

(C) The Cartwright Group Ltd., 2006

*Re*  
**Beacon Hill Lodges Inc. and S.E.I.U., Local 268**

**IN THE MATTER OF AN ARBITRATION BETWEEN BEACON HILL LODGES INC.  
(Hereinafter referred to as the "Lodge")  
AND SERVICE EMPLOYEES INTERNATIONAL  
UNION, LOCAL 268 (Hereinafter referred  
to as the "Union") CONCERNING:  
DISCHARGE GRIEVANCE OF KIM EAGLES**

1993 C.L.A.S.J. 584336

30 C.L.A.S. 226

Ontario

**Mikus**

MARCH 22, 1993, DECIDED

[para1]

*DISCIPLINARY OFFENCES -- Dishonesty -- General -- Breach of trust -- Grievor terminated for alleged misuse of sick leave benefits -- Grievor working at second part-time job after calling in sick to employer -- Grievor's sick leave claim genuine -- Dishonesty not intended -- Grievor believed she was capable of performing one job and not other -- Discipline not warranted -- Grievance allowed (22 pp.).*

*Brown & Beatty, 7:3322*

C.L.A.S.

APPEARING FOR THE LODGE: Robert Barlow, Counsel; Gail Henry, Katherine Simpson

APPEARING FOR THE UNION: Glenn Chochla, Counsel; Barbara Rankin, Cherrilynn Kocia, Kim Eagles

Loretta Mikus, Arbitrator

This grievance was referred to me under section 46 of the Labour Relations Act R.S.O. 1990, c. L-2. No objection was taken to my jurisdiction to hear this matter.

The grievance arises from the Lodge's decision to terminate the grievor's services for an alleged misuse of sick leave. There is no dispute between the parties as to the events giving rise to the grievance. The dispute arises with respect to what consequences, if any, ought to flow from those events.

The grievor has been employed as a Health Care Aide at Beacon Hill Lodge since 1988. Beacon Hill Lodge is a nursing home in the city of Thunder Bay. There are one hundred and sixty one (161) residents between the ages of forty-five (45) and one hundred and two (102). Their nursing care needs are categorised as either fully dependent, needing some assistance and needing full assistance. On the fourth floor, where the grievor works, there are thirty-three residents. During the day shift there is a Registered Nursing Assistant in charge of the floor, including the administration of medications and treatments. Although she does help the Health Care Aides upon request, it is not her primary duty to provide hands-on care to the residents. It is the responsibility of the Health Care Aides to assist the residents with their bathing, dressing and ambulation. The grievor is one of the two Health Care Aides scheduled to work from 0700 hours to 1500 hours. As well, one Health Care Aide is scheduled a short shift from 0700-1200 hours. During her shift, she is responsible for the care of eleven residents. There are periods during the day shift when the Health Care Aide is the only staff member on the floor, generally during lunch and break times and during those times the Health Care Aide on duty is responsible for all thirty-three residents.

The evidence as to the actual level of care needed by the residents on the fourth floor was unclear. For example, Ms. Simpson, the Director of Nursing, testified that there were eighteen residents in wheelchairs, Ms. Davis, the Registered Nursing Assistant assigned to that floor counted twenty-two and the grievor testified there were seventeen. What is clear is that of the thirty-three residents, all need some degree of assistance. Between seventeen to twenty-two of them get up in a wheelchair, with assistance. Some residents simply need support in transferring from the bed to the wheelchair, others need to be physically lifted by one or two people from bed to the wheelchair. Most residents need assistance to the bathroom.

The grievor worked her regular shift on January 28, 1993. Her evidence is that during that afternoon she began to experience pain in the right side of her neck. She was scheduled to be off the next day so she did not mention her sore neck to anyone, believing that it would be gone by her next scheduled work day, that is January 30, 1993. The pain, however, did not subside, but instead worsened. The grievor testified she was awakened about 0400 hours on the morning of January 30, 1993, with a severe pain in her neck. She noticed at that time that she had a hard mass at the back of her neck and assumed it was a muscle spasm. At 0446 hours she called in to the Lodge to advise them that she would be unable to report for work at 0700 hours as scheduled. Later that day a co-worker called her to see how she was feeling. During that conversation, she was told that the Lodge had been unable to replace her and that the fourth floor staff had worked short-handed. Since her neck was not feeling any better, the grievor advised the receptionist that she would also be absent on the next day, that is January 31, 1993. She

believed the Lodge would have an easier time replacing her if it had more notice of her absence.

The grievor testified that she did not call her own doctor about her neck pains because the Clinic where he worked was closed for the weekend. She did not believe that a visit to the Emergency Department was necessary either. She did, however, call the Clinic on Monday morning to see if her doctor could see her and was told he had no free appointments for the day. She decided she would go to the Clinic in the afternoon to see if she could persuade him to see her without an appointment. In the meantime, she received a call from Ms. Simpson asking her to attend at the Lodge later that afternoon to discuss her sick leave.

In addition to her full time position at the Lodge, the grievor has been working an average of fifteen to eighteen hours a week at Ricki's, a clothing store in a nearby mall, since December of 1991. The Lodge was aware of her second job and never objected. Apparently, on the following Monday, Ms. Simpson was advised by another staff member that the grievor had worked at Ricki's on Saturday evening. Ms. Simpson knew that the grievor had called in sick for the day shift on that Saturday. She called the Manager of the store, Ms. Mary Ann Duvall, and confirmed that the grievor had indeed worked from 1800 to 2100 hours on January 30, 1992. Ms. Simpson called the head office to advise them of the situation and to discuss dismissing the grievor for fraud. Ms. Simpson called the grievor at home and asked her to come in to her office later that day to discuss her sick leave. At the same time she had prepared a letter which stated that the grievor was being terminated for misuse of sick leave.

A meeting took place that same day at 1646 hours. In attendance were Ms. Simpson, Mr. John Hautala, Human Resource Officer, Ms. Cherrilyn Kocia, Union Steward and the grievor. The grievor acknowledged that she had called in sick for the day shift of January 30, 1993 and then worked that same evening at Ricki's. She explained that at the Lodge she would have had to do heavy lifting whereas, at Ricki's she would only be required to show customers to the dressing rooms, answer their questions and operate the cash register. She told Ms. Simpson that she had tried to find a replacement for her shift at Ricki's during the day because she had a migraine headache, but was unable to. Rather than leave them short-staffed, she decided she could manage. She also said that if she had known that the Lodge would be upset she never would have worked that evening. She offered to get a doctor's note to substantiate her sick claim. Ms. Simpson told the grievor that the issue was not what a doctor would say in a note. The issue, according to Ms. Simpson, was that the grievor had committed fraud and she handed the grievor the letter of termination.

Immediately after that termination meeting, the grievor went to the Fort William Clinic to see her family doctor, Dr. Toppin. He testified at the hearing that he has been her family physician for about three years and is familiar with her medical history. He stated that he had seen her at his office on January 27, 1993 for a general check up and found her to be in good health. She did not have any complaints about her neck at that time. He examined her on February 1, 1993, and on the basis of that examination wrote the following note:

Was off work medically Jan. 30 & 31 secondary to MSK (?) muscle strain. Apparently has had this as WCB Injury In past few years ago. Occasionally flares & few days off work during these periods is not unreasonable.

According to him, the grievor said she did not remember sustaining any injury to her neck and told him she had been awakened by the pain during the night. She advised him she had been fired from her job and described the circumstances leading to the termination. She explained the duties of each job and why she had decided she could do one but not the other. On the basis of her description and his own

general knowledge of a nursing home and a clothing store, he felt his note was reasonable in the circumstances. He did not, however, prescribe any medication or further treatment for the neck at the time. In his opinion, rest was the best cure. As a follow-up, and at the grievor's request, he wrote the following note, dated February 4, 1993:

Could have worked as sales Person, selling clothes Sat. January 30/93. Did not include lifting of any type.

On February 25, 1993, the Union sent a letter to Dr. Toppin setting out the job duties of a Health Care Aide and a clerk in a women's clothing store and asked him for an opinion as to whether the grievor could have worked at either job on January 30, 1993. In a letter dated March 1, 1993, he stated the following:

Thank you for your request regarding Kim's recent difficulties. I will answer your questions one by one.

1. On February 1, 1993 I assessed Kim's neck. There was some increased tension on the right side of her neck and some muscle spasm down the right side of her neck and the range of motion of her neck was approximately 40% of normal without pain, and she could get to 90% normal with pain, especially down the posterior right neck. She also had some pain radiating down her back and into her shoulder and she winced with pain when she went through these ranges of motion.
2. To the best of my knowledge, Kim did not mention anything regarding her neck to me on the days immediately before February 1st, however I do remember from her history that she has had difficulty with back and neck pain throughout the years, although we have never actually given her any specific treatment for this. She does tell me that she had an Injury of her neck at work that was reported and that since that time she has had trouble with her neck off and on. I have searched my notes for complaints regarding neck pain and can not find any, however If the patient Is not having an acute problem with the neck at the time of the visit, then if it is mentioned casually It is not recorded, so this is not an indication that she did not have pain or trouble In the past.
3. I do not think she should have worked at Beacon Hill Lodge with her neck In that condition on January 30th and 31st.

Regarding long term neck history and recent history of her condition, she mentioned to me that Indeed over the Yearsshe has had neck strain and recurrence of her neck pain from time to time while working and doing heavy lifting at her occupation at Beacon Hill, and also her neck was beginning to hurt In a flair-up of condition a few days before January 30th and 31st.

I think that given the job profile of her other job In sales of clothes, that I would have had no hesitation in recommending that she could work at that Job.

If I can be of any further assistance, please do not hesitate to lot me know.

In further support of the grievor's claim that she was genuinely ill, there was evidence from Ms. Duvall, the Manager at Ricki's and Ms. Saczawa, a co- worker at the store, that the grievor arrived at the store on the evening of January 30, 1993, with a sore neck. Ms. Duvall testified that the grievor had her

shoulders "hunched up" and she stayed in that position the whole time Ms. Duvall was there, approximately five or ten minutes. She testified that she remembered having a discussion with the grievor about her "hunched" shoulders and suggested that it might be caused by stress. She was unsure about when the conversation took place and stated that it might have been on that same evening. The grievor's evidence is that the conversation occurred on that same evening. Ms. Saczawa testified that the grievor's shoulders were "hunched up" and that she was favouring her right side. She said it was obvious from the look on the grievor's face that she was in severe pain. It was also obvious that she would occasionally try to stretch her neck to work out the cramp.

## LODGE'S ARGUMENT

Mr. Barlow, for the Lodge, took the position that the grievor misused sick leave and, in the process, committed a fraud against the Lodge. Those actions constitute just cause. He pointed out that the sick benefits in the Collective Agreement are found in the article entitled Income Protection in Case of Illness. Article 37.09 of that article reads as follows:

37.09 Once sick leave credits are earned, they may be used when sickness forces the employee to remain at home from work Sick leave credits used up will be deducted from the total credits accumulated.

The Lodge asserted the Collective Agreement is clear. In order to qualify for paid sick leave, an employee must comply with the terms of the Collective Agreement. It states that an employee must be "at home from work." and, by the grievor's own admission, she was not. While she was receiving sick pay from the Lodge, she was out of her home working elsewhere. Her actions are inconsistent with her claim that she was forced to stay off work due to sickness or illness. Her actions subsequent to that weekend are consistent with the Lodge's position. When she was called by Ms. Simpson and told to come in to discuss her sick leave, she did not admit to having worked elsewhere. She did not admit it until she was confronted by Ms. Simpson with the accusation. Once she admitted to working at Ricki's on the evening of January 30, 1993, she did not offer any apology or show any remorse. Mr. Barlow submitted that the medical evidence, both the doctor's notes and his testimony, should be viewed by this Board with suspicion. Dr. Toppin examined the grievor three days before the incident and saw no signs of a neck problem. His examination of her on February 1, 1993, was done in full knowledge of the reasons for the termination. On the basis of information provided by the grievor, he wrote a note saying that it was not unreasonable for her to have stayed off work There was, however, no medication prescribed, no follow- up treatment, no suggestion of physiotherapy and no referral to an orthopaedic doctor for consultation. That note also refers to a prior WCB injury when the two incident reports filed by the grievor concerning neck injuries deny any previous difficulty. For example, in November of 1992, she filled out an incident report claiming she had suffered an injury to her neck but could not identify how, where or when that injury occurred. In May of 1992, she filed another incident report claiming that a resident has struck her on the right side of her neck and face. On both of these forms the grievor stated that she had not had a similar occurrence in the past year. And yet, she told her doctor that she had suffered a WCB injury in the past the inference being that this neck pain might be associated with those previous injuries. The Lodge argued that when it seemed as if that note would be inadequate, Dr. Toppin prepared another note expanding on his opinion that the grievor acted reasonably in staying off work at the Lodge and then working at Ricki's. Both of those notes are based on fallacious information and are of no factual value. In Dr. Toppin's letter of March 1, 1993, he is more precise about his observations of the grievor's neck condition as well as her ability to perform her job functions at the Lodge and Ricki's. Again, that letter was based on information provided by the grievor to the Union about her job duties. There were inaccuracies in the Union's letter and, as a result,

Dr. Toppin's comments should be disregarded by this Board. For example, the Union's letter stated that there were between thirty-three and thirty-five residents on the fourth floor when, in fact there are only thirty-three. As well, the Union's letter stated that there were seventeen residents in wheelchairs when Ms. Simpson testified there were eighteen and Ms. Davis testified there were twenty-two. Mr. Barlow asserts that the medical evidence is totally suspect and should not be considered by this Board.

Mr. Barlow suggested that this Board heard evidence from Ms. Simpson that there is a modified work program at the Lodge designed to accommodate employees who are unable to fulfill all of the duties of the job but who can still manage some of the work required. The grievor could and should have made inquiries about modified work at the Lodge if she felt well enough to work at the store.

The Lodge argued that the fact is, the grievor wanted to have four days off work and called in sick for that purpose. She was aware of the Collective Agreement provisions respecting sick leave and knew, at the time, that she was not complying with the terms of that Collective Agreement. She intended to defraud the Lodge of two days of sick pay. This Board cannot condone this action. The Oxford Dictionary defines trust as the reliance on the truthfulness and honesty of a person. That trust no longer exists in this employment relationship. There has been an irrevocable breach of trust that dictates that the grievor should not be reinstated. The Lodge asks this Board to uphold the discharge.

In support of the Lodge's position, Mr. Barlow referred the Board to the following cases: Re Metropolitan General Hospital and Canadian Union of Public Employees, Local 1124 (1990), 16 L.A.C. (4th) 193 (I.A. Hunter); Re Sudbury General Hospital of the Immaculate Heart of Mary and Canadian Union of Public Employees, Local 1028 (1991), 18 L.A.C. (4th) 346 (Musgrove); Re Ford Motor Co. of Canada Ltd. and United Automobile Workers, Local 1520 (1975), 8 L.A.C. (2d) 149 (E.E. Palmer) and Re American Motors (Canada) Inc. and United Automobile Workers, Local 1285 (1985), 21 LAC (3d) 161 (H.D. Brown).

## UNION ARGUMENT

Mr. Chochla, for the Union, asks this Board to consider the allegations against the grievor. The Lodge has asserted that she wilfully, and with full knowledge, defrauded the Lodge by abusing or misusing sick credits. The question for this Board to determine is what exactly the grievor did that was dishonest. The Lodge contends that the fraud lies in her actions of booking off duty on January 30 and 31, 1993, and claiming sick pay for those days. And yet there can be no doubt in this Board's mind that the grievor did have a sore neck on the days in question. Her doctor testified that when he saw her on February 1, 1993, she was suffering from a muscle spasm on the right side of her neck which affected her mobility on that side. He stated in his note of February 1, 1993, and in his oral evidence at the hearing that he did not think she would have been able to work at the Lodge on January 30 and 31, if her neck was in the same condition it was when he saw her on February 1, 1993. Mr. Barlow has called into question the integrity of Dr. Toppin. There is simply no basis for that accusation. Dr. Toppin's evidence was consistent at all times. His oral evidence was consistent with his own file notes and he was unshaken under questioning. Mr. Barlow suggested that Dr. Toppin's assessment of the grievor's ability to perform her duties was fallacious in that it was based on incorrect information. The differences amongst the evidence of Ms. Simpson, Ms. Davis and the grievor were immaterial and trivial. There was a difference in the evidence of each of them about the number of wheelchair residents, but, in the main, they were in agreement that the number ranged from seventeen to twenty-two. There was no disagreement amongst them that those residents would need a range of assistance requiring an employee to lift or assist in lifting. There were also minor differences in the evidence as to the number of residents the grievor would be responsible for. The letter to Dr. Toppin stated she would care for eleven

residents, Ms. Simpson said it was only ten because the night staff assist one resident with his/herbathing before the day shift arrive. These differences are insignificant. The uncontradicted evidence is that, as a Health Care Aide, the grievor's job duties included heavy lifting and that was the type of work Dr. Toppin testified she could not have managed in her condition. He testified that he based his opinion on the grievor's description of her job duties at Beacon Hill Lodge and Ricki's. He also said he had a general understanding of the duties of a nurse in a nursing home and a clerk in a clothing store. Those duties were outlined with more precision in the Union's letter of February 26, 1993 and Dr. Toppin's response to that letter is consistent with his previous notes and opinion.

The Union asserted that as far as the work at the store is concerned, this Board heard evidence from two co-workers at the store and their description of the job duties is consistent with the grievor's. They testified that there would be no lifting or reaching required.

Mr. Chochia suggested that Dr. Toppin is not the only witness who can corroborate the grievor's contention that she had a muscle spasm in her neck on the night of January 30, 1993. Ms. Duvall, the Manager of Ricki's, testified that when the grievor came to work, she had her shoulders "hunched up" as if she was in pain. She also remembers a conversation with the grievor where they discussed the possibility that the neck spasm was caused by stress. She is unsure of the timing of that conversation but the grievor testified it occurred on that same evening, that is January 30, 1993. Ms. Saczawa agreed with Ms. Duvall. She also testified that the grievor came to work with "hunched" shoulders and that it was obvious from the look on her face that she was in severe pain. She testified that the grievor told her she had a muscle spasm in her neck. The evidence is clear and uncontradicted that the grievor was suffering from a muscle spasm in her neck and that, when she called in to say she would not be reporting for work, it was because she believed she would not be able to fulfil her duties as a Health Care Aide.

The Union argued that as well as the evidence about the condition of her neck on the days in question, there is evidence before this Board about previous neck injuries that have caused similar problems in the past. In 1989, the grievor filed an incident report concerning pain in her shoulders radiating down to her hip. Sometime after that incident, the grievor filled out another incident report concerning a neck injury sustained while transferring a resident. She remembers there was swelling and a hard mass of muscle on the right side of her neck. Both of those reports have been lost by the Lodge but there has been no suggestion by them that the incidents did not occur as described by the grievor. There was agreement between the parties that another employee, Ms. Julie Gluck, assisted the grievor in completing the second incident report but there was no agreement as to what, in fact, caused the report to be filed. In reviewing her medical history, Dr. Toppin testified that the grievor had suffered a whiplash injury in April of 1992, when she was involved in a motor vehicle accident. Although he testified that, as far as he knew, she had recovered from that injury, the fact is the grievor again had a medical problem concerning her neck.

The Union stated that the Lodge suggested the grievor should have asked to be given modified work to accommodate her sore neck. Ms. Simpson testified that, while she cannot compel an employee to divulge the specific illness causing an absence, she has asked employees to cooperate in advising the Lodge of any communicable disease of the respiratory and/or digestive system to avoid infecting the elderly residents. The grievor's illness involved neither of those complaints and there was no need for her to advise the employer of the nature of her illness. As well, the evidence is that the modified work program at the Lodge has only been utilized for employees returning to work after an extended leave compensable under the Workers Compensation Act as far as the grievor, Ms. Simpson and Ms. Davis are aware, it has never been applied in the case of short term sick leaves.

Finally, the Union raised a concern that the Lodge's treatment of the grievor is tantamount to a violation of the Human Rights Code. There is evidence before this Board that another employee, while of duty on sick leave, attended a funeral without complaint from the Lodge. Ms. Simpson also testified that, in some circumstances, it would be acceptable for an employee to leave his/her house while on sick leave. For example, she would not object if an employee went out to see a doctor or go to the pharmacy. She acknowledged that an employee might have to go out to pick up the children from school or take them to a baby-sitter. She also acknowledged that there might be other circumstances where she would have no objection. It would appear, from Ms. Simpson's evidence, that the Lodge's position on the requirement in Article 37.09 to be "at home" is applied inconsistently, at best, and has been applied in this case where it has not been in the past.

The Union takes the position that the evidence is clear that the grievor was genuinely off ill with a neck spasm. The evidence is equally clear that the grievor's job duties at the Lodge involved heavy lifting which the grievor and her doctor believed she could not perform in her condition. When the grievor called in sick, she was incapable of fulfilling her obligations at the Lodge. She did not misuse her sick leave. She also never intended to defraud the Lodge. When she was asked whether she had worked at the store on January 30, 1993, she readily admitted she had. She never attempted to lie or cover up her activities on the day in question. The grievor believed she was entitled to claim sick leave because she was unable to work. She also believed she could work the evening at Ricki's because she was physically capable of performing the duties required of her.

The Union reminded the Board that the grievor is a single mother of a ten year old son. In order to support herself and her son, she has been working at two jobs for over a year. This discharge has caused a financial hardship on her and the continued loss of her job at the Lodge in these hard economic times will have severe consequences on her and her son.

In support of its position the Union referred the Board to the following cases: Re City of Calgary and Amalgamated Transit Union, Local 583 (1983), 9 L.A.C. (3d) 294 (G.E. Anderson); Re De Havilland Aircraft of Canada and United Automobile Workers, Local 112 (1981), 2 L.A.C. (3d) 402 (H.D. Brown) and Re Canada Post Corp. and Canadian Union of Postal Workers (Zubas) (1992), 28 L.A.C. (4th) 40 (E.B. Joliffe).

## DECISION

The issue before me is whether the grievor misused her sick leave benefits, as alleged, and if so, whether that misuse should be characterised as fraud.

I am satisfied on the evidence before me that the grievor's claim for sick leave was genuine. I accept the evidence of Ms. Duvall and Ms. Saczawa as to the condition the grievor was in when she reported to work on the evening in question. They both testified that she was exhibiting signs consistent with a sore or stiff neck. I also accept Dr. Toppin's evidence about her condition when he saw her two days later. His observations were consistent with the grievor's explanation of her symptoms. He gave his evidence in a straightforward manner and I believe he was sincere in his opinion.

Mr. Barlow has suggested that Dr. Toppin's evidence is suspect because it was based on incorrect information about the job duties of the grievor. Although there were minor differences in the evidence between the information in the Union's letter of February 26, 1993 and the testimony of the witnesses concerning the grievor's actual duties at the Lodge, those differences were not significant. The fact is, the grievor would have been required to assist elderly residents to get in and out of bed and to the



bathroom. That assistance would have been physically demanding irrespective of the number of residents involved. In conclusion, I do not find that the grievor misused her sick leave benefits when she claimed sick leave for the shifts of January 30 and 31, 1993. She was genuinely unable to perform her duties at the Lodge on those days and was entitled to not attend at work.

I now turn to whether the fact that the grievor worked an evening shift at another job should transform that legitimate sick claim into a misuse of sick leave.

Firstly, I reject the Lodge's allegation that the grievor intended to commit an act of fraud by claiming sick pay while working elsewhere. The Lodge was fully aware the grievor had a part time job at Ricki's. The grievor's evidence was that it was not uncommon for her to see some Lodge staff members at the store. If she was intending to commit a fraudulent act, one would think she would realize there was a very good chance she would run into someone from the Lodge and be found out. In fact, that is exactly what happened. Also, the grievor never denied she worked the shift in question. When asked, she readily admitted to it and stated she would not have worked that shift if she had realized the Lodge would be so upset. I do not believe, based on the evidence before me, including the grievor's own evidence, that she intended to do anything dishonest. She honestly believed that given the nature of the work, she was capable of performing one job but not the other.

In each of Sudbury General Hospital, Ford Motors and American Motors cases ( *supra* ) all three grievors were caught working at another job while claiming sick leave benefits at another. In all three cases the grievors first denied the allegations and then, when confronted, attempted to explain their actions by further dishonest statements. In all three cases the arbitrators upheld the discharge. In contrast, the arbitrator in the Metropolitan General Hospital case ( *supra* ), came to a different conclusion on similar facts. In that case, the grievor was a Registered Nursing Assistant, whose hours of work had recently been reduced from full time to part time. She was also employed as a part time Registered Nursing Assistant in, coincidentally, a Beacon Hill Lodge nursing home. The grievor was scheduled to work on the evening shifts of May 19, 20 and 21, 1990. She called in sick for those shifts and then worked at Beacon Hill Lodge the evening shift on May 19 and 20, 1990. The grievor never denied working the shifts but stated that she honestly believed that the accumulated sick leave credits were an earned benefit. She testified that she did not believe she was doing anything dishonest and when she was made aware of the Hospital's position, apologised. The arbitrator found, as a fact, that while the grievor's actions were dishonest they were not "larcenous or fraudulent". That finding, coupled with what he described as her genuine remorse, was enough to persuade him to substitute the discharge for a lesser penalty.

In this case, having considered the evidence of the witnesses, including that of the grievor herself, I too am satisfied that she did not intend to defraud the Lodge when she claimed sick leave benefits for January 30 and 31, 1993. There was no dishonest attempt to mislead her doctor in order to obtain a fraudulent medical note. There was no attempt on her part to deny or otherwise mislead the Lodge as to her work at Ricki's on January 30, 1993.

Nor do I believe there was any action on the part of the grievor that is deserving of discipline. Her decision to work at the store on January 30, 1993, was based on her evaluation of a comparison of the type of duties she would be required to perform at each job. The work at the store is significantly less physically demanding than the work at the Lodge. Notwithstanding the minor differences in the evidence of the grievor, Ms. Simpson and Lb. Davis about the number of residents in wheelchairs, the job duties at the Lodge require the grievor to lift, either by herself or with the help of others, residents from their beds to their wheelchairs and back again. She also has to assist these residents from their

beds or wheelchairs to the washroom. Again, whether she does it alone or with the help of another Health Care Aide or Nursing Assistant, she would be required to lift these residents from one place to another. That work is substantially more physically demanding than anything she would be expected to do at Ricki's. The evidence of Ms. Duvall, the Manager of the store and Ms. Saczawa, a co-worker at Ricki's, supports the grievor's position in this regard. She concluded that she would be unable to perform her duties at the Lodge because of the physical demands of the job. In the circumstances, I do not think that was an unreasonable conclusion. She concluded, however, that the job duties at Ricki's would not be beyond her abilities and decided to go into work. It was not unreasonable for the grievor to believe she could do one type of work but not the other. While that decision might seem, in retrospect, have been ill- advised, it does not, in my view, warrant discipline. In the Metropolitan General case ( supra ), the grievor called in sick from her job as a Registered Nursing Assistant and then worked at another facility in the same capacity. That is not the case in this grievance. The nature of the work in this case is substantially and materially different and those differences distinguish this case from that one.

However, in the Metropolitan General case ( supra ), the arbitrator made the following comments at page 201:

In considering the severity of the penalty, I find there are considerations, both procedure and substantive, which incline me to mitigate. First, I am not satisfied that Ms. Schneider considered, except in a perfunctory way (1) the grievor's length of service: (2) her unblemished discipline record, and (2) alternatives to discharge. I find as a fact that Ms. Schneider went into the May 24th meeting intending to discharge the grievor unless she came up with a satisfactory and convincing explanation. When the grievor immediately admitted the allegations but failed to offer an apology, I find that Ms. Schneider implemented her tentative decision and summarily discharged the grievor.

That is precisely what occurred in the Simpson case. Once Ms. Simpson had verified the fact that the grievor had worked at Ricki's on January 30, 1993, she decided to terminate the grievor's services. When she asked the grievor to explain her actions on the evening in question, she had already prepared the letter of termination. When the grievor offered a doctor's note to substantiate her claim, Ms. Simpson rejected it out of hand. The grievor's comment that she would not have worked at Ricki's on the evening in question if she had known the Lodge would be so upset was summarily rejected.

The grievor has been employed as a Health Care Aide since 1988. There was no suggestion at the hearing that she has any prior discipline record or that there has been any dissatisfaction with her performance. In fact Ms. Katherine Simpson, the Director of Nursing, commented in the notes she made of the termination meeting that the grievor was a "good Nursing Aide and a loss to Beacon Hill Lodge". In my view, the Lodge should have had regard for those factors when it was considering disciplining the grievor. Finally, with respect to the Lodge's argument that Article 37.09 should be read to require an employee off on sick leave to remain "at home", I disagree. Ms. Simpson's own evidence on this point was equivocal. She acknowledged that there are situations where it would be acceptable to leave one's home even though one was off on sick leave. Her list of exceptions was not exhaustive and her testimony leaves one with the impression that it could be expanded or contracted depending on the circumstances of a particular case.

In conclusion, it is the decision of this Board that the grievor be reinstated to her position forthwith with full compensation for all lost wages, benefits and seniority. I will remain seized of this matter in the event the parties have difficulty in the implementation of this award.