HUNTER-LIBERATORE-LAW

Healthcare Update – June 2023

Healthcare Related Cases of Interest

a) *Withdrawal of Grievance: the valid withdrawal of a termination grievance pursuant to Minutes of Settlement must be upheld even where no consideration is given to the grievor, and he does not sign the settlement agreement.*

- ***Service Employees International Union, Local 1 Canada v Evergreen Retirement Community*** **(Nyman, June 5, 2023)**

The employer terminated the grievor's employment in March 2018 when he allegedly refused to return from compassionate leave in a timely manner. The union grieved the termination. At a meeting in December 2019 between the union and the employer to review three outstanding grievances, the union suggesting paying the grievor a small amount to settle his grievance; the employer refused but was willing to make a payment to one of the other grievors in return for the union's withdrawal of the outstanding grievances. Minutes of Settlement (MOS) to that effect were drafted and signed by the parties on January 22, 2020, and the employer made the required payment on January 31, 2020. On February 25, 2020, the union advised the employer that it would be proceeding with the grievor's termination case.

The employer brought a preliminary objection asking the arbitrator to enforce the binding MOS and dismiss the grievance. The union argued that the grievor received no consideration under the MOS and/or that the union should be relieved from the MOS because its representative was mistaken as to its effect. Arbitrator Nyman found that the union had received consideration in the form of payment to one grievor in exchange for the withdrawal of three grievances. The union signed the MOS despite the employer's position that it would not be paying the grievor any monies. Lastly, the union had carriage of the grievance and the grievor's lack of signature was not required to give effect to the MOS. The grievance had been validly withdrawn and there was no basis in law for voiding the MOS. The grievance was dismissed.

b) *Consecutive Weekend Premium: shifts drawing the premium must be "scheduled", meaning on the employer's regular posted schedule and excludes additional shifts accepted by employees through the call-in procedure.*

- ***United Food & Commercial Workers Canada, Local 175 v Homewood Health Centre*** **(Kugler, June 12, 2023)**

The union filed individual, group, and policy grievances challenging the employer's practice of paying consecutive weekend premiums under a Letter of Understanding (LOU) in the collective agreement. The relevant language in the LOU read as follows:

> **LOU #II RE: Extended Tours and Hybrid Schedules**
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> 3. Employees on the extended tours shall be scheduled off every third (3rd) weekend. Should the employee be scheduled to work the third (3rd) weekend, she shall be paid the premium as described in Article 20.16 of the Collective Agreement for all hours worked on the third (3rd) weekend and subsequent weekends until a weekend is scheduled off. Where an employee works on a schedule of four (4) on five (5) off, however, such employee may work up to but no more than six (6) out of nine (9) weekends under this paragraph.

The union argued that the grievors were entitled to the premium even where they voluntarily accepted weekend call-in shifts that were offered by the employer after the regular schedule was posted. Arbitrator Kugler dismissed the grievance finding that the plain and ordinary meaning of the word "scheduled" in the LOU referred to regularly posted schedule. The union's position would have required the arbitrator to interpret the word "scheduled" broadly to include any "work."

c) Attendance Support Program: Arbitrator provides guidance on re-introducing Attendance Management Programs in the post-pandemic period.

- ***Scarborough Health Network v Canadian Union of Public Employees, Local 5852*** **(Randazzo, June 19, 2023)**

The union filed a policy grievance alleging the Hospital's Attendance Support Program (ASP) was unreasonable and violated both the collective agreement and the *Human Rights Code*. The Union argued that Article 3.02 of the Central Agreement, which addresses implementation of an ASP, specifically excludes absences due to "medically established serious chronic condition, an on-going course of treatment, a catastrophic event, absence for which WSIB benefits are payable, medically necessary surgical interventions." The Hospital's ASP did not

exclude these absences stating instead that they *may* be excluded. Furthermore, the ASP did not exclude absences due to disabilities requiring accommodation under the *Code*, was overly mechanical, did not distinguish between culpable and non-culpable absenteeism, and was unfairly retroactive. The Hospital argued that the ASP was reasonable under the *KVP* test, applied to all employees, not just those in the union, and it was not possible to tailor a policy specifically addressing the Central Agreement. The Hospital further argued that *Code* related disabilities were not a form of job protection and that absences due to disabilities were properly considered under the ASP. Finally, the union's argument that the ASP was 'mechanical' was speculative and the program's retroactivity did not render it unreasonable.

Arbitrator Randazzo found that the ASP did not comply with the parties' agreement to exclude specific absences set out in the Central Agreement. This inconsistency rendered the ASP unclear, unreasonable, and unenforceable. He further found that the ASP did not explicitly exclude absences related to disabilities to which the *Code* applied and that an assessment of potentially *Code* related absences would not occur until employees reached Level 4 of the program; this adverse effect on employees with disabilities amounted to systemic discrimination in violation of the *Code*. Arbitrator Randazzo was not prepared to conclude that the ASP would be mechanically applied, however, he did find that the program's retroactive effect, which resulted from a miscommunication and/or misunderstanding between the Hospital, the union, and employees, was unreasonable. The grievance was allowed.