HUNTER-LIBERATORE-LAW

# HEALTHCARE UPDATE NOVEMBER 2021

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.

## *A. Case about the Arbitrability of an LTD Grievance*

***Humber River Hospital v Ontario Nurses Association***, (Misra, September 27, 2021) 2021 CanLII 91833 (ON LA)

The grievor went off work in 2016 and was approved for sick pay and EI sick benefits. The insurer denied her claim for LTD benefits after which the grievor request an appeal under the HOODIP plan Medical Appeal Process "MAP". The grievor was subsequently approved for LTD benefits for the "own occupation" period but was denied benefits under the "any occupation" disability period. The union filed a grievance, and the employer brought a preliminary motion, arguing that the outcome of the MAP was final and binding and the arbitrator was without jurisdiction to hear the matter.

Arbitrator Misra dismissed the motion finding that her jurisdiction arose from the collective agreement which provided that any dispute arising out of benefits under HOODIP could be grieved and arbitrated, subject only to the expectation that a nurse must first attempt to resolve the dispute with the insurer through that carrier's internal medical appeals process. Further, the union had appealed the MAP decision and been approved for subsequent benefits – it was therefore neither "final" nor "binding" nor was the Union a party to the MAP agreement.

## *B. Case about Accessing Confidential Medical Records*

***Orillia Soldiers Memorial Hospital v Ontario Public Service Employees' Union, Local 383***, (Herman, October 4, 2021) 2021 CanLII 94715 (ON LA)

The grievor had 14 years of service as a Clerk in the Kidney Care Program at the hospital and was discharged for improperly accessing confidential medical records of a patient. She denied accessing the records. Arbitrator Herman determined that the evidence as to the reliability and accuracy of the computer records relied upon by the hospital was credible. The grievor had accessed the medical records of the hospital's first admitted COVID-19 patient on three (3) occasions, without authorization, and in violation of the hospital's policies and the *Personal Health*

*Information Protection Act* ("PHIPA"). The Grievor had also been previously disciplined for untruthfulness and been cautioned for improperly accessing her own medical records. Lack of acknowledgement and remorse justified discharge; the grievance was dismissed.

### *C. Case About the Arbitrability of a WSIB-Related Claim*

***Unity Health Toronto v Canadian Union of Public Employees, Local 5441***, (Luborsky, October 6, 2021) 2021 CanLII 95115 (ON LA)

The grievor became disabled with a mental illness for which he received compensation for under the *Workplace Safety and Insurance Act* ("WSIA"). The employer denied STD and LTD benefits offering to accommodate the grievor in another role the Workplace Safety and Insurance Board ("WSIB") judged appropriate. As such, the WSIB stopped full loss of earnings and the union filed an individual and policy grievance arguing that the employer had violated the *Human Rights Code* and the Collective Agreement. The hospital raised a preliminary objection to the arbitrator's jurisdiction to hear the individual grievance, arguing that the grievor's entitlement to loss of earnings and benefits under the WSIB arose out of a workplace injury and was therefore solely within the authority of the WSIB.

Arbitrator Luborksy dismissed the employer's preliminary motion concluding that the Employer's alleged deliberate and negligent misconduct regarding its treated of the grievor at various points in the accommodation process, if proven, could independently warrant contractual and/or general damages. A labour arbitrator retained jurisdiction to adjudicate on employment matters that were mixed in with workplace injury claims, particularly where claims of human rights violations were raised. However, it was appropriate to adjourn both grievances until the final disposition of the WSIB appeal proceedings to avoid a duplication of efforts and the risk of inconsistent results.

### *D. Case about Failure to Award a Job Posting*

***Central West Specialized Developmental Services v Ontario Nurses' Association***, (Slotnick, October 6, 2021) 2021 CanLII 95681 (ON LA)

The grievor applied for a Community Nurse Specialist position in a job posting competition. The applicants were both interviewed orally and were asked to provide

written answers to three scenarios. They were also graded on education, experience, attendance, and an overall rating by the manager. A perfect score was 100 points, with half allocated to the interview, and another 20 allocated to the written answers. The grievor received a score of 74.1 out of 100 while the more junior applicant scored 83.5 out a 100. The employer used a 7 per cent differential – 7 points out of 100 – as the standard to determine whether the two candidates were relatively equal. Since the applicants were separated by 9 points, they were not relatively equal, and the junior applicant was awarded the position.

Arbitrator Slotnick found that the employer's hiring policy required sample answers and benchmarks that had not been created leading to possible subjective "after the fact" justifications. He further determined that the scoring on the written scenarios, some of the oral questions, and in assessing the applicants' relative experience was not reasonable. The employer had failed to abide by the mandate in the collective agreement to properly assess performance, ability, and experience. The evidence established the relative equality between the two applicants such that the position should have been awarded to the grievor because of her greater seniority. The grievor was to be placed in the community nurse specialist position and compensated for any losses based on the assumption that she should have been awarded the job at the time it was filled.

### *E. Case about Employee Violation of the Minutes of Settlement*

***Community Living Atikokan v Ontario Public Service Employees Union***, (Nairn, October 8, 2021) 2021 CanLII 97468 (ON LA)

The former employee had filed two grievances alleging an unsafe workplace due to alleged bullying, harassment, intimidation, and coercion in her capacity as a union steward. The parties entered into Minutes of Settlement ("MOS") which providing financial consideration to the former employee in exchange for the employer accepting her letter of resignation and resolving all issues with respect to her employment. The MOS included confidentiality and non-disparagement clauses and was executed on July 10, 2015.

In July 2020, the employer filed a grievance alleging the former employee had violated the confidentiality and disparagement MOS by posting disparaging remarks about management on Facebook and for her harassing 'civil protest' outside of the

employer's place of business over a 2-month period. The employer sought full repayment of the settlement monies. Arbitrator Nairn found that the grievor had deliberately and repeatedly breached the terms of the MOS and ordered that she repay $3,000 of the settlement to the employer.

### *F. Case about Holiday Pay for Part-Time and Casual Employees*

***Albright Gardens Homes Inc. v Ontario Nurses' Association***, (Johnston, October 12, 2021) 2021 CanLII 101012 (ON LA)

The collective agreement between the parties contained two conflicting provisions in the collective agreement. The first, Article 13.02(4) stipulated that all nurses were entitled to holiday pay. The only qualifier was that part-time and casual nurses must earn wages on eight out of the twenty-eight days preceding the holiday to receive the benefit. The second was the salary schedule in Appendix A which stated, "It is understood and agreed that holiday pay is included within the percentage in lieu of fringe benefits" which is added to part-time and casual nurses' hourly pay rate. The parties put the following question to the arbitrator: What compensation is owed to part-time and casual employees under the collective agreement in regard to holiday pay when a part-time or casual employee does not work on a holiday?

Arbitrator Johnston found that Article 13.02(4) and Appendix A were specific provisions directly in conflict with one another; there was no way to read these provisions in harmony. Either part-time and casual nurses were entitled to holiday pay under Article 13.02(4) or the parties had rolled that entitlement into the percentage in lieu calculation. Both provisions could not operate at the same time. To resolve the dispute, he applied a contextual approach to the language and concluded that the employer ceased paying holiday pay to part-time and casual employees when it increased the percentage in lieu in November 2007. Article 13.02(4) thereafter remained in the collective agreement as an oversight. The grievance was dismissed.

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