

IN THE MATTER OF AN ARBITRATION

BETWEEN

THE CORPORATION OF THE DISTRICT OF SAANICH

(the “Employer”)

AND

CUPE, LOCAL 2011

(the “Union”)

RE: D. HARMER GRIEVANCES

PRELIMINARY ISSUE

APPEARANCES: Kacey A. Krenn, for the Employer

Michael Shapiro, for the Union

ARBITRATOR: Mark J. Brown

DATE OF AWARD: February 17, 2019

## I. ISSUE

An arbitration is scheduled for February 25 and 26, 2019. The Employer files a preliminary application asserting that the arbitration should be limited in scope to David Harmer's termination grievance. Harmer's LTD and WCB grievances were held in abeyance by agreement.

The Union argues that it is not seeking to have all three grievances heard at the same time; however, the loss of benefits and termination are linked and must be heard together.

## II. BACKGROUND

I will set out some background very briefly in order to put this preliminary application into context.

Harmer commenced employment in December of 1999. He was injured at work in September of 2003. He worked for the Employer up until April of 2006. In April of 2006, Harmer went on sick leave and did not return to work. He had access to LTD and group insurance benefits.

In July of 2017, the Employer threatened to discontinue group insurance coverage.

On August 11, 2017, the Union filed the WCB grievance alleging that the Employer failed to ensure that Harmer continued to maintain his employment status and associated benefits while in receipt of WCB. On the same date the Union requested an extension of time for processing the grievance and asked that Harmer's benefits be continued while the grievance was being processed.

On August 14, 2017 the Union filed the LTD grievance.

On September 22, 2017, Harmer received a termination letter, effective September 30, 2017, on the basis of non-culpable absenteeism.

The Union filed the termination grievance on September 26, 2017 which asserted in part that Harmer should continue "to maintain his employment status and associated benefits". The remedy requested as "reinstatement of employment status, all associated benefits".

On September 27th the Union contacted the Employer and requested that the LTD and WCB grievances be placed in abeyance pending resolution of the termination grievance. The Employer agreed and the Union confirmed later in the day in an email that the LTD grievance was held in abeyance; however, the WCB grievance was not referenced. The parties confirmed on November 22nd that both grievances were held in abeyance.

In an email dated May 3, 2018, the Employer confirmed that there were three grievances for Harmer. It wanted confirmation that in the event the Employer was successful at arbitration for the termination grievance that the other two grievances would “be closed”. The Union phoned the Employer and said the other grievances would “likely be closed”.

On October 12 and 16, 2018, the parties exchanged emails confirming that the termination grievance was being referred to arbitration and the LTD and WCB grievances were held in abeyance.

### III. ARGUMENT

The Employer argues that my jurisdiction is limited by the scope of the grievance. Arbitrators have the power to determine the essential nature of the dispute however this power must be applied within the scope of the grievance advanced to arbitration: *Goodbrand Construction Ltd. (Re)*, [1979] B.C.L.R.B.D. No. 53.

The Employer argues further that a party cannot expand the scope of the grievance absent mutual agreement: *Ontario Hydro v. Power Workers' Union*, [1996] O.L.A.A. No. 38.

The Union argues that it is not seeking to unilaterally expand the scope of the grievance nor have the LTD and WCB grievances heard at the same time.

The Union argues that the termination grievance and loss of benefits are at issue in the termination grievance. In order to determine whether there was just cause for termination it is necessary to determine whether the discharge deprived Harmer of access to benefits negotiated for disabled workers which clearly puts the loss of benefits at issue in the case at hand.

The Union argues that the termination grievance references loss of employment and benefits; the Union Step 3 grievance submission makes it clear that loss of benefits was an issue; and, I must deal with the real matter in dispute which includes whether an employer can dismiss a disabled worker for non-culpable absenteeism if doing so would deprive them of benefits.

#### IV. AWARD

The legal principles to be applied in the case at hand are not in dispute. A party cannot expand the scope of a grievance without agreement of the other party. An arbitrator has authority to address the real substance of the matter in dispute but must do so within the scope of the grievance referred to arbitration.

It is clear that the parties agreed to hold the LTD and WCB grievances in abeyance. Those grievances are not before me.

Accordingly, the Employer's preliminary application is granted to the extent that the LTD and WCB grievances will not be adjudicated by me in conjunction with the termination grievance.

Having said that, the Union's reply submission notes that it is not attempting to consolidate the three grievances into one hearing.

I will not be determining the merits of the LTD or WCB grievances.

However, the legal argument raised by the Union regarding an employee's collective agreement benefit coverage and its impact on whether an employer can terminate an employee when the termination would deny access to benefits, is a legal argument that may need to be addressed in the case at hand. There may also be limited evidence that needs to be led for this legal point, without getting into the actual merits of the LTD and WCB grievances.

The termination grievance arbitration will proceed on February 25 and 26, 2019 in Victoria.

*"Mark J. Brown"*

Dated this 17th day of February, 2019.