IN THE MATTER OF AN ARBITRATION

Between

CARLETON UNIVERSITY

("the University")

and

CARLETON UNIVERSITY ACADEMIC STAFF ASSOCIATION

("CUASA")

RE: GRIEVANCE NUMBER 16-E-00057

CONCERNING THE ACCOMMODATION OF PROFESSOR "S"

PAMELA COOPER PICHER **ARBITRATOR**

APPEARANCES FOR CUASA:

Christal Côté - Interim Director/Senior Grievance & Arbitration Officer
In-House Legal Services Professional

APPEARANCES FOR THE UNIVERSITY:

Michael J. Kennedy - Legal Counsel

Charles Macdonald - Dean of the Faculty of Science

Amy Wyse - Manager, Academic Labour Relations

Hearings in this matter have been held in Ottawa on November 20, 2018 and February 27, 2019.

INTERIM DECISION

THE GRIEVANCE:

1 Carleton University Academic Staff Association (CUASA) filed a grievance on behalf of Professor S dated November 1, 2017 asserting that the University failed to accommodate Professor S in the workplace and has acted contrary to both the provisions of article 5 (No Discrimination) of the collective agreement and the Human Rights Code of Ontario by discriminating against him on the prohibited ground of disability.

2 CUASA maintains that the University has continuously withheld 25% of Professor S' salary through its refusal to allow Professor S to work at a 100% accommodated workload. CUASA asserts that Professor S has provided the University with a reasonable accommodation plan for him to work at a workload of 100% which, it maintains, is supported by medical documentation from his treating physician, Dr. Christine Rivet, in a medical certificate dated June 27, 2017. By failing to implement the accommodation workload recommended in Dr. Rivet's medical note of June 27, 2017, CUASA maintains that the University has failed to meet its obligation to accommodate Professor S within the limits of undue hardship.

OVEVIEW OF THE UNIVERSITY'S REQUEST FOR AN INTERIM ORDER FOR THE DISCLOSURE OF CONFIDENTIAL MEDICAL DOCUMENTATION:

3 Prior to the commencement of the hearing of Professor S' grievance on its merits, the University has requested that the Arbitrator issue an order for the production of all "arguably relevant" confidential medical documentation in Dr. Rivet's medical file, such as clinical notes, tests, descriptions by the Grievor, that formed the objective medical basis for Dr. Rivet's conclusions and/or her recommendations in her medical notes that were voluntarily provided to the University on June 27, 2017, September 27, 2017, June 13, 2018, November 5, 2018 and December 10, 2018.

4 The University seeks to maintain the Grievor's privacy and asks that the order and its dissemination be restricted to the University's counsel and key advisors with dissemination of relevant parts of the documentation on a "need to know" basis as would be required to support potential evidence from the University and/or to respond to evidence advanced by CUASA.

5 Of particular importance, the University further seeks the scope in its requested production order to refer the medical documentation provided by Dr. Rivet to a third-party medical expert selected by the University for the

purposes of obtaining an expert medical assessment of the medical documentation as well as expert testimony, if required.

BACKGROUND:

6 The facts relevant to the University's production request are not in particular dispute.

7 The University confirms that Professor S is a well-respected member of the faculty in the School of Mathematics and Statistics. Moreover, the University does not contest the existence of Professor S' disability, which may be described as cognitive in nature.

8 Professor S first went off work for medical reasons in October of 2014. Although attempts were made for Professor S to return to work, it became clear through a medical note provided by Dr. Rivet dated July 29, 2015 that he was required to be fully off work for a period of time.

9 By October of 2016, the University approved a 75% temporary workload accommodation plan, which was endorsed by Dr. Rivet, and was accompanied by a pay level of 75%.

10 The foundation for the Professor's grievance occurred on June 27, 2017, when Professor S provided the University with an updated medical certificate which recommended a 100% workload with a specified workload balancing between teaching, research and service duties. Dr. Rivet's medical note of June 27, 2017 provided, in part, as follows:

> Jun[e] 27, 2017
> …
>
> I recommend that [Professor S] can return to 100% as long as he is accommodated by the following rebalancing of the work load assignment: 50% research, 25% service and 25% teaching.
>
> I think this schedule should be reassessed in 12 months or sooner as medically required.
>
> Sincerely,
>
> Christine Rivet MD

11 Under article 13.1 of the collective agreement, the “Workload of Faculty Employees” is set out, in part, as follows:

> 13.1 Workload of Faculty Employees
>
> The normal workload of faculty employees shall include teaching, research/scholarly/creative activities, and service to the University in proportion of approximately 50% [teaching], 35% [research] and 15% [service including committee work] …

BASIS OF THE UNIVERSITY’S REQUEST FOR DISCLOSURE OF CONFIDENTIAL MEDICAL DOCUMENTATION:

12 In support of its request for an interim direction from the Arbitrator for the production of confidential medical documentation from the Grievor’s treating physician, Dr. Rivet, the University asserts that it lacks sufficient objective medical information from Dr. Rivet to determine whether the revised accommodation workload advanced by Dr. Rivet to bring Professor S to 100% of his workload, and therefore 100% of his salary, is appropriate.

13 By a letter dated June 30, 2017, the University asked Professor S to direct to Dr. Rivet a list of questions seeking more detail regarding Professor S’ medical ability to teach a three-hour lecture and to carry out related teaching responsibilities, as well as his abilities regarding research and service activities. The letter further asked Dr. Rivet to, “Please provide further clarification on the anticipated duration of Dr. [S’] medical restrictions and limitations regarding teaching, and whether this is a permanent or temporary accommodation request.”

14 In a follow-up letter to Professor S dated August 22, 2017, the University stated the following: “Further to the letter, I provided to you on June 30, 2017 to have Dr. Rivet respond to, it is not clear based on the medical [provided by Dr. Rivet] dated June 27, 2017 as to what your restrictions are and what is preventing you from teaching the full teaching load of 50%.” In such circumstances, the University then advised Professor S in the same letter that, “Until further information is received, your previous accommodation will remain in place at 75% (25% teaching, 35% research and 15% service).”

15 Following the two letters from the University to Professor S, one dated June 30, 2017 and the other dated August 22, 2017, which requested additional medical information from Dr. Rivet aimed at ascertaining the objective

medical restrictions that formed the foundation for her recommended rebalanced workload, which limited his teaching to 25% (instead of the normal 50% carried by a professor working at 100%), there was a further exchange of information between Dr. Rivet and the University in a letter from Dr. Rivet dated September 27, 2017.

16 The University, however, was not satisfied that the information provided by Dr. Rivet in the September 27, 2017 communication spoke to the actual medical restrictions Professor S was subject to, as opposed to Dr. Rivet's stipulations regarding the type of work he could perform and in what percentages. Accordingly, the University declined to implement Dr. Rivet's recommended accommodation at 100% with a workload distribution of 25% teaching, 25% service and 50% research.

17 As a result, in its letter dated October 19, 2017, the University advised Professor S of its decision not to implement the accommodation workload distribution recommended in Dr. Rivet's medical note of June 27, 2017, as follows:

> Given that it is not clear that you are fit to return to a modified 100% workload at this time, your current accommodation at 75% will remain in place. I understand you will be reassessed in June 2018. Once we have another medical update at that time, I am happy to meet with you to discuss your workload. …

18 On November 1, 2017, CUASA filed its grievance on behalf of Professor S.

19 Subsequent to the filing of the grievance, communication continued between the University, Professor S and Dr. Rivet, with the University continuing to press Dr. Rivet for additional underlying objective medical information regarding his medical restrictions and, for example, to ask her to "provide objective medical reasons as to why [Professor S] cannot teach a full course load which equates to six hours of classroom/contact hours per week…" (See a letter on behalf of Dr. Rivet dated June 13, 2018, a letter from the University to Professor S dated August 3, 2018 and a letter from Dr. Rivet dated November 5, 2018.)

20 The University still was not satisfied that the medical information advanced by Dr. Rivet provided it with sufficient information to enable it to understand the medical justification behind what the University considered were the conclusions of Dr. Rivet regarding, for example, limiting Professor S' teaching load to 25% instead of the 50% that is the normal teaching percentage for a

professor teaching at 100%, a workload which Dr. Rivet had asserted Professor S was ready to undertake.

21 By a letter to Dr. Rivet from the University dated November 20, 2018, a final attempt was made by the University to obtain both additional medical clarification from Dr. Rivet and her response to a proposal from the University which entailed Professor S performing 50% of his workload in teaching under various alternative methods for Professor to deliver the teaching. The University asked that Dr. Rivet provide the objective medical basis for her conclusions if she determined that none of the University's alternative proposed ways for Professor S to deliver the 50% teaching workload was suitable for Professor S. The University, however, was not satisfied that Dr. Rivet's reply dated December 10, 2018 provided the University with sufficient medical information to enable it to evaluate whether the accommodation of Professor S with a 25% teaching load was an appropriate accommodation for him in light of his medical circumstances.

22 Accordingly, prior to the evaluation of Professor S' grievance on its merits, which will commence at the next scheduled hearing, the University seeks a formal Order from the Arbitrator for the production of specified confidential medical documentation from Dr. Rivet to be delivered to the University in advance of that hearing.

POSITION OF CUASA:

23 CUASA's legal services representative emphasizes that although Professor S has been under the care of his treating physician, Dr. Rivet, since at least 2014 when he initially went off work, and although his absence and attempts to return to work were continually supported by medical notes from Dr. Rivet indicating what percentage of work he was able to perform in the three categories of teaching, research and service, it was not until June 30, 2017 that the University started asking questions of clarification from Dr. Rivet regarding her recommended workload distribution of duties in his accommodation. CUASA's representative maintains that it was not until Professor S sought to obtain his final 25% percent of salary to reach 100% that the details of his recommended accommodation were called into question, specifically regarding the recommended percentage allocation of his time spent in teaching, which had been at 25%, as opposed to the normal load of 50%.

24 CUASA's legal representative stresses that the privacy of Professor S' confidential medical documents is of utmost concern to him and maintains that he should not be required to disclose such documentation until the need

for its disclosure outweighs the prejudice to Professor S that would follow from the disclosure. She emphasizes that the hearing on the merits of Professor S' accommodation does not start until the next scheduled hearing, such that, in her submission, it would be premature, prior to that hearing, to order the production of the requested medical documentation. In this regard, CUASA's representative highlights Brown and Beatty, Canadian Labour Arbitrations, Chapter 3, Pre-hearing Disclosures. She also cites the arbitration decision in Re Oliver Paipoonge (Municipality) v. L.I.U.N.A. Local 607, (1999) 79 L.A.C. (4th) 241, 1999 CarswellOnt 3359, which provides, in part, as follows:

> 11 … In my view, three propositions may be gleaned from these authorities.
>
> > Firstly, the production of medical information generally and a direction to a grievor to submit to a medical examination, should only be made where it is clear that the fact of the grievor's health is being put in issue by the Union, or, where the employer needs the information sought to prove its case. …

25 CUASA's legal services professional maintains that Professor S' medical condition is not in dispute because the University does not contest the existence of the Grievor's mental health disability. She maintains that the dispute in the grievance focuses on the appropriate process for providing the Grievor with the last 25% of his full salary. On that foundation, that is, at the hearing prior to the hearing on the merits, CUASA's representative maintains that the request for medical documentation is premature and that, at this stage, it is not yet clear that the requested medical documents are arguably relevant.

26 Further advanced by CUASA for guidance in determining whether production of confidential medical documents is appropriate is the arbitration decision in Dufferin Concrete and Teamsters Local Union 230, 2015 CanLII 68945 (ON LA) (G. Luborsky). At paragraph [29] the arbitrator stated the following:

> [29] Thus the authorities indicate that production of inherently private medical information should only be ordered if 'arguably relevant' to the matters directly placed in issue by the circumstances and claims of the grievance. There must be demonstration of a clear nexus of the specific documentation requested

> to the factual matters in dispute that is real as opposed to notional or potential, with minimal intrusion into the employee's medical affairs, so [as] to properly reflect the appropriate balancing of important interests where the private information of an employee is involved. An employer's request for the production of personal medical documentation must also be sufficiently particularized and not unduly prejudicial to the employee, failing which a request of this nature should be denied.

27 Regarding the appropriate balancing of interests in determining whether disclosure should be ordered, CUASA' legal representative cites the following passage from the Supreme Court of Canada decision in M. (A) v. Ryan, [1997] 1 S.C.R. 157, (1997) 119 D.L.R. (4th) 19, 1997. At paragraphs 16 and 37, the Supreme Court stated, in part, the following:

> 16 Where the person objecting to production is a party to the action and privilege is raised , … the judge must take into account the interest of the person being asked to disclose. The fourth branch of the Wigmore test for privilege requires the judge to consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and correctly disposing of the litigation.
>
> …
>
> 37 … It must be borne in mind that in most cases, the majority of the communications between a psychiatrist and her patient will have little or no bearing on the case at bar and can safely be excluded from production. Fishing expeditions are not appropriate where there is a compelling privacy interest at stake, even at the discovery stage. Finally, where justice requires that communications be disclosed, the court should consider qualifying the disclosure by imposing limits aimed at permitting the opponent to have the access justice requires while preserving the confidential nature of the documents to the greatest degree possible.

28 CUASA's legal representative points to the arbitration decision in West Park Hospital v. O.N.A. (P. Knopf – Chair), (1993) 37 L.A.C. (4th) 160, 1993 CarswellOnt 1283 to highlight the criteria that should be considered in determining the issue of the production of medical records over the objection of the grievor. At paragraph 20, the board stated the following:

> 20 However, where the disclosure is contested, the following factors should be taken into consideration. First, the information requested must be arguably relevant. Second, the requested information must be particularized so there is no dispute as to what is desired. Third, the Board of Arbitration should be satisfied that the information is not being requested as a 'fishing expedition'. Fourth, these must be a clear nexus between the information being requested and the positions in dispute at the hearing. Further, the Board should be satisfied that disclosure will not cause undue prejudice. …

29 Regarding the definition of a "fishing expedition," CUASA's representative highlights the arbitration decision in Re Laurentian University and LUFA (Galiano-Riveros), (G. Surdykowski Member), 2011CarswellOnt 1596, [2011] O.L.A.A. No. 660. At paragraph 28, the following description of a "fishing expedition" is set out, in part, as follows:

> 28 … A party is permitted to fish for arguably relevant documents within the litigation pond already established by the allegations and issues in dispute in the particular case, but a party is not permitted to fish for documents to discover a litigation pond or for documents outside of the established litigation pond. This is why litigation parameters have to be established. Arguable relevance cannot be determined in the air. Grievance arbitration litigation parameters are defined by the parties' positions on the merits of a case, and that is why both [parties'] positions provide the context and basis for a determination of arguable relevance.

30 In the alternative, CUASA's representative argues that if the Arbitrator determines that Professor S' confidential medical records should be produced, there should be clear restrictions placed on the production order. As an example of such appropriate restrictions, CUASA's representative points to the arbitration decision in Ontario Federation of Labour and Canadian Office and Professional Employees Union, Local 343 (Staff Unit), (Ian Anderson), 2015 CanLII 67264 (ON LA).

31 CUASA's legal representative objects particularly to the University bringing in a third-party medical expert to review the medical documentation. When asked who should review the disclosed medical documentation, CUASA suggested someone from within in University such as the Dean or an individual from Human Resources.

POSITION OF THE UNIVERSITY:

32 Counsel for the University observed that this matter is not yet at the point where the accommodation requested by CUASA on behalf of Professor S, through reliance on the recommendation of his treating physician, Dr. Rivet, is in dispute. Rather, counsel states that the University is requesting more information from Dr. Rivet so that it may be in a position to determine whether the accommodation recommended in Dr. Rivet's medical certificate of June 27, 2017, and referred to in the grievance, is appropriate.

33 It is noted by counsel for the University that the grievance includes reference to the June 27, 2017 medical certificate and he contends that it is with this note that the issue crystalized. The relevant paragraph in the grievance provides as follows:

> On June 27, 2017, Professor [S] provided an updated medical certificate. His treating physician indicated that Professor [S] was able to return to 100% workload with modifications or re-bundling of duties. The approximate normal workload for Faculty is 50% teaching, 35% research and 15% service. The treating physician recommended 25% teaching, 50% research and 25% service.

34 As detailed above, by communications dated June 30, 2017, October 19, 2017, August 3, 2018 and November 20, 2018, the University sent letters to Professor S and/or directly to Dr. Rivet requesting that Dr. Rivet provide

further objective medical documentation regarding the foundation for her recommended workload distribution under a 100% workload, particularly as it related to her stipulation that Professor S was restricted to a 25% teaching load instead of the 50% load which is standard for a faculty member performing a 100% workload.

35 Counsel for the University maintains that the grievance makes clear that the nature of the medical information being provided by Dr. Rivet and relied on by the CUASA is at the heart of the dispute between the parties regarding the appropriate accommodation for Professor S. Counsel contends that the documents sought are essential for the litigation of the dispute that is central to the grievance. Moreover, and in addition, counsel for the University seeks production of the medical documentation so that the University will be able to have a third-party medical expert examine the documentation and advise the University appropriately.

36 The University's counsel contends that the responses provided by Dr. Rivet to the University's inquiries as to the objective medical basis of her reason for maintaining that Professor S is able to undertake teaching duties for only 25% of his total workload, instead of the normal 50% for a full teaching load, amount to Dr. Rivet assuming the role of actually setting the accommodation. Counsel asserts that it is not Dr. Rivet's responsibility to establish the accommodation for Professor S but rather that it is her responsibility to advise the University as to the objective medical basis for her recommendation regarding the allocation of duties and the percentage of time he is able to spend, respectively, in teaching, service and research.

37 Counsel emphasizes that once the University is able to obtain the appropriate medical information that defines the restrictions on Professor S, the University might find that it is able to agree with the accommodation advanced by the CUASA on behalf of Professor S.

38 Pointing to paragraph 24 of Re Laurentian University, *supra,* a case relied on by the CUASA, counsel for the University emphasizes that the University is entitled to documents that are arguably relevant and contends that if CUASA wants to claim medical privilege, the onus is on the Union to justify the exclusion of arguably relevant documents. Paragraph 24 of Re Laurentian University provides as follows:

> 24 Just as procedural fairness in a civil court proceeding requires complete mutual pre-hearing production, procedural fairness in a grievance arbitration proceeding requires full mutual pre-hearing

> production of non-privileged arguably relevant documents if requested. Proper production tends to focus the parties' attentions and expedite the proceeding by ensuring that both parties' litigation cards are on the table in advance of the hearing… A party which claims privilege must identify the privilege claimed. It is only then that a production issue can be properly dealt with.

39 Counsel submits that the University meets the test for production set out in the case relied on by the CUASA, Re Oliver Paipoonge (Municipality) v. L.I.U.N.A. Local 607, as referred to above. Specifically, counsel for the University contends that in this matter, " … it is clear that the fact of the grievor's health is being put in issue by the Union …[and that] the employer needs the information sought to prove its case …"

40 Additionally, counsel maintains that the University has met the tests detailed in Re West Park Hospital, *supra,* a further case relied on by CUASA. More particularly, regarding the various tests set out in that case, counsel asserts (a) that the medical evidence related to the accommodation for Professor S is relevant, (b) that seeking the medical documentation is not a fishing expedition since the University wants only the documents necessary to process and present its case, (c) that there is a clear nexus "between the information being requested and the positions in dispute at the hearing" given that the University is seeking the medical documents that support the accommodation the Grievor is requesting, and (d) that the overriding prejudice involved in respect of the requested disclosure would be the prejudice to the University if it is unable to obtain the documents.

41 Counsel for the University stresses that for the protection of Professor S' privacy, he would seek to avoid sharing the medical documentation with Human Resources, which, he maintains, would be possible if the University is able to have access to the opinion of a third-party medical expert to review the medical documentation. Counsel observed that his advisors do not want to see or review the medical documentation to determine appropriateness of the medical information advanced to support the recommended restrictions. He noted that they would prefer to keep that review at arms length.

42 Counsel stressed that the University is seeking to solve this matter outside litigation in an effort to protect the privacy of Professor S as fully as possible. Counsel observed, however, that without the medical information it is seeking, the University would be ill equipped to take steps in an effort to resolve this matter outside litigation. Counsel commented that the more information it is

able to obtain outside litigation, the more the Professor's privacy may be protected. Counsel noted that after he obtains the requested medical documentation, if the matter does then go to litigation, he would subpoena Dr. Rivet in any event and he would need to have a third-party medical expert beside him to effectively advise him for a potential cross-examination of Dr. Rivet at that point.

DECISION:

43 The dispute regarding the production of medical documentation arises because of the legitimate and deeply held concern for the Grievor's privacy. Medical documentation is confidential and, under normal circumstances, is not revealed without the permission of the patient. Departure from that norm requires careful consideration. As set out in the Supreme Court of Canada decision in M. (A) v. Ryan, *supra,* at paragraph 16, "… the test for privilege requires the judge to consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and correctly disposing of the litigation."

44 With respect to determining the appropriateness of the disclosure of confidential medical documentation, the arbitration decision advanced by CUASA, West Park Hospital v. O.N.A., *supra,* addresses factors relevant to balancing, on the one hand, the interests of the Grievor in protecting the confidentiality of his medical records, with, on the other hand, the interests of the University in reaching an understanding of the scope of the accommodation that is appropriate for the Grievor in light of his medical condition. At paragraph 20, the board set out the criteria that should be considered in determining the issue of the production of medical records over the objection of a grievor, as follows:

> 20 However, where the disclosure is contested, the following factors should be taken into consideration. First, the information requested must be arguably relevant. Second, the requested information must be particularized so there is no dispute as to what is desired. Third, the Board of Arbitration should be satisfied that the information is not being requested as a 'fishing expedition'. Fourth, there must be a clear nexus between the information being requested and the positions in dispute at the

> hearing. Further, the Board should be satisfied that disclosure will not cause undue prejudice. …

45 The first criterion in Re West Park Hospital stipulates that the information sought must be "arguably relevant." As set out in paragraph 28 of Re Laurentian University, *supra,* a case relied on by CUASA, "Grievance arbitration litigation parameters are defined by the parties' positions on the merits of a case, and that is why both [parties'] positions provide the context and basis for a determination of arguable relevance."

46 Having reviewed the submissions of the parties and the documentary evidence provided by the parties, I am satisfied that the nature of the medical restrictions to which Professor S is subject is a primary issue that will need to be addressed in determining whether the University breached its duty to accommodate Professor S by declining to adopt the recommendation of Professor S' treating physician to move Professor S to a 100% workload with the distribution of teaching duties held at 25%, instead of 50%, which, pursuant to article 13.1 of the collective agreement, is the normal teaching workload for faculty members.

47 Accordingly, it is apparent to the Arbitrator that the nature of the medical restrictions that result from Professor S' medical condition and the impact of those restrictions on the appropriate workload distribution of duties for his accommodation are "arguably relevant" to the determination of the grievance, that is, the determination of the nature of the workload allocation of duties that would constitute appropriate accommodation.

48 Regarding the second criterion in Re West Park Hospital concerning the particularization of the requested information to eliminate any dispute as to what is desired, the Arbitrator is satisfied that, as set out in more detail below, the University has structured its request in a manner that is detailed and confines the medical information to what is necessary to the determination of the accommodation issue.

49 Regarding the third criterion in Re West Park Hospital of precluding a "fishing expedition," the Arbitrator has determined that the University's request for production does not constitute a "fishing expedition." As set out in Re Laurentian University, *supra,* at paragraph 28, "… a party is not permitted to fish for documents to discover a litigation pond or for documents outside of the established litigation pond." In the instant grievance, the litigation pond includes accommodation, as accommodation is the issue that lies at the heart of the grievance, along with a dispute over the understanding of the medical evidence that appropriately supports the accommodation.

50 Regarding the fourth criterion in Re West Park Hospital concerning the existence of a nexus, the Arbitrator finds that there is a clear nexus between the medical information being sought by the University and the dispute between the parties regarding whether the workload distribution in the specific accommodation recommended by Dr. Rivet on behalf of Professor S is appropriate. Dr. Rivet's medical documentation is what is advanced by CUASA as justification for the accommodation sought by CUASA and the Grievor. The intersection between the medical information of concern and the dispute between the parties is clear.

51 Regarding the final issue of prejudice highlighted in Re West Park Hospital, the Arbitrator concludes that the prejudice caused to Professor S by the disclosure of the medical documentation requested is not undue and would be outweighed by the prejudice that would be caused to the University, the party under the duty to accommodate, if it were unable to have access to the medical documentation that would enable it have sufficient information to come to an understanding of the objective medical foundation for the accommodation requested by CUASA on behalf of Professor S.

52 Accordingly, the Arbitrator concludes that the test for the production of medical documentation in the face of the objection of the Grievor as set out in Re West Park Hospital has been met. It is noted that CUASA's legal professional describes Re West Park Hospital as the leading case on the production of medical documentation.

53 Notwithstanding that the conclusion of the Arbitrator is that the medical documentation sought by the University should be released, CUASA's legal professional strongly disputes that the University should be permitted to review the disclosed medical documentation from Dr. Rivet with its own external third-party medical expert.

54 In support of CUASA's objection to the release of the medical documentation to a third-party medical expert, CUASA's legal representative maintains that article 19.5(b) of the collective agreement supports a medical review of an employee by a medical practitioner of her own choosing, not by a third-party. CUASA's representative maintains that by seeking to share the medical documentation with a third-party medical expert selected by the University, the University is asking for the equivalent of a medical assessment of the Grievor. CUASA asserts that, in so doing, the University is seeking to do something that is inconsistent with the spirit of the collective agreement. CUASA points specifically to article 19.5 (b) of the collective agreement, which stipulates that where the employer requires an employee to be

examined by a medical practitioner in circumstances of an employee's absence due to illness, the examination will be performed by a medical practitioner of the employee's choice. CUASA's legal representative emphasizes that article 19.5 does not contemplate the participation of a third-party medical expert in the evaluation of the employee. Article 19.5 provides, in part, as follows:

> **19.5 Sick Leave**
>
> …
>
> (b) In case of absence of three (3) months or more due to illness, the Employer may, at its discretion, require that the employee be examined by a medical practitioner of the employee's choice, for the purpose of evaluating the employee's fitness to return to work.

55 Article 19.5 pertains to sick leave. The grievance at hand, however, is not related to sick leave. Instead the grievance of Professor S concerns accommodation. Moreover, the Arbitrator cannot agree that in seeking the medical review of the medical documentation of Dr. Rivet by a third-party medical expert, the University is asking for the equivalent of a medical assessment of the Grievor. Instead what the University is seeking is a review of the medical documentation underlying Dr. Rivet's proposed accommodation.

56 In Complex Services Inc. v. O.P.S.E.U., Local 278, 3177 (Surdykowski – chair), (2012) 217 L.A.C. (4th) 1, 2012 CarswellOnt 3177, [2012] O.L.A.A. No. 409, the board considered, among other matters, the employer's entitlement to confidential medical information in matters concerning an employee's accommodation. As in the instant situation, the grievor in Re Complex Services had a mental illness disability. At paragraph 84, the board stated, in part, as follows:

> An employee's personal medical information is generally acknowledged to be private and confidential. However, …an employer is entitled to access sufficient such information for legitimate purposes, including … to provide necessary appropriate accommodation… An employer is entitled to only the least such information necessary for the purpose and an employee should generally not be

> required to disclose their medical files, or even the diagnosis or treatment. However, exactly what is required will depend on the circumstances and purpose – and may very well include diagnosis, or treatment, or other information. …

57 At paragraph 85 of Re Complex Services, the board stated that although there is an overlap in applicable principles for the disclosure of confidential medical information between matters relating to sick leave and matters relating to accommodation, "… more information is generally required and a concomitantly greater intrusion on an employee's privacy is therefore necessary when accommodation is the issue than when a short-term absence or sick leave benefits are in issue."

58 At paragraph 86, the board went on to state that, "…an employee has no right to … accommodation unless she provides sufficient reliable evidence to establish that she … has a disability that actually requires accommodation and the accommodation required." At paragraph 88 of Re Complex Services, the board stated that, "The employer has a legitimate need for sufficient information to permit it to satisfy its accommodation obligations." At paragraph 89, the board continued: "The medical information that establishes that the employee has a disability that requires accommodation may not be, and more often than not will not be, sufficient for accommodation purposes. Accommodation is a matter of equal treatment required by the Code. It is not intended to be, and no employee is entitled to, a superior working arrangement merely because that is what she wants or thinks is best."

59 At paragraph 95, of Re Complex Services, the board summarized what otherwise confidential medical information will generally be required for accommodation purposes, as follows:

> 1. The nature of the illness and how it manifests as a disability (which may include diagnosis, particularly in cases of mental illness).
>
> 2. Whether the disability … is permanent or temporary, and the prognosis in that respect …
>
> 3. The restrictions or limitations that flow from the disability (i.e. a detailed synopsis of what the employee can and cannot do in relation to the duties and responsibilities of her normal job duties, and possible alternative duties).

4. The basis for the medical conclusions (i.e. nature of illness and disability, prognosis, restrictions), including the examinations or tests performed (but not necessarily the test results or clinical notes in that respect).

5. The treatment, including medication (and possible side effects) which may impact on the employee's ability to perform her job, or interact with management, other employees, or "customers".

60 Of importance to the issue of the appropriateness of a third-party medical expert becoming privy to and evaluating the confidential medical documentation, at paragraph 126 of Re Complex Services, the board concluded and declared the following:

> I am satisfied that it was reasonable for the Employer to seek and request an Independent Medical Review of the medical documentation provided by the grievor in support of her assertion that she has a mental illness and of the accommodation demanded in that respect, and that it was and is unreasonable for the grievor to refuse to permit her confidential medical information to be used for that limited purpose, *AND I SO DECLARE.*

61 It is apparent upon a review of the jurisprudence that the principles set out in Complex Services have been consistently adopted in subsequent matters. (See, for example, Re G & K Services Canada Inc. and UFCW, Local 206, (Diane Gee), 2013 CarswellOnt 8450; City of Toronto and the Canadian Union of Public Employees, Local Union No. 79, (N. Kanrar grievance) (Mary Lou Tims, Member), 2016 CarswellOnt 18235; and Unifor Local 252 and Nestle Canada Inc. (Grievance of T. Khan), unreported decision of Arbitrator Adam Beatty dated January 11, 2019.)

62 In the instant matter, what the University seeks is production of the confidential medical records, in part, so that it will be able to have an outside medical specialist review the medical documentation to confirm for the University the objective basis upon which the accommodation sought on behalf of the grievor is being requested.

63 The arbitration decision in Greater Toronto Airports Authority v. Public Service Alliance Canada, Local 0004 (C.B. Grievance), (O.B.Shime) , [2010] C.L.A.D No. 127, 191 L.A.C. (4th) 277 addresses the importance of seeking the evaluation of medically trained experts, as opposed to lay opinions, when issues turn on facts that are best understood by professionals trained in the subject area. At paragraph 167, Arbitrator Shime stated, in part, the following:

> 167 I am also of the view that the extent to which a person may modify their gait or their posture to compensate for an injury is outside the expertise of an ordinary lay person. Shifts in posture and gait to accommodate an injury may or may not be readily apparent. Such shifts may also be subtle and not apparent to the untrained eye. I am not prepared to adopt any conclusions from the opinions derived from the videotapes, or the investigators or management members of the GTAA, concerning the Grievor's ability to return to modified duties. They were not doctors and they ought not to have arrogated to themselves the medical knowledge which was necessary to asses the medical condition of the Grievor based on an examination of the tapes. They ought, at least, to have consulted a person with the relevant expertise such as a medical doctor and to have had that person assess the videotapes.

64 Counsel highlighted that the University is seeking, in part, to explore the possibility of resolving this matter outside litigation in an effort to more fully protect the privacy of Professor S. Counsel observed that without access to the confidential medical information used by Dr. Rivet as a basis for the proposed accommodation she detailed in her June 27, 2017 medical certificate, and without being able to obtain the evaluation of that documentation by a third-party medical expert prior to commencing the hearing on the merits of the grievance, the University will be hampered in its ability to attempt to resolve this matter outside litigation. The Arbitrator accepts the legitimacy of the observation of counsel for the University that the more medical information relating to the accommodation sought by CUASA and Professor S that the University is able to appropriately obtain outside litigation, the more the Professor's privacy may be protected.

65 Counsel noted that after he obtains the medical documents, if the matter does go to litigation, he would have to subpoena Dr. Rivet and he would require a medical expert beside him to effectively cross-examine Dr. Rivet at that point.

It is apparent that during the hearing on the merits, the confidential medical information the University now seeks would be permitted to come out.

66 Accordingly, on the basis of the foregoing, the Arbitrator is satisfied that with respect to the instant production order, it is appropriate for the University to have the scope to provide the disclosed medical documentation to a third-party expert to obtain his or her expert medical evaluation and advice

67 Additionally, the Arbitrator is unable to adopt the further position of CUASA that the University's request for production of the medical documentation is premature on the ground that the hearing on the merits will not begin until the next scheduled hearing. It is apparent that, in the matter at hand, it is optimal for the University to have access to the medical documentation that meets the criterion for disclosure set out in Re West Park Hospital prior to the commencement of the hearing on the merits. In such circumstances the University will be positioned, appropriately, not only to more effectively evaluate and prepare its case but also to gain the perspective necessary to determine whether it is possible for the parties to come to a resolution of the dispute regarding Professor S' accommodation prior to hearing, thereby avoiding the time, expense and publicity that accompanies an arbitration hearing and providing an avenue for the possibility of enhanced protection of Professor S' privacy.

68 As previously noted, counsel for the University advised that in seeking to protect the privacy of the Grievor to the fullest extent possible, it would be content to have restrictions placed on the Order that would be consistent with those set out in two cases cited by the CUASA: Ontario Federation of Labour and Canadian Office and Professional Employees Union, Local 343 (Staff Unit), *supra*, and Re Dufferin Concrete, *supra.*

DISPOSITION:

69 Having regard to the submissions of the parties, the terms of the collective agreement, the underlying factual circumstances and the jurisprudence advanced by the parties, the Arbitrator finds that it is appropriate to issue the order for the production of documents requested by the University for all "arguably relevant" documentation, as defined below, in Dr. C. Rivet's medical file, which the Grievor is, hereby, directed to authorize accordingly.

70 For the purpose of clarity, the Arbitrator narrowly construes the definition of "arguably relevant" to the production of those clinical notes, records of examinations, tests, descriptions by the Grievor, and the like, forming the

basis of Dr. Rivet's conclusions and/or recommendations in the medical notes that were voluntarily filed with the University on June 27, 2017, September 27, 2017, June 13, 2018, November 5, 2018 and December 10, 2018.

71 To the extent that CUASA redacts documents or portions of documents in the medical records, sufficient information shall be left non-redacted to disclose the general nature of the redacted documents or portions.

72 If the University does not accept that one or more of the redactions have been limited to matters not arguably relevant to the Grievor's psychological disability, it shall give notice of its challenge(s) to the Union. CUASA shall forthwith provide the Arbitrator with non-redacted copies of the challenged documents for comparison with the redacted copies. The Arbitrator will then determine what further portions of the documents, if any, shall be produced in a non-redacted form to the University.

73 To maintain proper respect for the privacy of such documentation, I also order that its dissemination be restricted to the University's counsel and its key advisors having carriage of the grievance on behalf of the University, with further dissemination of those relevant parts of the documentation on a "need to know basis" to support potential responding evidence by the University, including the possibility of its referral for expert assessment and testimony, all of which is conditional on the deemed undertaking of all recipients of the medical information that the documentation will be kept confidential and only used for the purposes of the present grievance proceedings, at the conclusion of which all such documentation in the University's possession or control shall be returned to the Grievor or destroyed.

74 I remain seized and may be contacted to resolve any disputes between the parties concerning the interpretation and/or compliance with this order prior to the continuation date scheduled in the usual course.

Dated at Toronto this 29th day of March, 2019.

Pamela Cooper Picher

Pamela Cooper Picher - Arbitrator