.: with the annual performance review or

> contract renewal.
> . . .
>
> 5. Breaches of confidentiality include accessing personal information without the authorization to do so, and without a need to know.

Employees are also made to sign a "Confidentiality Agreement" that includes acknowledgement that the employment relationship gives access to personal information about residents, their families and other employees and that a breach of confidentiality "is grounds for termination." One of the stated violations is: "Misusing or disclosing personal information (verbally, through the computer system or in hard copy) without proper authorization." The contractor who disclosed the information had not been asked to sign the Confidentiality Agreement.

The Union has also alleged a breach of the following provisions in the *Occupational Health and Safety Act,* R.S.O. 1990, c.O.1:

> Duties of employers
> 25. (1) An employer shall ensure that, ...
>
> (c) the measures and procedures prescribed are carried out in the workplace; . . .
>
> (2) Without limiting the strict duty imposed by subsection (1), an employer shall, ...
>
> (h) take every precaution reasonable in the circumstances for the protection of a worker; . . . .
>
> Information confidential
> 63. (1) Except for the purposes of this Act and the regulations or as required by law, . . .
>
> (f) no person shall disclose any information obtained in any medical examination, test or x-ray of a worker made or taken under this Act

except in a form calculated to prevent the information from being identified with a particular person or case

Employer access to health records
(2) No employer shall seek to gain access, except by an order of the court or other tribunal or in order to comply with another statute, to a health record concerning a worker without the worker's written consent.

The Submissions of the Parties

The Submissions of the Union

The Union properly acknowledged that this Employer had a right to seek medical information from the Grievor in August 2013, resulting in her delivering the medical note from her doctor indicating that she was fit to perform her duties. The Union's complaint is that the Employer delivered a copy of this note to another employer without the Grievor's consent. It was stressed that while the other facility, West End Villa, had sought information about the Grievor's shifts and whether she had made any requests for accommodation, it had never asked for a copy of her medical records or reports. The Union complained that although the Employer has now apologized for releasing the information, the apology did not come until counsel for the parties were in the process of drafting the Agreed Facts for this proceeding. The Union also criticized the Employer for failing to require its contractors to abide by the Confidentiality Policy or sign the Confidentiality Agreement.

The Union suggested that if the Grievor or any other bargaining unit member had breached the confidentiality of a resident or another employee, they would likely have been terminated. Therefore, it was said that the Employer's

failure to abide by its own Policy should trigger a similarly serious result. The Union also argued that the release of the Grievor's medical note amounts to a violation of the Collective Agreement's specific harassment provision and a breach of the *Occupational Health and Safety Act* provisions cited above. Further, the Union submitted that the Employer's actions amount to a violation of the tort of Invasion of Privacy or "Intrusion upon Seclusion" as defined in *Jones v. Tsige,* 108 O.R. (3d) 241, 2012 ONCA 32. It was stressed that the release of confidential medical information is a breach of trust by the Employer and is especially problematic from a health care facility that ought to be sensitive to such issues. Reliance was also placed on *Rio Tinto Alcan and Unifor, Local 2301,* 2014 CarswellBC 4251, 124 C.L.A.S. 93 (Sullivan); and *Canadian Bank Note Company Limited and International Union of Operating Engineers, Local 722,* 2012 CarswellOnt 10489, 222 L.A.C. (4th) 293 (Surdykowski).

On the basis of the forgoing, the Union requested the following remedies:

I. A declaration that the Employer violated the Collective Agreement, the *Occupational Health and Safety Act* and committed a violation of the Grievor's privacy rights by intrusion on her right to seclusion;

II. Monetary damages for the Grievor (although no amount was specified or suggested);

III. An order directing the Employer to cease and desist from violations of its Confidentiality Policy;

IV. An order directing the Employer to comply with and require compliance with its Confidentiality Policy; and

V. Any other remedy this Arbitrator deems appropriate.

The Submissions of the Employer

The Employer stressed that it recognizes and respects the importance of employee privacy. Further, the Employer repeatedly acknowledged that the release of the Grievor's medical information was "inappropriate" and stressed that it wants to maintain a positive and ongoing relationship with the Grievor.

The Employer took measures to try to explain what occurred and put it in what the Employer views as the proper context. It was pointed out that the contractor who released the medical note was not an employee and had not been required to sign the facility's Confidentiality Agreement. Further, it was suggested that the note itself did not contain any precise medical diagnosis or anything that might imply any stigma, condition or impairment. It was suggested that by disclosing the information that the Grievor could perform her job without accommodation, this Employer was merely passing on factual information in good faith. It was argued that if this is viewed objectively, it should not be seen as something that would cause humiliation to the Grievor. While the Grievor's subjective feelings were not disputed, the Employer asserted that its conduct does not amount to "harassment" or a violation of the *Occupational Health and Safety Act.* Reliance was placed on *Kinark Child & Family Services SYL APPS Youth Centre v. Ontario Public Service Employees Union, Local 213 (Patterson Grievances),* [2012] O.L.A.A. No. 532; *S v. M.G.Z.* [1995] B.C.C.A.A.A. No. 131.

The Employer argued that the proper way to characterize what happened would be to find a breach of Article 7 and its Confidentiality Policy. It was submitted that declaratory relief should be sufficient, given the circumstances of this case, including the Employer's apology and the fact that the Grievor suffered no economic harm as a result of the disclosure of information. The

late timing of the Employer's apology was said to be related to the fact that the Union had initially claimed that the Employer was liable for the Grievor's lost income from West End Villa. It was explained that the apology became forthcoming once the claim was more focused. In the alternative, if a monetary remedy is deemed to be appropriate, the Employer relied on the following cases to submit that an award should be in the range of $500-$1250: *Hamilton Wentworth Catholic District School Board v. Ontario English Catholic Teachers' Assn. (Pizzacalla Grievance),* [2015] O.L.A.A. No. 452; *North Bay General Hospital v. Ontario Public Service Employees Union (Anger Grievance),* [2006] O.L.A.A. No. 533; *Alberta v. Alberta Union of Provincial Employees (Privacy Rights Grievance),* [2012] A.G.A.A. No. 23.

The Union's Reply Submissions

The Union urged this Arbitrator to apply the parties' definition of Harassment under the Collective Agreement, rather than any found in the case law. Further, it was submitted that declaratory relief alone is insufficient in this case because the Employer did not apply its own Confidentiality Policy. The Union also discounted the notion that the Employer's apology should be given much weight because it was not offered until years after the wrong occurred. The Union stressed that the confidentiality of medical information is so important a value that it is protected by statute and by the rules governing health care professionals. Therefore, it was argued that the contents of a medical note are irrelevant to the fact that any such information should never be released without the consent of the individual or without proper authorization from a court or tribunal.

The Decision

This decision should begin by clarifying the scope of the grievance presented. This is a grievance about the release of confidential medical and employment information. While the Grievor believes that this led to her termination by another employer, her employment and its termination at the other facility were resolved in an earlier arbitration before a Board of Arbitration chaired by Arbitrator Brian Keller in the case of *West End Villa, supra*. That decision makes it very clear that St. Patrick's Home, this Employer, is not liable for what happened to the Grievor at West End Villa. The Keller Board of Arbitration dealt with the Grievor's allegations that she had not been properly accommodated following an alleged injury at West End Villa and that she had been terminated as a result of her request for accommodation. The Keller Board unanimously awarded the Grievor $20,000 in damages for West End Villa's initial failure to turn its mind to proper accommodation efforts in March 2013 when the accommodation was first requested. Further, the Keller Board concluded that West End Villa later gave full consideration to all the medical information that the Grievor provided and ultimately did not violate her right to be accommodated:

> The medical evidence, as well as the evidence of the grievor, is first that her medical issues would be continuing and, second there was no likelihood that the restrictions would become any less onerous.
>
> The evidence also is clear that of the 14 distinct duties of the dietary aid she could not perform, in whole or in part, 13 of those duties. . . .
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> . . . we are satisfied that by the time of her discharge the employer had fully considered all of the medical information provided to it by the grievor, had reviewed her restrictions in relations to the work available and had concluded that she could not be accommodated to the point of undue hardship. . . . The nature of her restrictions, coupled with her lack of skills, led the employer to the inevitable conclusion that it was incapable of continuing her employment.

Therefore the Keller Board concluded that the Grievor could not be accommodated without undue hardship because the evidence established that she was medically unable to perform the essential elements of her position or any other position. Therefore, the termination of her employment was lawful. The Keller Board also rejected the request to reinstate her employment because it was concluded that the employment relationship was irreparably breached as a result of the fact that "the grievor was, for some time at least, performing duties at her other place of employment [St. Patrick's Home] that were, essentially, the same as those duties that she claimed that she could not perform at West End Villa." This was said to have created a breach of the "trust relationship" that is fundamental to the employment relationship. Therefore, the unanimous Keller Award regarding the Grievor's employment with West End Villa reveals that her part-time employment at that facility came to an end because of the evidence supporting the conclusion that her medical situation was such that she could not be accommodated without undue hardship. It is true that the Keller Board also declined to reinstate the Grievor based on the finding of dishonesty arising from the contradictions between her ongoing work at St. Patrick's Home and the accommodations being claimed at West End Villa for essentially the same duties. However, it remains evident from the Keller Board's conclusions that she could not be reinstated to West End Villa because her own evidence established that she was medically unfit to perform 13 out of 14 aspects of her position and was unable to fulfill any other meaningful role. As a result, it must be recognized that the St. Patrick's Home, this Employer, cannot be held legally liable for the termination of the Grievor's employment with West End Villa. While the Grievor may feel that St. Patrick's Home is responsible for her loss of her other part-time position, that is not the case. Further, the Union has quite properly not asserted such a claim against St. Patrick's Home. Most importantly, the unanimous decision in *West End Villa* by a

respected and experienced Board of Arbitration fully resolved the substantive issues of this Grievor's Human Rights and employment issues against that employer. There can be no liability for any losses or damages from her employment at West End Villa beyond what the Keller Board awarded. Therefore, there can be no finding of any economic loss arising from that situation. Accordingly, this Award must focus itself on the sole issue of what remedy is appropriate for the admitted breach of this Employer's Confidentiality Policy.

The Agreed Facts establish that this Employer made an appropriate and legitimate request for the Grievor to supply a medical note regarding her fitness to perform her duties in this workplace. The Grievor complied with that request. A contractor associated with the Employer then provided West End Villa, another employer, with a copy of her medical note without the Grievor's consent. The contractor also shared information regarding the Grievor's shifts, hours of work and whether she had requested or received accommodations. The parties agree that the other employer did not request the release of the medical note and that the release was a violation of the Employer's Confidentiality Policy. For purposes of this Award, it is not necessary to decide whether the release of the other information regarding her attendance and hours of work was appropriate or not.

The parties have put in issue the question of whether the release of medical information amounts to violations of the Collective Agreement's Harassment clause or any other statutes or legal rights and what the appropriate remedy should be. Medical information in this case includes the doctor's note, as well as information regarding accommodations or accommodation requests.

A) Does the sharing of the medical information amount to a breach of the Occupational Health and Safety Act?

The clear answer to this question is 'Yes'. Section 63(1)(f) of this *Act* specifies that no person shall disclose any information obtained in any medical examination except in a form that will prevent the information from being identified with a particular person or case. The copy of the note that this Employer gave to West End Villa contained medical information from the Grievor's doctor that clearly identified the Grievor. Further, section 62(2) of the *Act* mandates that no employer shall seek to gain access to a health record concerning a worker without the worker's written consent, except by an order of the court or other tribunal or in order to comply with another statute. The Grievor gave no consent to the release of the information or note and West End Villa neither requested the note nor had any legal authorization to receive it. Since West End Villa had no right to seek the Grievor's health information, this Employer had no right to provide it. Therefore, the Agreed Facts reveal a clear violation of the *Occupational Health and Safety Act.*

B) Does the release of the medical information constitute Harassment?

The parties have defined Harassment in Article 3.02 as including: ". . . any behaviour which denies and or undermines individuals' . . . dignity and respect, and that is offensive, embarrassing and humiliating to said individual." Further, Article 3.02 provides that harassment by any employee or a supervisor "constitutes a disciplinary infraction." This language signals the parties' mutual commitment to create a respectful workplace and to protect the dignity of individuals. This is the definition that governs this situation. The release of medical information about one's personal health, regardless of the contents of the note, is objectively offensive and

embarrassing. It can also cause humiliation. It is not sufficient for this Employer to say that the contents of the note in question do not disclose any medical conditions that would stigmatize or cause embarrassment to a reasonable person. Any medical information is personal, private and must remain confidential. The nature and extent of information that may be revealed in a medical note may have a bearing on the remedy available when there has been improper disclosure, but the disclosure of personal medical information of any kind is very disrespectful and offensive and therefore amounts to harassment as defined by these parties in this Collective Agreement.

C) Does the sharing of the medical information amount to the Tort of Invasion of Privacy or Intrusion on Seclusion?

This tort was defined by the Ontario Court of Appeal in *Jones v. Tsige, supra:*

> [70] I would essentially adopt as the elements of the action for intrusion upon seclusion the Restatement (Second) of Torts (2010) formulation which, for the sake of convenience, I repeat here:
>
> > One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.
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> [71] The key features of this cause of action are, first, that the defendant's conduct must be intentional, within which I would include reckless; second, that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. However, proof of harm to a recognized economic interest is not an element of the cause of action. I return below to the question of damages, but state here that I believe it important to emphasize that given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be

measured by a modest conventional sum.

The Agreed Facts reveal that although this Employer's Human Resources department and contractor acted in the honest belief that they were doing no wrong, the release of medical information was done deliberately and done without regard to the Employer's Confidentiality Policy and without seeking legal advice. Therefore, it was reckless and improper. This was an intrusion into the Grievor's private medical affairs. Any reasonable person would be offended by such conduct and would suffer distress as a result. Accordingly, the elements of "intrusion on seclusion" or invasion of privacy have been established. However, the Court of Appeal also made it clear that such a finding will not normally result in significant monetary damages:

> [72] These elements make it clear that recognizing this cause of action will not open the floodgates. A claim for intrusion upon seclusion will arise only for deliberate and significant invasions of personal privacy. Claims from individuals who are sensitive or unusually concerned about their privacy are excluded: it is only intrusions into matters such as one's financial or health records, sexual practises and orientation, employment, diary or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive. . . . . [emphasis added]
>
> Determining the quantum of damages
>
> [87] In my view, damages for intrusion upon seclusion in cases where the plaintiff has suffered no pecuniary loss should be modest but sufficient to mark the wrong that has been done. I would fix the range at up to $20,000. The factors identified in the Manitoba *Privacy Act,* which, for convenience, I summarize again here, have also emerged from the decided cases and provide a useful guide to assist in determining where in the range the case falls:
> (1) the nature, incidence and occasion of the defendant's wrongful act; (2) the effect of the wrong on the plaintiff's health, welfare, social, business or financial position; (3) any relationship, whether domestic or otherwise, between the parties; (4) any distress, annoyance or

> embarrassment suffered by the plaintiff arising from the wrong; and (5) the conduct of the parties, both before and after the wrong, including any apology or offer of amends made by the defendant.
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> [88] I would neither exclude nor encourage awards of aggravated and punitive damages. I would not exclude such awards as there are bound to be exceptional cases calling for exceptional remedies. However, I would not encourage such awards as, in my view, predictability and consistency are paramount values in an area where symbolic or moral damages are awarded and absent truly exceptional circumstances, plaintiffs should be held to the range I have identified.

D) What is the appropriate remedy for the improper release of the Grievor's medical information?

As can be seen above, the Ontario Court of Appeal has set the normal upper limit for damages for the breach of privacy at $20,000, without there having to be any proof of loss. This figure was set after canvassing a great deal of case law dealing with situations far more serious than the one at hand. The Court has also set out the factors to be taken into consideration in setting a "modest" quantum. In the arbitral sphere, there have not been many determinates of quantum for breaches of privacy or Intrusion on Seclusion. The cases cited by the parties to this case reveal the following:

- $1,250 - $2,750 for unauthorized credit checks during a fraud investigation, but with a timely apology and admissions of wrongdoing. *Alberta v. Alberta Union of Provincial Employees, supra.*
- *$1,250 - $2,250* for unauthorized and inappropriate searches of employees' private living quarters. *Rio Tinto Alcan, supra.*
- $750 for disclosure of information from the Occupational Health Department regarding an employee's refusal to be properly inoculated during an influenza outbreak. This led to the employee's termination. There was no apology from the Employer. *North Bay General Hospital and OPSEU, supra.*
- $500 for disclosure from the employer's medical consultant of the Grievor's diagnosis and treatment plan. The Employer apologized to the grievor. *Hamilton Wentworth Catholic District School Board and OECTA, supra*.

It now becomes necessary to apply the facts of this case to the principles set out above.

(1) *The nature of the wrong done to the Grievor:* As concluded above, the Employer has breached the Collective Agreement's Harassment provision, its own Confidentiality Policy, the *Occupational Health and Safety Act* and committed the tort of Intrusion on Seclusion. As a health care facility charged with the responsibility for residents' privacy, this Employer should have been more sensitive to such issues and taken better steps to prevent this situation.

(2) *The effect of the wrong on the Grievor's health, welfare, social, business or financial position:* The Agreed Facts disclose that the Grievor feels "offended, embarrassed, humiliated and disrespected as a result of St. Pat's disclosure of this personal information." These subjective feelings must be taken into account. However, her additional belief that the Employer's actions caused her to lose her part-time position at West End Villa cannot factor into the determination of quantum. Her employment rights, including the loss of her job at that facility, were fully resolved in the *West End Villa* decision, *supra.* Therefore, there can be no finding of liability for economic loss against this Employer.

(3) *The relationship between the Grievor and the Employer:* This is an employment relationship, requiring mutual respect and trust. As quoted in *Rio Tinto Alcan, supra,* "It is well established that persons do not, by virtue of their status as employees, lose their right to privacy and integrity of a person," see *Monarch Fine Foods Co. Ltd. and Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647,* (1978) 20 L.A.C. (2d) 419 (Kelleher). Further, the ownership of confidential medical information remains within the control of employees, as stressed in *Canada Bank Note Inc. and IUOE, supra:*

> To be clear, confidential medical information belongs to the individual. It does not belong to a medical health professional, or to a medical health facility, or to an administrator/assessor . . . . who gains access to it. They are all mere custodians of such information entitled to use it for the purposes for which it was obtained or provided, and are required to hold all such information securely confidential from all others. That is why in other than emergency situations any such custodian must have the person's express voluntary informed written consent before they can either use his/her confidential medical information for any purpose other than the purpose for which it was obtained or provided, or disclose it to anyone else.

Therefore, the employment relationship between the Grievor and the Employer must be seen as creating an important bond of trust requiring that the Employer safeguard private medical information that it has received.

(4) *The distress, annoyance or embarrassment suffered by the Grievor.* The Grievor has made it clear that she has suffered significant distress as a result of this situation. However, one also has to take into consideration all the facts. They reveal that by doing similar jobs in two facilities and by providing conflicting medical information to them for overlapping periods of time, the resulting consequences cannot be solely attributed to this Employer.

(5*) The conduct of the parties, both before and after the wrong, including any apology or offer of amends made by the Employer.* This Employer has apologized to the Grievor in the course of these proceedings and affirmed its desire to maintain and to continue a positive relationship with the Grievor. However, this apology was only offered once the Union refined and narrowed the claim for relief in the course of preparation for this hearing, even though the breach of the Confidentiality Policy was apparent from the outset. Therefore almost three (3) years had gone by. The evidence also disclosed that the Employer had not required its contractors to abide by this Policy and there is no evidence to suggest that it has done so to date. Employers often

criticize grievors who do not offer timely apologies in situations of wrongdoing. Employers should be held to the same standard. The apology from the Employer is clearly meaningful and significant, but it did come very late and it lacks completion, given the apparently continuing failure to insist on compliance with its Confidentiality Policy by the contractors who serve the residents and interact with the members of this bargaining unit.

CONCLUSION

Given that this Employer has not complied with its own Confidentiality Policy and does not seem to have taken any steps to ensure compliance by its relevant contractors, declaratory relief is not sufficient. A monetary remedy is appropriate to impose a tangible consequence for the wrongdoing. However, it is also clear from the Courts and the arbitral case law that breaches of confidential information, including medical information, trigger only "modest" monetary recovery unless there are exceptional circumstances. There are none in this case. Further, the nature of the medical information disclosed in this case did not reveal any actual medical condition or anything that could invoke a stigma on the Grievor. That is a mitigating factor. Its disclosure did play a part in her other employment relationship, but that has been dealt with in another proceeding. Accordingly, this is not a case that warrants a significant monetary remedy, nor is it one that would take it beyond similar arbitral cases decided to date. Therefore, I order as follows:

1. The Employer is ordered to require any of its contractors or agents that have any interaction with residents or staff to abide by its Confidentiality Policy and to sign its Confidentiality Agreement;
2. I declare that by disclosing the Grievor's confidential medical information without her consent, the Employer breached the Collective

Agreement, the *Occupational Health and Safety Act* and committed the tort of Intrusion on Seclusion;

3. The Employer is ordered to comply with and require compliance with its Confidentiality Policy; and
4. The Grievor shall be paid the sum of $1,000.00 as damages as a result of the above.

I remain seized with regard to implementation should the parties require further assistance.

Dated at Toronto this 26th day of February, 2016

Paula Knopf - Arbitrator