HUNTER-LIBERATORE-LAW

Healthcare Update – April 2022

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COVID-19 Related Cases of Interest

a) Pandemic Pay: ESA Overtime payable on the hourly temporary pandemic pay (TPP) amount

- ***North Wellington Health Care Corporation v Ontario Nurses' Association*** **(Johnston, April 4, 2022)**

The union filed a grievance arguing that the Hospital was obliged to pay overtime on both the hourly ($4/hour) and the lump sum portion ($250) of the temporary pandemic pay (TPP) paid to nurses and other frontline workers between April and August 2020 pursuant to *Regulation 241/20*. The union argued that the TPP did not form part of a nurse's base salary or change their straight-time hourly rate. It existed outside of the collective agreement and thus attracted an overtime premium under section 22 of the *Employment Standards Act* (ESA). The Hospital argued that the $250 lump sum payment was not an hourly rate and should not be incorporated into the overtime premium. Furthermore, the ESA overtime provisions did not apply to the TPP hourly rate because the collective agreement provided a greater benefit as set out in section 5(2) of the ESA. Lastly, the Hospital argued that paying overtime on TPP on top of a nurse's straight time hourly rate violated the rule against pyramiding.

Arbitrator Johnston allowed the grievance in part. He found that the $250 lump sum did not form part of an hourly rate and should be excluded form the overtime calculation. He concluded however that statutory overtime must be applied to the TPP hourly amount. Since the union was seeking entitlement under the ESA, the arbitrator was obliged to apply the statute in its entirety, including section 5(2). On its face, the collective agreement provided a greater overtime benefit than the ESA. Therefore, in the unlikely event that a nurse worked enough hours in a week that their entitlement under the ESA *exceeded* the benefit under the collective agreement, they would be entitled to the greater statutory overtime benefit on the TPP. He further held that limit on pyramiding did not apply to the TPP as it was a statutory entitlement meant to compensate employees working on the frontlines of the pandemic – it was not a premium under the collective agreement.

b) Fact Evidence: where there appears to be ever-evolving COVID-19 variants, it is necessary to limit the substantive evidence by choosing a point in time when the issues "crystallize"

- ***Hamilton Health Sciences v Ontario Nurses' Association*** **(Misra, April 18, 2022)**

This was an interim decision regarding the Hospital's preliminary motion requesting a "crystallization" date that would prevent the union from continuing to call fact evidence on an ongoing basis. The union's grievances alleged that the Hospital had breached the collective agreement and the *Occupational Health and Safety Act* (OHSA) by failing to provide adequate personal protective equipment (PPE), failing to follow the precautionary principle, and failing to take every precaution reasonable in the circumstances arising because of the COVID-19 pandemic. The initial grievances had been filed in March 2020 and April 2021. The expert evidence tendered by the union in November 2021 had referenced the then dominant strain of COVID-19 – the Delta variant. By mid to late December 2021, the Omicron variant had become the dominant COVID-19 variant.

The Hospital argued that it was unfair and prejudicial to permit the union to continue to introduce evidence regarding a new variant or variants which were not addressed in its expert report from November 2021. This "moving target" created an unwieldy and unmanageable litigation process, preventing the Hospital from knowing the case it had to meet. The union argued that it was entitled to call relevant evidence until it closed its case. These were ongoing grievances, with constantly fresh breaches by the Hospital, and the union argued it should be permitted to call fresh evidence about the evolving situation. While a party was entitled to know the issue in dispute, the Hospital had reserved its right to make an opening statement until after the union had completed its evidence. At that time, the Hospital would know all the evidence to be addressed.

Arbitrator Misra found that the scope of evidence regarding the two grievances should be up to December 8, 2021, which was the date that the union made its opening statement. A review of the jurisprudence found no case where an arbitrator permitted a party to rely on evidence well past the commencement of the hearing and until a party had closed its case. Even a continuing grievance required defined litigation parameters as a matter of fairness and practical hearing management. Arbitrator Misra concluded that the commencement of the merits case was a logical end point for evidence admissibility purposes. The Hospital had to know the case to meet and could not be prejudiced by permitting a limitless scope to the union's evidence.

Healthcare Related Cases of Interest

a) Disclosure: confidential information regarding the cost of agency nurses can be disclosed to the union subject to certain restrictions

- ***William Osler Health System v Ontario Nurses' Association*** **(Price, February 9, 2022).**

This was an interim decision addressing the union's production request for 1) the total hourly "per nurse" cost to the hospital for ICU and Emergency Department (ED) nurses supplied by agencies from August 2019 to the present and 2) copies of monthly invoices or other documents showing the hospital's total hourly "per nurse" cost for ICU and/or ED nurses supplied by agencies from August 2019 to the present. The union filed seven individual and one policy grievance, alleging, among other things, that the Hospital acted unreasonably and violated the management's rights clause of the collective agreement in August 2019 when it decided to stop allowing Clinical Nurse Educators (CNEs) to pick up Registered Nurse (RN) bedside shifts on overtime (RN overtime shifts). The union intended to show that the Hospital's decision to prevent highly skilled CNEs from picking up RN overtime shifts before assigning them to less capable agency nurses was unreasonable because agency nurses cost more per hour than CNEs on overtime. In the alternative, any cost savings to the Hospital was insignificant.

The Hospital argued that the specific dollar amounts paid for agency nurses was highly confidential information with no probative value to the case. The Hospital was however willing to provide written confirmation that the agency nurses cost the Hospital less money than the CNEs on overtime. Arbitrator Price noted that the test for production is arguable relevance, not necessity. There was a clear nexus between the union's intended argument and the documents being sought. However, given the confidential nature of the information, the arbitrator ordered disclosure limited to union counsel and a maximum of one union advisor. The Hospital was ordered to produce documents substantiating the total hourly cost to the Hospital for agency nurses working in the ICU and ED, but redacted to remove the names of the agencies, the global amounts charged, and any information not arguably relevant to the issues in the case. The documents would be used only for the purposes of the arbitration hearing, would remain in the possession of union counsel, would not be photocopied, and would be destroyed upon the conclusion of the proceedings.

b) Premium Pay: additional hours worked when an employee is offered and accepts them do not affect the "employee's scheduled shift" and do not attract premium pay

- ***Sault Area Hospital v Ontario Public Service Employees' Union, Local 620*** **(Davie, February 16, 2022)**

The grievor was employed as a part-time Medical Laboratory Technologist (MLT) at the Hospital. She was scheduled to work from 9:00 am to 5:00 pm on October 23 and October 24, 2019. The grievor worked her scheduled shift on October 23. On that

same date, the Hospital needed to fill a shift from 3:00 pm to 11:00 pm because an employee had called in sick. The grievor was offered and accepted that shift. Since she was already working from 3:00 pm to 5:00 pm, another union employee was required to work that period. The grievor then worked her scheduled shift on October 24. Under the terms of the collective agreement, failure to provide a part-time employee with 20 hours between the commencement of scheduled shifts attracted time and a half for those hours which reduced the 20-hour period, unless the change was requested by the employee. The agreement also provided part-time employees with a break of at least 12 hours between shifts.

The union filed a grievance alleging that the grievor should have been paid premium pay for the first four (4) hours worked on October 24, due to the Hospital's failure to provide the required time between the commencement of scheduled shifts and the required break between shifts. The Hospital argued that the grievor was properly paid premium overtime pay on October 23, but those additional overtime hours were "worked", not "scheduled" hours, and did not entitle her to further premium pay on October 24. Arbitrator Davie dismissed the grievance, finding that there was a material distinction between "scheduled" hours and "worked" hours when those terms were found in a collective agreement. The arbitral case law also indicated that when an employee agreed to work additional hours or an additional shift, those hours did not become part of their scheduled hours or scheduled shifts.

c) Post-65 LTD Premiums: the collective agreement clearly incorporates a benefits booklet whose terms do not limit LTD entitlement to people under the age of 65

- ***Pembroke Regional Hospital v CUPE*** **(Kaplan, O'Byrne, Herbert, February 25, 2022)**

The union filed a policy grievance alleging the Hospital breached the collective agreement and the *Human Rights Code* by not paying the billed premiums for Long Term Disability (LTD) coverage for employees over the age of 65. Article 13.01(a) of the collective agreement provided that, "[t]he Hospital will pay 75% of the billed premium towards coverage of eligible employees under the long-term disability portion of the Plan (HOODIP or an equivalent plan as described in the August 1992 booklet (Part B))." The union argued that this was clear and unambiguous language that incorporated the August 1992 booklet and the payment obligation into the collective agreement. The Hospital argued that as evidenced by the bargaining history, it had no obligation to make these payments once an employee turned 65 and that employees who were 65 and older could not make LTD claims. While Article 13.01(a) referenced the "August 1992 booklet," it was the Plan, that set out LTD entitlement, and that Plan restricted coverage to employees under the age of 65. In

the alternative, the union was estopped from enforcing its legal rights until the Hospital could address the matter in bargaining.

The Board of Arbitration allowed the grievance. The Board noted that an identical central agreement provision was considered in *Markham Stouffville Hospital & CUPE*, an unreported award from November 2018, that was subsequently upheld by the Divisional Court. In the Board's view, the parties clearly and deliberately incorporated the August 1992 booklet into their collective agreement and that decision could not be characterized as "housekeeping." While the Ontario Hospital Association did not intend to expand coverage, the intentions of one party were not legally and factually determinative when the contractual language was clear and unambiguous. The Board also noted that since mandatory retirement ended, the parties had several opportunities to revisit post65 LTD benefit eligibility but had not done so and Article 13.01(a) remained unchanged. Finally, the Board held that there was no estoppel; when the Hospital signed the central agreement and became subject to its terms, it was those terms that applied. The limited evidence of past practice based on its Plan were insufficient to establish an estoppel.

d) General Damages: Placing an employee on administrative leave without cause and then issuing an ROE for shortage of work when there is work justifies a general damages award

- ***Windsor Regional Hospital v Canadian Union of Public Employees Local 1132.02*** **(Davie, March 7, 2022)**

The grievor was hired as a part-time RPN in February 2012. She worked without complaints about performance, and without discipline, at the Hospital's Ouellette campus. The grievor successfully posted into a part-time RPN position at the Hospital's Met campus in May 2016. During her orientation period in that position, certain concerns were identified. As a result, the grievor developed a self learning plan which was accepted by the Hospital. On August 18, 2016, after having worked approximately six (6) shifts, the grievor was placed on a paid Administrative Leave pending an investigation. She remained on leave and continued to be paid from August 2016 to November 2017 when the Hospital, without notice to her or the union, issued a record of employment (ROE) for "shortage of work" and stopped paying her wages. The Hospital however continued her benefit coverage.

The union filed a grievance seeking reinstatement, payment of lost wages, and damages. The union argued the grievor should be returned to her previous position with full compensation from August 2016 to the date of reinstatement. The union acknowledged that a claim for back wages should be reduced for the period following October 23, 2018, when the grievor suffered a domestic assault and was unable to work because of her injuries. The grievor also sought damages under the *Human Rights Code* for mental distress and loss of dignity. The Hospital conceded

that it violated the collective agreement when it issued the ROE however, it argued the grievor should not be returned to work until she had provided satisfactory medical evidence outlining her restrictions and limitations and attesting to her ability to return to work safely. The Hospital further claimed it was not obliged to compensate the grievor for lost earnings during any period following the 2018 assault when she was not medically able to return to work. Finally, the Hospital argued there was no medical evidence to support the grievor's claim for mental or emotional distress which was likely affected by the October 2018 assault and not the Administrative Leave or the issuance of the ROE.

Arbitrator Davie found that the Hospital's violation of the collective agreement dated to August 2016 when it placed the grievor on a paid suspension without just cause. The grievor therefore had a right to be reinstated. Given the length of absence from the workplace and the October 2018 assault, the Hospital's request for medical documentation supporting the grievor's return to work was reasonable. With respect to compensation and damages, the arbitrator found that the grievor was not owed any lost income between August 2016 and November 2017 as she suffered no loss of income during this time. However, compensation was owed between November 2017 up to the assault in October 2018. Compensation for lost wages after October 2018 were not appropriate as the grievor would not have been at work to earn those wages. The evidence suggested that as of November 2019 and November 2021, the grievor continued to experience injuries from the October 2018 assault that inhibited her return to work.

With respect to the damages claimed by the union, Arbitrator Davie found little evidence supporting an alleged violation of the Code. There was also no evidence that the grievor's initial placement on Administrative Leave was discriminatory or based on prohibited grounds. Notwithstanding the lack of specific medical evidence, the arbitrator nevertheless determined that general damages should be awarded in the extraordinary circumstances of the case. The grievor had been summarily placed on leave, heard nothing from her employer for 15 months and was then issued an ROE for shortage of work when there was work. These circumstances would have been distressing and cause a deterioration of the grievor's mental and emotional wellbeing. The manner of placing the grievor on leave and the issuance of the ROE was unfair, thoughtless, and insensitive and warranted a $12,000 award for general damages for mental distress.

e) Time Limits: union's decision not to file a grievance in the six (6) years since the issue crystallized gave the hospital reasonable grounds to believe the grievance would not be filed

- ***Windsor Regional Hospital v OPSEU Local 101*** **(Waddingham, April 4, 2022)**

The union filed policy and group grievances alleging that the Hospital created a new classification on January 1, 2015 and failed to determine and pay an appropriate wage rate for the classification. January 1, 2015 was the deadline by which the Hospital required all Pharmacy Technicians to be registered and in good standing with the Ontario College of Pharmacists if they wished to continue working as Pharmacy Technicians at the Hospital. The grievances were filed on March 23, 2021, and June 7, 2021, respectively; the union's view was that the Hospital created a new classification on January 1 and failed to notify the union that it had done so. The Hospital raised a preliminary objection arguing that the grievances were untimely because the union had failed to formally protest the wage rate of the alleged "new classification" within the 30-day time limit prescribed by the collective agreement.

The union urged the arbitrator to relieve against the time limits as some of the delay could be attributed to the union's optimistic belief that the Hospital would ultimately adopt the outcome of the 2016-2018 OPSEU-OHA grievances regarding the Registered Pharmacy Technician wage rate and increase wages in accordance with those decisions. Arbitrator Waddingham dismissed the grievances finding that there were no reasonable grounds for extending the time limits. While appropriate and equitable remuneration was unquestionably a serious matter, the Hospital could reasonably have expected the union to file a grievance on the issue at the earliest opportunity and certainly, no later than January 2015. The union's legitimate expectation that the Hospital would adopt the outcome of the central arbitration process did not bind the Hospital. Furthermore, the union's decision to forgo the grievance process at several junctures gave the Hospital reasonable grounds to believe that the grievance would not be filed.

f) Shift Premium: "Time off between Shift" premiums are not payable for shifts that employees agree to work after the schedule is posted

- ***Canadian Union of Public Employees, Local 1974 v Kingston Health Sciences Centre*** **(Trachuck, April 19, 2022)**

The union filed three grievances alleging that the Hospital had violated the collective agreement by failing to pay time and one half to employees who accepted call-in shifts, when those hours worked reduced the guaranteed time off between scheduled shifts. The union argued that the premium for time off between shifts compensates employees for the disruption to their work/life balance and that employees were entitled to the premium even if they accepted a shift. The Hospital argued that the premium was only triggered when the Hospital posted a schedule that did not allow for the 12 or 16 hours off between shifts and did not apply when an

employee accepted a call-in shift over and above the posted schedule. Arbitrator Trachuk dismissed the grievance, finding that premiums (aside from shift differentials) were not payable in circumstances where an employee accepted a shift that would trigger a premium if it were "scheduled." The collective agreement did not provide a premium if an employee was *required to work* hours that reduced the time off between shifts. The premium was only payable if the hospital was *unable to schedule* the requisite number of hours off in the posted schedule.

g) Shift Cancellation: where a collective agreement grants different rights and benefits for employees based on the employee's class, an arbitrator cannot rewrite the agreement to add benefits to an employee class

- ***Children's Hospital of Eastern Ontario v Laborers' International Union of North America*** **(Parmar, April 20, 2022)**

The grievor was employed as a casual employee. The union alleged a breach of the collective agreement when the Hospital cancelled two shifts that the grievor was scheduled to work without payment of any compensation. The union argued that cancelling a shift on short notice for a casual employee without providing some sort of consideration was an unreasonable exercise of management rights. The Hospital argued that the union was trying to rewrite the collective agreement by adding a provision granting a monetary benefit to casual employees where none existed. Arbitrator Parmar dismissed the grievance finding that the Hospital did not unreasonably exercise its management rights, nor act unfairly or inequitably when it cancelled the Grievor's shifts with no monetary compensation. There was no evidence that the Hospital's decision to cancel the shifts in question involved anything improper or different from its usual considerations. Furthermore, the collective agreement provided monetary benefits only for the cancellation of shifts for full-time and regular part-time employees. Where the parties had expressly agreed that there would be different rights and benefits for employees based on the employee's class, the arbitrator could not ignore or rewrite the agreement to add some benefit for casual employees.

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