00 19 48 **AGYEMANG, Gabriel**

« Applicant »

v.

IPEX INC.

« Respondent »

The request for the examination of the disagreement between the parties

On November 13, 2000 Mr. Gabriel Agyemang submitted to the Commission d'accès à l'information (Commission) a request for examination of a disagreement concerning the refusal, by the company Ipex Inc., to grant his request for the withdrawal of certain documents which were in his file at the company and which related to his state of health. This request had been made by Mr. Agyemang verbally on September 25, 2000. Following an initial refusal by a representative of Ipex Inc. he made an application in writing to the company dated October 18th 2000, to which he received a refusal for reasons explained in a letter dated October 31st 2000. This letter sets forth the respondent's position « … that the Company, according to its management's rights, has a legitimate right to have and keep this information namely because it relates to your state of health and to your ability to work or to absent yourself from work and because you are challenging the decision we took when terminating your employment ».

The Commission held a hearing in Montreal on February 16th, 2000.

The issue in dispute

The parties agree as to the issue in dispute. It is whether Mr. Agyemang has a right to insist on the withdrawal from his file at the Ipex Company of certain medical documents, which he himself remitted to the company in the context of his application for disability income benefits with the Great-West Life Group.

Mr. Agyemang insists that these particular medical documents were not intended to be kept by the company but were only submitted for transferal to the insurer, Great West, for the purposes of proving a claim for disability benefits.

Ipex, on the contrary, claims its right to retain the documents as employer and as part of the proof concerning the applicant's ability or inability to work at a certain time period. The question of his ability to work is central to the dispute, still ongoing at the time of the hearing, as to whether Mr. Agyemang's termination from employment in September 2000 was justified under the collective bargaining agreement.

The relevant facts

There is substantial agreement as to the events preceding the request for withdrawal of the documents held in Mr. Agyemang' s file by the company Ipex Inc.

Mr. Agyemang worked for the company Ipex Inc. He was called to work on June 21 and 22 and June 26 and 27 2000. He did not show up for work on those days. On July the 5th the company suspended him for absence from work and in early September terminated him pursuant to the collective bargaining agreement. This termination was grieved by the applicant and, at the date of hearing before the Commission, a hearing before a labor arbitrator was scheduled some two weeks later.

According to the applicant's testimony and the documents filed with the Commission at the hearing, the following pattern of events emerges. Mr. Agyemang testified that he was in Ghana on June the l9th when he felt ill and obtained a medical certificate entitled Excuse Duty Form (P-3). He testified that on June the 30th he attempted to go to work at Ipex in Ville Saint-Laurent but was sent home because he had been suspended for absenteeism.

Madame Claire Dubé, who accompanied him and who testified on his behalf at the hearing, said that she was present on the night of July the 4th 2000 when he went to the emergency department of the Hôtel-Dieu hospital and was subsequently kept in intensive care for three days. She testified that he was hospitalized for two to three weeks in July. He underwent an extensive series of medical tests in July and early August at the various laboratories of the Hôtel-Dieu hospital of the Centre hospitalier de l'Université de Montréal (CHUM). These documents were grouped together and submitted in proof by the applicant as the document (P-2).

On August 22, 2000 he gave this series of detailed medical reports (P-2) to his employer for transmission to the insurance company Great-West Life in support of his claim for disability insurance. On September 25, Mr. Agyemang went to review his file at the company in the presence of Mr. Philippe Jean, an employee of Ipex, and saw that a copy of the documents he destined for the insurance company had been made and were now in his personal file. Mr. Jean refused to withdraw these documents. On October 31st, Mr. Pierre Coulombe of Ipex replied in writing to the applicant's request for retrieval of the documents, citing the exception of s. 39 (2) of the Act respecting the protection of personal information in the private sector.

At the hearing the witness, Madame Dubé, testified that the applicant felt the company didn't need the documents destined for the insurance company and was apprehensive of the sensitive personal information the medical reports contained. She gave as an example the test for VIH, which she stated was negative but was an example of the type of personal information which Mr. Agyemang feared might circulate within the company.

The provisions of the Act and its application

I The exception for judicial proceedings

To justify its refusal to return the documents in question to Mr. Agyemang, the respondent company refers to s. 39(2) of the Act respecting the protection of personal information in the private sector, which states:

> **39. A person carrying on an enterprise may refuse to communicate personal information to the person it concerns where disclosure of the information would be likely to**
>
> **(1) hinder an inquiry the purpose of which is the prevention, detection or repression of crime or statutory offences conducted by his internal security service or conducted on his behalf for the same purpose by an external service or a detective or security agency in accordance with the Act respecting detective or security agencies (chapter A-8);**
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> **(2) affect judicial proceedings in which either person has an interest.**

The company argues that, since the employee is involved in an industrial relations dispute concerning his absence, ostensibly for health reasons, he has renounced the right to keep his medical information confidential.

The lawyer for the company referred to the Quebec Court of Appeal decision in *Laprise* c. *Bonneau et Johns-Manville Canada Inc.*[1]. The excerpt of the judgement written by Mr. Justice Jacques, which concerns this request for revision, is well summarized in the headnotes :

> ***Le bureau de révision de la C.S.S.T. est un tribunal au sens de l'article 7 de la* Loi sur les services de santé et les services sociaux :** ***par ailleurs, le fait d'invoquer son état physique devant un tel tribunal judiciaire constitue, en l'absence d'indications contraires, une autorisation implicite de donner communication des dossiers médicaux de l'appelant sous réserve du fait que les composantes du dossier ne soient admises en preuve que suivant les règles usuelles de la pertinence et de la causalité.***

Having read this judgement and with respect for the contrary opinion, I do think that the situation envisaged there could be distinguished from the case of Mr. Agyemang for several reasons. First of all, it is directed to a case where a worker whose compensation benefits for a work-related accident have been terminated and who applies to have them reinstated while at the same time refusing access to his medical files. The Court concludes in this case that this would be contrary to what it qualifies as elementary principles of justice, that is, that each party be informed of the elements of proof relevant to the decision sought in order to make the appropriate representations.

This is different to the situation in the present case. The applicant Agyemang, in the context of a medical condition requiring hospitalization and subsequent tests, hands over documents to the company believing that they will be transmitted in their entirety to the company Great-West Life for the sole purpose of determine the disability benefits to which he hopes to be eligible and subsequently finds, to his surprise, that the company has made a copy for its own purposes.

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1 [l985] C.A. 9 à 13.

Secondly, while undoubtedly the request for revision before the Commission is one before a judicial tribunal, the issue between the parties here is not whether Mr. Agyemang's health justified his absence at different periods of time and his ultimate loss of employment from the company Ipex. This is the subject for the labor arbitrator to deal with pursuant to the collective bargaining agreement. The Commission must decide if the company held personal information concerning the applicant in accordance with the Act respecting the protection of personal information in the private sector.

Article 39(2) envisages the situation where information is held by one party, concerns the person who requests access, and will likely have an effect on a judicial proceeding. In the decision of *Andrée Nadeau* c. *SSQ-VIE* the Commissioner Michel Laporte ruled that the refusal to disclose information must be evaluated at the moment when the request for access was refused[2]. Since Mr. Agyemang already had the documents, article 39(2) would not, to my mind, be applicable to the situation in the present case where the company intercepted and made a copy of personal information given to it for transmittal to a third party, the insurance company Great-West. With holding the document could not affect a judicial proceeding in the way envisaged in s. 39(2) because the applicant already had a copy.

The judicial proceedings in this case may be said to have been initiated not before the 5th of September 2000, the day when the company dismissed Mr. Agyemang and when he filed a grievance in return. Documents obtained without the consent of the subject and which he has already, thus cannot be said to be the ones contemplated by s. 39(2), even if they would later have a bearing as subsequent judicial proceedings.

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2 (1999) C.A.I. 376 à 381 à 380.

Medical reports could be requested and obtained in the course of arbitration hearings. That they may ultimately form part of an ongoing legal dispute is not a justification for their interception without consent.

For these reasons, s.39(2) is not applicable.

II The relationship between the insurer and the employer

The applicant entrusted the documents to his employer for one purpose : to forward them on to his insurer. But before doing this, the company made a copy of them.

The veritable debate must be situated at this point. Did the company have the right to obtain this personal information without the consent of the person concerned, the applicant Agyemang ?

To answer this question, several issues must be examined. First, the provisions of the collective bargaining agreement relating to the obtaining of the medical records by the company and secondly, the nature of the relationship between the company and the insurer Great West which could justify the copying of medical records.

Article 29.01 of the collective bargaining agreement states :

> **Art. 29.01 La Compagnie pourra exiger un certificat médical si, à l'intérieur d'une période de six (6) mois, un salarié a été absent pour une période de deux (2) jours ou plus.**

This provision recognizes the right of the employer to call upon an absent worker to justify his or her absence by a medical certificate. It is possible the worker could refuse to supply the certificate requested. It does not, however, appear to give the employer the right to detention and access of personal information amounting to much more than a medical certificate without the subject worker’s consent.

As to the second question, if the company is acting as insurer or mandatory of the insurance company with which there is a previous agreement as to detention of medical records in the case of a claim, the situation would be different.

No proof was submitted as to a possible relationship of mandatory between the insurance company and the employer.

However, for further certainty, I have examined the Employee Claim Submission Guide of the insurer as well as the Authorization Request signed by Mr. Agyemang on August 14, 2000.

The relevant sections of the Employee Claim Submission Guide are as follows:

> How to submit a claim
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> 1. Notice of Claim
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> The Notice of Claim asks general information about you, your job and the nature of your disability. Please complete all questions on this form and be sure to include your Group Policy Number.
>
> 2. Authorization Request
>
> We need your permission to obtain information that will help us assess your claim. By signing this authorization request, you give Great-West Life permission to obtain this information from your doctor, your employer, other insurers and hospitals where you received treatment.

AUTHORIZATION REQUEST

> In connection with your claim for benefits, a file will be set up by The Great-West Life Assurance Company. Employees or agents of The Great-West Life Assurance Company will have access to your file, and will request information required to investigate your claim. As part of your claim for benefits, The Great-West Life Assurance Company may provide rehabilitative services, which may include coordinating return to work planning with your employer. The Great-West Life Assurance Company and your employer will need to exchange information related to you in order to facilitate these rehabilitative services.
>
> To assist The Great-West Life Assurance Company with your claim for benefits, you must sign the following authorization before benefits can be considered.

> I hereby authorize and direct any physician, dentist, medical or non-medical practitioner, hospital, clinic, pharmacy or other medical or medically-related facility, insurance company, or other organization, institution or person, including my employer, that has any records or information related to me, to give to The Great-West Life Assurance Company or its agent any such information for the purpose of assessing my claim.
>
> I also authorize The Great-West Life Assurance to release information to any insurer or benefits administrator, including administrators of government benefits.
>
> I also authorize The Great-West Life Assurance Company to release any information to my employer for the purpose of discussing return to work planning.
>
> Occasionally, an employer, or an agent engaged by an employer, will ask to audit their employees' disability claim files to ensure the efficient assessment of the claims. For audit purposes, I authorize my employer, or an agent of my employer to conduct an audit of my claim, if such an audit is approved by The Great-West Life Assurance Company.
>
> This authorization shall remain valid for the duration of my claim for benefits or until otherwise revoked by me. A reproduction of this authorization shall be as valid as the original.

Nowhere in these latter two documents is there an indication that the employer has a right to conserve a copy of any documents submitted to the insurer. On the one hand, the employee may submit his or her documents directly to the insurer. On the other hand, the employee must accept the employer’s right to audit the employee files with the insurer. If the employer had an automatic right of access to all employee medical insurance files, it would not need to obtain express consent to audit.

In conclusion, it does not appear that the relationship between the employer and the insurer justified the interception and detection of information destined for the insurer.

III Collection and consent in the Act

Were the employer's actions justified in the light of s. 5 of the Act, which allows for the lawful collection of necessary information given the object of the file ?

> **5. Any person collecting personal information to establish a file on another person or to record personal information in such a file may collect only the information necessary for the object of the file.**
> **Such information must be collected by lawful means.**

A medical diagnosis is not, for an employer who does not administer a health insurance scheme, necessary information such that its collection without consent is justified. According to the authors Desbiens and Poitras[3] :

> **Le diagnostic médical (nature de la maladie) n'est pas un renseignement nécessaire à l'employeur qui n'administre pas le régime d'assurance-invalidité. La collecte de ce renseignement est nécessaire à l'administrateur du régime, dans le présent dossier, l'assureur, et au courtier, mandataire de l'assureur. L'employeur doit donc remplir sa partie du formulaire avant le médecin traitant de l'employé : *X. et Centre d'action bénévole d'Iberville*[4]. et *X. et Synergic international 1991 inc.*[5].**

Such sensitive personal information should not be obtained without the employee's express consent. Even if such information throws light on an ongoing industrial dispute, it must be noted that labor standards legislation and, in many cases, legislation and collective bargaining agreements already prescribe the ways in which proof of medically related facts and expert opinions can be made.

Section 5 cannot be used to legitimize the surreptitious collection of personal information passing through the employer's hands to the insurer. In this sense, the file to which the information is destined is the file of the Applicant employee with the insurer. The employer has no relevant file, within the meaning of section 5, on the employee's insurance claims.

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3 Linda DESBIENS et Diane POITRAS, SOQUIJ, 1996, p. 476.

Moreover, consent is one of the fundamental principles underlying the collection of personal information. Section 14 of the Act states :

> **14. Consent to the communication or use of personal information must be manifest, free, and enlightened, and must be given for specific purposes. Such consent is valid only for the length of time needed to achieve the purposes for which it was requested.**
>
> **Consent given otherwise than in accordance with the first paragraph is without effect.**

Consent is a principle which cannot be circumvented, especially in the case of sensitive personal information. Health data may be particularly revealing about individuals in various ways. For example, some jurisdictions even place particular limits on the use of health data as on that pertaining to sexual orientation and political opinion[6]. Methods of transmission of health data warrant careful scrutiny in order to preserve the fundamental right to respect for a person's private life[7].

It is generally recognized that control of information about one's self is an essential component of any definition of privacy[8]. Interpreting the Act in its application to the collection of personal health information must take into account the importance of this information for the individual, for whom it forms part of his or her identity as a person.

Mr. Agyemang testified that his medical records were copied without his consent. The company offered no proof to contradict this assertion.

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4 C.A.I. 94 01 65, juillet 1994 (rap. d'enq.).

5 [1995] C.A.I. 361 (rap. d'enq.).

6 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data *Official Journal L281, 23/11/95 p. 0031 - 0050.* Art. 8, Brussels, February 3rd, 1995.

7 *Charter of Human Rights and Freedoms* R.S.Q. c. C-12, section 5.

8 Alain-Robert NADEAU *Vie privée et droits fondamentaux : étude de la protection de la vie privée en droit constitutionnel canadien et américain et en droit international*. Cowansville, Éditions Yvon Blais, 2000, p. 19-32.

Conclusion

The question to be resolved is that of justifying a refusal to return information collected without consent. The fact that this information may ultimately affect a legal proceeding is not the guiding principle in a situation where the person concerned holds the information already and cannot be shown to have consented to its duplication by another. Section 39(2), an exception to the right of access, cannot so operate as to fundamentally change the conditions under which consent for the collection of personal information is given.

The applicant Agyemang never intended and did not consent to the retention of his medical reports, which were destined for the insurance company. The employer company cannot intercept this sensitive information destined for a third party without permission because it could be useful in a related legal proceeding in which it is involved. It is not information necessary for the object of an employee file and was not collected by lawful means.

For these reasons and referring to s.28 of the law, the Commission orders the respondent company to destroy the documents in its possession which correspond to exhibit (P-2) "Detailed tests and results". It further orders the non-communication, non-publication and forbids any release of these same documents (P-2) now in the files of the Commission d'accès à l'information.

Quebec April 12, 2001

JENNIFER STODDART
Commissioner

M[e] Pierre Hébert

Attorney of Respondent