Healthcare Update – March 2023

Healthcare Related Cases of Interest

a) ***Weekend Premium: Under the unique language of this collective agreement, a consecutive weekend premium is payable if an employee is called in and accepts a shift resulting in them working three or four weekends in a row unless the employer has made its best efforts to avoid that result.***

- ***Service Employees International Union, Local 1 v Georgian Bay General Hospital*** **(Trachuck, February 21, 2023)**

The Union filed individual and policy grievances alleging that the Hospital had been interpreting Articles L 16.02 and L 16.03 regarding payment of a third consecutive weekend premium in violation of the collective agreement. The issue was whether an employee who was not scheduled for three consecutive weekends (or four for part-time), but was offered an additional shift which led to the employee working three (or four) consecutive weekends, was entitled to the third (or fourth) consecutive weekend premium.

The language of the collective agreement read as follows:

> **ARTICLE L16 – HOURS OF WORK**
>
> L16.02 Weekends Off - Full-Time Employees
>
> In scheduling shifts, the Hospital will endeavor to arrange schedules so as to provide for a minimum of eight (8) weekends off in every twenty-four (24) week period, and, in any event, at least one (1) weekend off in each three (3) week period. **Where a weekend off is not granted within a three (3) week period, time worked on such third weekend, but not subsequent weekends shall be paid at the rate of time and one-half (1½)** unless the Hospital, notwithstanding its best efforts, was unable to meet this standard, and shall not apply where:

(i) such weekend work was performed by the employee to satisfy specific days off requested by such employee; or

(ii) such employee has requested weekend work, or was advised at the time of hire or when the job was posted that the regular schedule normally requires continuous weekend work; or

(iii) such weekend is worked as a result of an exchange of shifts with another employee; or

(iv) the Hospital is unable to comply due to a prohibition against scheduling split days off.

L16.03 Weekends Off - Part-Time Employees

In scheduling shifts, the Hospital will endeavor to arrange schedules so as to provide for a minimum of eight weekends off in every twenty-four week period, and, in any event, at least one weekend off in each four week period. **Where a weekend off is not granted within a four week period, time worked on the Saturday and Sunday of the fourth consecutive weekend worked but not subsequent weekends shall be paid at the rate of time and one-half (1½)** unless the Hospital, notwithstanding its best efforts, was unable to meet this standard and shall not apply where i, ii, iii, and iv as listed in “Weekends off Full-Time”. This shall not be construed as requiring the Hospital to hire additional staff.

The Hospital argued that a call-in shift picked up by a union member did not count as “a weekend off which is not granted” for the purposes of Article 16.02 and 16.03 and could not create an entitlement to the third consecutive weekend premium. The premium was only payable if the third and preceding weekends were *scheduled* without best efforts being made. The Union argued that a weekend “not granted” is a weekend worked; once an employee was called in, they were required to work and therefore entitled to the premium. The premium payment was not tied to “hours scheduled and worked” but “time worked”. Furthermore, the parties had not included call-ins in the provision setting out exceptions to the premium payment.

Arbitrator Trachuk concluded that the plain and ordinary meaning of Articles L16.02 and L16.03 was that the premium is payable if an employee is called in and accepts a shift resulting in them working three or four weekends in a row unless the employer has made its best efforts to avoid that result. The Arbitrator considered whether the term "not granted" in Articles 16.02 and 16.03 meant not booked off in the schedule or meant the employee attended at work. Since the clause went on to refer to the "time worked" on the weekend, she concluded that an employee who attends at work is "not granted" a weekend off and is entitled to the premium. She further observed that,

> The parties did not say "Where a weekend off is not granted in the schedule" in the second sentence of the provision which is what one would expect if that were their intention, given the jurisprudence. It would not be appropriate to read the words "in the schedule" into the sentence if it is not clear that was what the parties meant.... Furthermore, the words "not granted" themselves lead to the conclusion that the premium is payable if an employee works a third or fourth shift even if that is the result of agreeing to come in. A shift may be originally "granted" on the schedule but that grant is withdrawn if the employee accepts the shift and then it is "not granted". By offering the shift the Employer is offering to withdraw the granted weekend off.

While the collective agreement included an exception if the employer had made "best efforts" to grant a weekend off within a three- or four-week period, the arbitrator found that language such as "best efforts" required the employer to make a case-by-case assessment and not issue a blanket policy that calling in employees indicated the employer had in fact made its "best efforts." Arbitrator Trachuk allowed the grievance and remitted the issue of remedy back to the parties.

b) *Job Posting: Unless specified in the collective agreement, it is management's exclusive right to determine whether a vacancy exists.*

- ***[Cornwall Community Hospital v Ontario Public Service Employees Union](#)*, (Nairn, March 16, 2023)**

The Union filed nine individual and one policy grievance challenging the Hospital's decision not to post a full-time Pharmacy Technician position following the departure of the prior incumbent. The Hospital had eliminated the position and distributed the remaining shifts among part-time Pharmacy Technicians. The Union alleged the Hospital had breached Article 13.01(a) of the collective agreement by failing to post the full-time vacancy. The Article read as follows:

> 13.01 (a) Where a vacancy exists, or where the Hospital creates a new position in the bargaining unit, such vacancy shall be posted for a period of seven (7) calendar days. Applications for such vacancies shall be made in writing within the seven (7) day period referenced herein.

The employer argued that no vacancy existed and that for business reasons, and in accordance with the collective agreement, it was within management's rights to redistribute the available hours to existing part-time employees. The Union argued that upon the incumbent's resignation, a "vacancy" existed; the work done by the full-time employee continued to be required and the employer was required to post and fill that vacancy.

Arbitrator Nairn noted that Article 13.01(a) does not define "vacancy". She determined that whether a vacancy exists is a matter for the employer to determine pursuant to the exercise of its management rights: "Only once a vacancy is determined to exist, is it required to be posted pursuant to Article 13.01(a) of the collective agreement" (at para 17). The employer's operations were the exclusive function of management and there was nothing in the collective agreement restricting management's right to re-allocate the incumbent's hours among part-time employees.

c) Reasons for Termination: Where the Union was advised of the reasons for termination during a grievance meeting and raised no objection, the Hospital is not barred from relying on those reasons during the arbitration.

- ***North York General Hospital v Ontario Nurses' Association*** **(Parmar, March 16, 2023)**

This was a preliminary decision regarding the termination of a grievor without just cause. The grievor began her employment as a registered nurse with the employer in June 2019. The grievor was previously employed at another hospital but her employment with the other hospital ended in May 2019, at which point she was terminated, and her termination was reported to the College of Nurses ("CNO"). The CNO initiated an investigation, and a discipline hearing was scheduled for November 17, 2022. The grievor first informed her manager about the pending CNO discipline hearing on November 14, 2022, indicating it may result in a temporary suspension of her license. Following the discipline hearing, the Grievor's nursing license was suspended from December 17, 2022, to February 17, 2023, due to professional misconduct. The employer terminated the grievor's employment on November 30, 2022, citing the suspension of her license to practice as a nurse.

The Union filed a grievance. A step 2 meeting was held whereby the employer referenced concerns about risk and patient safety and the employer's "internal risk assessment". Subsequently, the Union requested production and particulars. Employer counsel advised the Union that the employer's basis for the just cause termination included an allegation that there was a demonstrated patient safety risk from continuing to employ the grievor. The Union objected to the employer's reliance on this ground and brought a preliminary motion seeking to bar the employer from raising this argument.

The Union alleged that under Article 7.06(b) of the collective agreement, the employer was obliged to provide written reasons for termination within seven days. The only reason identified in the termination letter was the suspension of the grievor's license. The employer argued that the grievor's termination letter referenced the professional misconduct finding by the CNO and that the patient safety risk was raised with the grievor and the union during the Step 2 grievance meeting. The Union did not raise any objection at that meeting and the employer argued this constituted a waiver of Article 7.06(b). In the event the employer had violated the article, the employer argued that

the arbitrator had discretion to determine an appropriate remedy as a specific consequence was not outlined in the collective agreement.

Arbitrator Parmar found that the employer did not identify safety concerns as a reason for terminating the grievor in the termination letter, in violation of Article 7.06(b). However, she also found that by the Step 2 meeting (one day after the expiry of the seven-day window), the Union and the grievor were advised and understood that the employer's reasons for terminating the grievor included risk concerns arising from the misconduct for which her license had been suspended. Furthermore, the CNO posted a summary of its decision to its public website well before the date of termination so the Union's contention that the employer could not possibly have had safety concerns at the time of termination was contrary to the evidence. The Union raised no objection during or shortly after the Step 2 meeting and failing to do so constituted a waiver. Arbitrator Parmar concluded that Article 7.06(b) would not bar the employer's ability to advance safety concerns as a justification for termination. The Union's motion was dismissed.

d) *Overtime: Unless specified by the collective agreement, hours worked on a public holiday and compensated at an overtime rate are not "overtime" hours and can be included in the calculation of an employee's entitlement to overtime under the Central Agreement.*

- ***Ellis Don Facilities Services (OTMH) Inc. and CUPE, Local 815.1 AND Ellis Don Facilities Services (William Osler Health System Inc). and CUPE, Local 145.3* (Parmar, March 20, 2023)**

The Unions filed 11 grievances raising the same issue of interpretation regarding Article 15.03 of the central collective agreement. The issue was whether hours worked on a public holiday and compensated at a rate of time and one-half pursuant to Article 16, contributed to the calculation of an employee's entitlement for overtime pay for all hours worked over 75 hours in

a two-week period, pursuant to Article 15.02. Until the fall of 2020, the employers' practice was to treat hours worked on public holidays as contributing to the calculation of an employee's entitlement to overtime for hours in excess of 75 in a biweekly period. The relevant collective agreement provisions read as follows:

> <u>15.02 – Definition of Overtime</u>
>
> Overtime shall be payable for all hours worked in excess of seventy-five (75) hours averaged over two (2) weeks ….
>
> <u>15.03 – Overtime Premium and No Pyramiding</u>
>
> The overtime rate shall be time and one-half (1–½) the employee's straight-time hourly rate.
>
> Where an employee is required to work additional overtime contiguous to an overtime shift within a twenty-four (24) hour period, the employee will be compensated at the rate of double time his or her straight time hourly rate for all additional contiguous overtime hours worked.
>
> **Overtime premium will not be duplicated nor pyramided nor shall other premiums be duplicated nor pyramided nor shall the same hours worked be counted as part of the normal work week and also as hours for which the same overtime premium is paid.** ….
>
> <u>16.05(a) Payment for Working on a Holiday</u>
>
> (The following clause is applicable to full-time employees only)
>
> If an employee is required to work on any of the holidays set out in Article 16.01 the employee shall be paid at the rate of time and one-half (1 ½) her regular straight time hourly rate of pay for all hours worked on such holiday subject to Article 16.04. …

Arbitrator Parmar upheld the grievances, finding no basis to conclude that payment under Article 16.05(a) was an "overtime premium". Article 16.05(a)

referenced a rate of pay that was identical to the “overtime rate” but the article made no reference to the word “overtime”, did not treat, or identify work on a holiday as overtime, nor did it identity payment of that work as “overtime pay” or an “overtime premium”. As the third prohibition in Article 15.03 only applied in respect of hours for which the “overtime premium” was paid, Article 15.03 did not prohibit adding the hours worked on a public holiday to the calculation of an employee’s entitlement for overtime worked in excess of 75 hours under Article 15.02.

The article in this update provides general information and should not be relied on as legal advice or opinion. This publication is copyrighted by Hunter Liberatore Law LLP and may not be photocopied or reproduced in any form, in whole or in part, without the express permission of Hunter Liberatore Law LLP.

2 Pardee Avenue, Suite 300, Toronto, Ontario, Canada M6K 3H5
Tel: 416-534-7770 Fax: 416-534-7771 hunterliberatore.ca