HUNTER-LIBERATORE-LAW

# HEALTHCARE UPDATE

In this article we summarize some of the cases of interest in the healthcare sector in 2021. Not every case that has been published is included.

- **COVID-19 Related Cases of Interest**

## *A. Cases About PPE*

***Ontario Nurses' Association, Local 003 v Peterborough Regional Health Centre,*** (Wacyk, April 11, 2021) 2021 CanLII 27718 (ON LA)

This is a preliminary award regarding access to N95 respirators. ONA had grieved, alleging the Hospital had failed to follow a precautionary approach in attempting to manage health and safety risks associated with COVID-19, in violation of the Collective Agreement, and the *Occupational Health and Safety Act* (OHSA). ONA brought a preliminary motion to bifurcate the hearing so that the issue of access to N95 respirators could be heard first, on an urgent basis. Arbitrator Wacyk granted the motion. She noted that the motion was primarily a request for the ordering of proceedings based on urgency. The present existence of a third wave of the pandemic with more contagious variants heightened that urgency. Since there was no dispute that N95s respirators were a key line of defense, she was prepared to hear and determine that issue first. This would not compromise fairness and there was no prejudice to the Hospital that would outweigh the risk of irreparable harms that could befall the nurses and their patients.

***Health Sciences North v Ontario Nurses' Association***, (Johnston, April 16, 2021) 2021 CanLII 35430 (ON LA)

This is another preliminary award regarding access to N95 respirators where ONA alleged that nurses were not being properly directed to use the appropriate PPE. ONA further alleged that the Hospital had failed to follow the precautionary principle in protecting the health and safety of workers under the Collective Agreement and the OHSA. The award addressed three preliminary issues: the scope of the grievance, deferring to the judicial review process, and bifurcation of the hearing process.

Arbitrator Johnston held that the scientific question raised by ONA's motion (aerosol/asymptomatic transmission of the virus and the efficacy of N95 masks) was simply an articulation of its position as to the appropriate PPE and was not an improper expansion of the grievance. He also denied the Hospital's request to defer the scientific question to the Court under the Application for Judicial Review ONA had filed seeking an order against the Chief Medical Officer of Ontario to revise Directive #5 in accordance with the scientific evidence on modes of transmission. As a labour arbitrator, Johnston found he had exclusive jurisdiction to determine whether the scientific evidence supported ONA's claims under the collective Agreement and OHSA. Lastly, the arbitrator agreed to bifurcate the hearing so that he would first determine whether aerosol and asymptomatic transmission were the dominant forms of transmission for the COVID virus and if N95 respirators were the best defense against aerosol transmission. The existence of virulent and more transmissible variants of the virus required an expeditious resolution to this aspect of the dispute where there was no prejudice to the hospital.

### *B. Cases about the Healthcare Redeployment Regulation*

***Scarborough Health Network v Canadian Union of Public Employees***, (Abramsky, May 11, 2021) Local 5852, 2021 CanLII 39023 (ON LA)

The Hospital hired Nurse Externs under the Ministry of Health's Enhanced Extern Program which allows hospitals to hire qualifying nursing, medical, respiratory therapy, and paramedic students. The Union filed a grievance alleging these employees were members of the bargaining unit. The Hospital refused to hear the grievance, citing Regulation 74/20 which allows health service providers to take any reasonably necessary redeployment measures to respond to COVID-19 and suspend "any grievance process with respect to any matter referred to in this Order." Two months after filing the grievance, the Union submitted a request to the Minister of Labour to appoint an arbitrator under Section 49 of the Ontario *Labour Relations Act* (the "Act"). The Hospital filed a preliminary motion arguing that the appointed arbitrator had no jurisdiction to hear the grievance because Regulation 74/20 allowed it to suspend the grievance process. Arbitrator Abramsky denied the Hospital's motion, finding that the Regulation allows the Hospital to suspend the grievance process but not the arbitration process. The legislature could empower

hospitals to suspend the arbitration process, but the provision did not currently do so.

***Ontario Public Service Employees Union, Local 101 v Windsor Regional Hospital,*** (Trachuk, May 13, 2021) 2021 CanLII 40879 (ON LA)

The Union grieved the Hospital's decision to deny the grievor IDEL at the completion of her parental leave. The Hospital's preliminary motion argued that Regulation 74/20 allowed the Hospital to suspend arbitration of the grievance. Furthermore, under the Regulation, the Hospital could defer or cancel "vacations, absences or other leaves, regardless of whether such vacation, absences or leaves are established by statute, regulation, agreement or otherwise." Arbitrator Trachuk affirmed Arbitrator Abramsky's ruling that the Regulation did not suspend the arbitration process, only to the grievance process. She further determined that the words in Regulation 74/20, when given their plain and ordinary meaning, give health care employers the authority to defer or cancel statutory leaves, including IDEL, and that authority is intended to prevail over the ESA. The arbitrator found no conflict between the ESA and the Regulation because the IDEL provisions of the ESA continue to apply to Hospital employees. What the Regulation provides is that the Hospital can cancel IDEL when "reasonably necessary to respond to, prevent, and alleviate the outbreak of coronavirus for patients." If there was a conflict, the Regulation would still prevail as temporary emergency legislation specific to health care providers.

### *C. Case about Access to Hospital Property*

***Humber River Hospital v National Organized Workers' Union***, (Johnston, August 23, 2021) 2021 CanLII 80164 (ON LA)

The Union filed a policy grievance claiming that the Employer had unreasonably denied NOWU staff representatives access to Hospital property since the start of the COVID-19 pandemic. The Union sought a direction that two of its two staff members be provided access to the Union office at the Hospital's Wilson Avenue site. The Hospital argued that by reducing access to Union representatives who were not employees of the Hospital, it was complying with Ministry of Health directives intended to contain the spread of the COVID-19 virus by restricting visitor access to the Hospital. Arbitrator Johnston dismissed the grievance, finding that the Hospital's

policy to restrict non-employee Union representatives from its property was reasonable as it balanced the Union's right to attend the property against the Hospital's obligations with respect to the health and safety of staff and patients. There was also no evidence to support the Union's claim that the policy was administered in an unjust discriminatory manner.

### *D. Case about N95 Masks under Directives 1 and 5*

***Ontario Nurses' Assn. v. Chief Medical Officer of Health (Ontario)***, (Divisional Court, September 27, 2021) 2021 ONSC 5999 (CanLII)

The Union sought an order requiring the Chief Medical Officer of Health (CMOH) to amend two directives issued under the *Health Protection and Promotion Act* (HPPA) to reflect evidence of aerosol and asymptomatic transmission of COVID-19. Both Directive #1 (aimed at health care providers and health care entities) and Directive #5 (aimed at public hospitals and LTC homes) addressed the use of personal protective equipment ("PPE") by health care workers and required at minimum, gloves, face shields or goggles, gowns, and surgical/procedure masks for workers interacting with suspected, presumed, or confirmed COVID-19 patients. Greater precautions could be taken when performing "aerosol-generating medical procedures". ONA argued that the possibility of asymptomatic and aerosol transmission meant the directives should require the use of N95 masks in a broader range of circumstances. In the alternative, they sought an order quashing the directives. When issuing directives, the HPPA requires the CMOH to consider the Precautionary Principle that reasonable steps to reduce risk should not await scientific certainty. ONA argued that the CMOH had failed to do so.

The Divisional Court dismissed ONA's Application finding that the standard of review for the directives, which involve "quasi-legislative" decisions, was one of reasonableness. Based on the evidence provided, the Court found that ONA had failed to establish that the directives were unreasonable. The directives themselves make it clear that the CMOH considered both the precautionary principle and the scientific evidence about how COVID-19 is transmitted. Although the directives were based on the scientific view that the virus was not normally transmitted by aerosols, Directive #5 was amended on October 8, 2020, to allow nurses to insist on being provided with an N95 respirator in any setting where they believe, based on their professional judgment, one is required. Where nurses were encountering difficulties

accessing N95 respirators, these were matters of labour law and the remedies available in that context.

### *E. Case About Reprisal Contrary to OHSA*

***Paul Hemmings v North York General Hospital,*** (Rogers, March 30, 2021) 2021 CanLII 28054 (ON LRB)

The Applicant was employed as a facilities technician at the Hospital. He filed a harassment complaint against his colleague that was upheld. His colleague received a one-day suspension, and the Applicant also received a one-day suspension for engaging in similar harassment. The Applicant received a further two-day suspension for refusing to complete work assigned. While investigating the complaint filed against the Applicant, the Hospital learned that he had been surreptitiously recording conversations with his colleagues and management. He was terminated and filed an application under section 50 of the OHSA alleging that the suspensions and termination constituted reprisals after he complained of harassment and raised health and safety issues. Vice Chair Rogers dismissed the Application finding that that the Hospital's actions in disciplining and dismissing the Applicant were not tainted by his having engaged the OHSA. The Hospital's actions were not responsive to anything other than the facts and circumstances.

### *F. Case about Termination for Insubordination and Harassment*

***Humber River Hospital v National Organized Workers Union***, (Stout, June 10, 2021) 2021 CanLII 51843 (ON LA)

The Grievor was a porter with 20 years of service when he received a three-day suspension and was ultimately terminated for refusing to transport patients from the Mental Health Unit (MHU) and for taking pictures of co-workers. Arbitrator Stout found that that the Grievor's behavior and refusal to transport MHU patients was unprofessional, discriminatory, offensive, and unacceptable in the workplace. A three-day suspension was a proportionate response. However, the arbitrator found that the Grievor took pictures of his co-workers to prove that he was being singled out for uniform violations. While the offense was serious, it was not serious enough to justify termination. Further, the Grievor admitted to the allegations during the

hearing and was apologetic and contrite. The Grievor was reinstated without loss of seniority but without compensation.

### *G. Case about Premium Pay Entitlement*

***Cambridge Memorial Hospital v Ontario Nurses' Association***, (Price, June 14, 2021) 2021 CanLII 51696 (ON LA)

The union filed three individual and one policy grievance alleging that the hospital had violated the collective agreement when it failed to pay premium pay to the grievors for working five or more consecutive extended shifts. Arbitrator Price upheld the grievance, finding nothing in the language limited the availability of the premium only to those fifth consecutive tours scheduled by the hospital. A nurse who worked a shift on a day or several days before and contiguous to a scheduled four (4) shifts for a '4 On 5 Off' schedule as defined in the Local Appendix and was to be paid at time-and-one-half rates for that shift was also entitled to be paid the separate premium at time-and-one-half rates for the work performed on their scheduled fifth shift.

### *H. Case about Termination for Unsuitability*

***Ontario Nurses' Association v Belvedere Heights Home for the Aged***, (Jesin, June 22, 2021) 2021 CanLII 53791 (ON LA)

The grievor alleged she was discharged from her casual position as a nurse in retaliation for raising health and safety issues, for filing a harassment complaint against the local Union president, for reporting a "failure to bathe" incident to the Ministry of Long-Term Care, and for refusal to participate in "Mask Fit Testing". The employer stated that the grievor was terminated during her probationary period due to concerns about her suitability in the long-term care setting including her lack of judgment and her inability to cope with situations under her responsibility. Arbitrator Jesin dismissed the grievance finding that the termination was not based on any improper motive and did not constitute prohibited retaliation. The decision to terminate the grievor was made long before the grievor filed her complaints and reports and was within management's broad right to discharge probationary employees for unsuitability.

### *I. Case about Unpaid "Reporting Time"*

***Rosewood Senior Living/Erie Glen v UFCW, Local 175***, (Jesin, July 7, 2021) 2021 CanLII 58425 (ON LA)

The Union filed a policy grievance alleging that members of the bargaining unit were required to work without being paid. The collective agreement allowed employees at the end of their shift to have ten (10) minutes of reporting time to count narcotics. Time in excess of ten (10) minutes would be paid at their regular rate of pay. Historically, the reporting time was not paid, but nurses were allowed to take longer 20-minute breaks. The Union argued that this time should be compensated as overtime. Arbitrator Jesin allowed the grievance finding that under the collective agreement, this "reporting time" required payment at the overtime rate for the first ten minutes, and straight-time after that. The employer was to comply with this order on a go-forward basis and the historic practice related to 20-minute breaks was discontinued.

### *J. Case about Notice of Reorganization*

***Unity Health Toronto v Canadian Union of Public Employees, Local 5441***, (Burkett, July 8, 2021) 2021 CanLII 60006 (ON LA)

The Union filed two policy grievances and 26 individual grievances alleging that the employer had failed to meaningfully consult or provide the required notice in regard to the reorganization of its operating rooms following procedures. The employer had changed the way work was organized when turning over operating rooms; Duties previously assigned to a combination of Unit Service Workers (USW) and Perioperative Support Assistants (PSA) were now to be assigned to PSA's resulting in the elimination of seven USW positions in the operating room area. The parties were bound to a collective agreement that required the employer to provide the Union with no less than five months' notice of proposed layoffs or elimination of position. Arbitrator Burkett allowed the grievance finding that the Hospital had provided less than five months' notice, in violation of the collective agreement. The affected employees were entitled to a remedy commensurate with the nature of the breach and were awarded $375.00 each.

### *K. Case about Requiring a Sexual Harassment Complainant be Examined for Discovery*

***Mohotoo v Humber River Hospital***, (Superior Court, July 12, 2021) 2021 ONSC 4894 (CanLII)

The plaintiff employee had 30 years of service when he was terminated for cause on February 14, 2020, following a substantiated sexual harassment complaint. The employee commenced an action for wrongful dismissal and advised that he wanted to examine the complainant for discovery stating it was the complainant's harassment complaint that led to the plaintiff's termination. The Hospital proposed the Human Resources Business Partner (HRBP) who conducted the investigation as its discovery representative and filed a motion under Rule 31.03(2) of the *Rules of Civil Procedure* for an order that the plaintiff examine the HRBP. The Court dismissed the Hospital's motion. First, the Court found that the person selected (the complainant) was sufficiently knowledgeable in relation to the matters in issue. The examining party was entitled to their choice of witnesses under this aspect of the test, provided that the proposed witness was *sufficiently* knowledgeable. The Court also found no evidence or suggestion that the plaintiff's selection of the complainant was perverse, illogical, vindictive, or made for a collateral purpose, such as intimidation. Lastly, the Court found it would be unfair to the plaintiff to attempt to obtain evidence and admissions on the allegations of sexual harassment from someone who did not have first-hand knowledge. The Hospital's request that the examination for discovery proceed by way of written questions and answers was also dismissed because the plaintiff did not consent as required by the Rules.

### *L. Case about Premium Pay for Excess Hours Worked*

***Muskoka Algonquin Healthcare v Ontario Nurses' Association***, (Waddingham, August 13, 2021) 2021 CanLII 76836 (ON LA)

The Union grieved that the Hospital violated the collective agreement by failing to pay the grievor premium pay for hours worked in excess of her normal workday and premium pay for weekend days the grievor worked in April 2020 when she was redeployed to the ICU. The grievor went from working "regular tours" of 7.5 hours per day and working one weekend in four, to working "extended tours" of 11.25 hours, on a two days, two Nights ("2D2N") rotation, without regard to weekend scheduling restrictions. The Hospital argued that when it redeployed the grievor pursuant to O. Reg. 74/20, she became subject to the provisions of the collective agreement

pertaining to nurses working in the ICU. Arbitrator Waddingham dismissed the grievance finding that the grievor was lawfully redeployed, after which she became subject to different collective agreement provisions regarding premium pay. The Hospital was not obliged to pay her in accordance with provisions pertaining to her previous assignment.

### *M. Case about Weekend Premium Pay*

***Sunnybrook Health Sciences Centre v Ontario Nurses' Association***, (Surdykowski, August 25, 2021) 2021 CanLII 80167 (ON LA)

The Union filed policy and individual grievances alleging the Hospital had violated the collective agreement by denying premium pay for all hours worked by nurses on consecutive and subsequent weekends. The Hospital argued that the grievances should be dismissed without a hearing because the issue raised by the grievances was determined more than 14 years ago by a decision of Arbitrator Stewart. In that decision, Arbitrator Stewart had determined that a nurse who advised the Hospital they were available for weekend work, had requested weekend work and was therefore disqualified from the weekend premium for hours worked during a second consecutive and subsequent weekend. Arbitrator Surdykowski dismissed the grievance on a preliminary basis, finding that the Stewart decision determined substantially the same issue. Although he did not agree with the analysis in the Stewart decision, it was not manifestly wrong, and he declined to exercise his discretion not to apply it.

### *N. Case about Double Time Premium for Excess Hours Worked*

***St. Joseph's General Hospital, Elliot Lake v Ontario Nurses' Association***, (McNamee, September 3, 2021) 2021 CanLII 85123 (ON LA)

The grievor was offered an extended tour of 11.25 hours (7:00 am to 7:00pm) and agreed to work part of the extended tour (7:00am to 3:00pm). She ultimately worked the full extended tour and the Union argued that pursuant to Article 14.04 of the Central Agreement, she should be paid double time for those four (4) "additional hours" she worked in excess of the partial tour that she had initially accepted. Arbitrator McNamee dismissed the grievance finding that the originally scheduled shift was an extended tour. Therefore, the grievor did not complete a full tour at

3:00pm and the hours worked between 3:00pm and 7:00pm were not additional hours but rather the completion of the full tour.

***O. Case about "First Refusal" of Public Holiday Shifts***

***Sinai Health System v National Organized Workers Union***, (Knopf, September 7, 2021) 2021 CanLII 85700 (ON LA)

The Union filed a policy grievance arguing that members of the full-time service bargaining unit employees had the right of "first refusal" for shifts on public holidays over part-time employees. Arbitrator Knopf dismissed the grievance finding that there was no language in either the full-time or part-time collective agreements supporting a "right to first refusal" for working public holidays. The Hospital retained the management right to schedule unless the collective agreement directed otherwise. The collective agreement required the Hospital to "grant" the specified public holidays with pay to full-time employees but this could not be interpreted as giving these employees the right of first refusal to insist on working those days.

***P. Case about the Order of Proceedings***

***Markham-Stouffville Hospital v Canadian Union of Public Employees, Local 3651***, (Mohamed, September 9, 2021) 2021 CanLII 84068 (ON LA)

The grievor was an RPN whose probationary period was extended due to performance issues. She was subsequently terminated for failing to meet the job standards of an RPN. The union alleged that the termination was discriminatory and without cause. Prior to the hearing, the Union raised a preliminary issue regarding the order of proceedings. The Union argued that to balance fairness and efficiency in the process, the Hospital should proceed first in the hearing and tender its evidence regarding its reasons for termination. Arbitrator Mohamed dismissed the grievance, finding that the collective agreement gave the employer broad discretionary powers to release probationary employees and that decision could only be challenged under specific circumstances. Therefore, the union had the legal onus of establishing that the employer's actions were arbitrary, discriminatory, in bad faith or for exercising a right under the collective agreement.

***Q. Case about the Notice of Elimination of a Position***

***Canadian Union of Public Employees, Local 1974 v Kingston Health Sciences Centre***, (Trachuk, September 14, 2021) 2021 CanLII 88573 (ON LA)

The Union filed policy and group grievances alleging that the Hospital wrongfully eliminated the Home Transcriptionist/Editor (HTs) positions and violated the layoff provisions of the collective agreement when it moved the HTs onsite when they were previously remote positions. Subsequent events, including a flood and the COVID-19 pandemic, resulted in the HTs not being moved. Arbitrator Trachuk upheld the layoff portion of the grievance on a preliminary basis finding that requiring the HTs to move to the Hôtel Dieu Hospital site would have eliminated the position of *Home* Transcriptionist. Therefore, the employer was required to give notice that it was eliminating the Home Transcriptionist position and not doing so was a violation of the collective agreement.

### *R. Case about Failure to Consult*

***Oak Valley Health Markham Stouffville Hospital v Canadian Union of Public Employees, Local 3651***, (Price, September 17, 2021) 2021 CanLII 88145 (ON LA)

The Union filed a policy grievance alleging the Hospital failed to give proper notice or consult with the union prior to making its decision to eliminate two Customer Service Representative (CSR) positions. The Hospital maintained the Union had been given five (5) months' notice of the elimination of the CSR positions which were vacant throughout the notice period. Arbitrator Price allowed the grievance finding that the Hospital's advised the incumbents of the elimination of position, prior to giving notice. This meant that the Redeployment Committee was not given a meaningful opportunity to meet to discuss alternatives to the elimination of positions because the Hospital had clearly decided to eliminate the positions before giving notice to the Union.

### *S. Case about Implementation of a Reinstatement Order*

***Humber River Hospital v National Organized Workers Union***, (Mohamed, September 21, 2021) 2021 CanLII 88765 (ON LA)

An employee was terminated and following a successful grievance arbitration, was reinstated to his previously assigned permanent porter position by Arbitrator Stout.

Meanwhile, the grievor had been the successful candidate for the terminated employee's position. Following Arbitrator Stout's Reinstatement Order, the Hospital reinstated the terminated employee to his previously assigned position and returned the grievor to his home position as an environmental attendant in the Housekeeping Department. The Union grieved arguing that the grievor was entitled to remain in the position he competed for and successfully won. Arbitrator Mohamed dismissed the grievance, finding that the grievor was the terminated employee's replacement and was therefore not entitled to remain in that position after the Reinstatement Order.

### *T. Case about Non-Compliance with a Production Order*

***Baycrest Centre For Geriatric Care v Ontario Nurses' Association***, (Gedalof, September 22, 2021) 2021 CanLII 88751 (ON LA)

The grievor was terminated from her position for alleged benefit fraud. Arbitrator Gedalof issued orders directing the grievor to produce certain information and arguably relevant documents and imposed deadlines on the production of these materials. The grievor did not comply with these orders, and the employer brought a motion to dismiss the grievance based on the grievor's failure to comply. An interim award denied the Employer's motion, provided the grievor with a final opportunity to comply with the production orders, and specifically warned that failure to comply with the interim award, would lead to the dismissal of her grievance. The grievor once again failed to comply with the production order, and the Employer renewed its motion to dismiss. Arbitrator Gedalof allowed the motion and exercised his discretion to dismiss the grievance. He found that the grievor had definitively and intentionally refused to cooperate with the processing of the grievance and that her refusal constituted an abuse of process, an abuse of the Employer and an abuse of the Association.

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