HUNTER-LIBERATORE-LAW

HEALTHCARE UPDATE - THE PANDEMIC YEAR

March 23, 2021

"At the end of the day, we can endure much more than we think we can."
– Frida Kahlo

As we mark the end of the first year of the COVID-19 pandemic and prepare ourselves for the third wave, it is hard to believe how much has been accomplished in the last twelve months. Life carried on in the new normal of PPE wearing and social distancing as we navigated the constantly changing government frameworks for how Ontarians can interact with one another. Despite regulations overriding certain collective agreement provisions, there were no shortage of grievances, arbitration and other cases in the healthcare sector. From disputes about N-95 masks and PPE, to mandatory COVID-19 testing, to pandemic pay premiums, to sick pay for self-isolation, the pandemic related decisions were plentiful. Beyond COVID-19 we saw decisions about Bill 124, overtime, HOOPP, vacation, privacy, how work is assigned, payment for ACLS training and reporting time, and many more. In this article we summarize the more interesting cases from the last year. It is a long list, but not exhaustive list. It might explain why healthcare HR professionals are ready for that beach vacation as soon as it is possible again.

CONTENTS

- **Labour Arbitration and Other Cases of Interest (COVID-19 Related)**

A. Cases About PPE

Ontario Nurses Association v. Eatonville/Henley Place, (Superior Court, April 23, 2020) 2020 ONSC 2467

Justice Morgan of the Ontario Superior Court issued an order requiring four Long Term Care homes (LTCs) to comply with the Chief Medical Officer of Health of Ontario (CMOH) Directives regarding health and safety measures in LTCs during the COVID-19 pandemic. The Order required the LTCs to provide access to N95 masks

and to implement administrative controls around isolating and cohorting residents and staff as set out in Directives #3 and #5 issued by the CMOH.

The Court's decision is notable because Justice Morgan concluded that the decision regarding the need for PPE, including N95 masks, is to be made by a nurse based on his or her point of care risk assessment (PCRA). Justice Morgan further ordered that nurses are not to be "impeded" by management in making their assessment and determination. Nurses are expected to apply their professional judgment, taking into account the relevant short-term and long-term considerations – which include the scarcity of N95 masks.

Participating Nursing Homes v Ontario Nurses' Association, (Stout, May 4, 2020) 2020 CanLII 32055

Arbitrator Stout's award addresses all the ONA grievances filed under the collective agreements between the participating homes and ONA related to health and safety measures arising as a result of the COVID-19 pandemic. The award is the result of an expedited process similar to the mediation/arbitration process under section 50 of the *Labour Relations Act, 1995.* A number of orders were issued including orders related to N-95 masks. The arbitrator noted that while homes reserve the right to store PPE in secure locations, a sufficient supply of all appropriate sizes of fit-tested N95s must be available.

Participating Nursing Homes Sienna Madonna Care Community v Ontario Nurses' Association**,** (Stout, June 10, 2020) 2020 CanLII 39641 see also ***Participating Nursing Homes Sienna Madonna Care Community v Ontario Nurses' Association***, (Stout, July 31, 2020) 2020 CanLII 52817 as a further follow up award.

These are follow-up awards directing LTC homes to comply with the May 4, 2020 award. The first award directs the home to revise the PCRA tool given to nurses to include aerosol generating medical procedures (AGMPs) and the additional considerations noted in the May 4, 2020 award. A further follow up award required the parties to refer issues of whether the home was maintaining an adequate supply of N95 masks to their joint health & safety committee.

Ontario Hospital Association v Ontario Nurses' Association, (Stout, O'Byrne, Hughes, November 1, 2020) 2020 CanLII 84240

This is a supplemental award to the ONA central interest arbitration. In the initial award, the Board remitted back to the parties for further negotiation ONA's proposal

to amend article 6.05 (a) of the central collective agreement to address the pandemic. The hospitals opposed the proposal in favour of a Letter of Understanding that did not form part of the collective agreement. The Board awarded the employer's proposal without extensive reasons but noted that the original award was for a one-year collective agreement and that the parties would be returning to the bargaining table. The Letter of Understanding includes an expedited process to adjudicate issues related to access to PPE under Directive #5.

United Food and Commercial Workers Canada, Local 175 v Hazel Farmer, (December 22, 2020) 2020 CanLII 104942 (ON LRB)

The Ontario Labour Relations Board overturned a refusal by a health and safety inspector to issue an order requiring a LTC home to install plexiglass barriers in the nursing station. The Board made the following finding:

> Moreover, the fact that there is PPE being used by the staff to protect against the spread of infection does not obviate the advantage of additional forms of protection if they are also reasonable precautions in the circumstances. The use of preventative measures is not mutually exclusive as the Union pointed out and the IPAC document from July 27, 2020, does indicate the use of PPE is the lowest and last barrier between a worker and the hazard and not, as the Employer arguments suggest, the first and only preventive measure.

Almonte General Hospital v OCHU/CUPE Local 3022, (Kaplan, August 18, 2020) 2020 CanLII 57334

This is a preliminary award regarding CUPE's proposed expert regarding N95 masks. The proposed expert was an Occupational Hygienist with experience with masks and airborne particulates. However, the proposed expert had no expertise regarding infectious disease transmission or control. Arbitrator Kaplan declined to certify him as an expert.

Blackadar Continuing Care Centre and ONA (Stout, January 13, 2021) 2021 CanLII 3449

This is another award where Arbitrator Stout makes a series of orders to comply with PPE and safety requirements.

ONA Judicial Review

On February 25, 2021, ONA announced that it is seeking an urgent judicial review application to seek changes to the CMOH directives. ONA continues to be concerned regarding access to N95 masks and aerosol and asymptomatic transmission of COVID-19.

B. Cases About Access to Sick Leave Benefits for Self-Isolation

Participating Nursing Homes v Ontario Nurses' Association (Stout, May 26, 2020), 2020 CanLII 36663 see also ***Toronto Terminals Railway West Division v Unifor Local 101-R***, (Coleman, October 20, 2020) 2020 CanLII 99175

In this decision, Arbitrator Stout found that employees who are asymptomatic but required to self-isolate are not entitled to HOODIP benefits. He concludes:

> The full-time employees who were symptomatic or tested positive are entitled to disability income protection benefits pursuant to Article 14 for their absence due to COVID-19, including any time they were no longer experiencing symptoms but were not allowed to return to work. **All other employees are not entitled to any income replacement benefits or other wage protection**. All employees absent due to COVID-19 are entitled to have their benefits maintained, pursuant to s. 51 of the *ESA, 2000*, while they are absent from work due to COVID-19.

C. Interest Arbitrators Refuse to Order Pandemic Pay Premiums

Chippawa Creek At Bella Care Residence, Park Place Seniors Living v Healthcare, Office and Professional Employees' Union, Local 2220, (McNamee, Caley, Zabek, June 26, 2020) 2020 CanLII 43467.

In this interest arbitration award, the Board of Arbitration declined the union request for a premium of 1.5 times regular pay for working during the pandemic and a $2.00 per hour premium for "working short". After considering the submissions of the parties, the Chair of the Board concluded that the government, not interest arbitrators should address the issues in the long-term care sector:

> Both of these proposals address real issues of concern to employees, and matters which impact many, if not all, nursing homes. At least, with respect to the Covid 19 issue, the federal and provincial governments have recognized that they bear some responsibility, and have offered some compensation. We

> believe that the various commissions which will be examining the structure and workings of the entire LTC sector, as well as the provincial ombudsman, should re-examine this issue and the amount of compensation afforded to employees who continued to go to work and to take care of our most vulnerable citizens at great peril, not only to themselves, but their families. We cannot expect employees to put their health and lives at risk without both adequate safety measures and a reasonable return for the courage and loyalty. We therefore defer this issue to the government and industry investigatory bodies and commissions charged with overall responsibility for recommending and implementing change throughout the entire LTC sector, including the proper treatment of employees.

See also ***Conmed (Four Homes) v Christian Labour Association of Canada Local 302***, (Gedalof, Kleiner, Schachter, September 1, 2020) 2020 CanLII 62091, ***Lifetimes Retirement Inc. v Southwestern Ontario Health Care & Service Workers Union, Local 303,*** (McNamee, Schachter, Kleiner, January 22, 2021) 2021 CanLII 5443, ***West Oak Village v Service Employees International Union Local 1 Canada***, (Randall, O'Byrne, Wray, August 31, 2020) 2020 CanLII 62884, ***Downsview Long Term Care v Service Employees International Union Local 1 Canada***, (Randall, Campeau, Wray, September 24, 2020) 2020 CanLII 70801

D. Cases Where Terminations Upheld for Failure to Follow COVID-19 Protocols

Garda Security Screening Inc. v. IAM, District 140 (Shoker Grievance) (Keller, July 2, 2020), [2020] O.L.A.A. No. 162

In this case, the employer required employees to self-isolate if they were awaiting the results of a COVID-19 test. The grievor tested positive for COVID-19. She attended work after she was tested but before she received the results. Her employment was terminated for cause. The termination was upheld as the grievor's actions put countless others at risk of illness or death and she showed no remorse for her actions.

Labourers' International Union Of North America, Ontario Provincial District Council And Labourers' International Union of North America, Local 183 v Aecon Industrial (Aegon Construction Group Inc.), (Carrier, September 30, 2020) 2020 CanLII 91950

In this case, a 64-year-old grievor with five years of service was terminated for failing to comply with COVID-19 protocols. He attended at work while experiencing symptoms of COVID-19 despite being told to stay home. The employee had a prior disciplinary record for failing to carry his Electronic Personal Dosimeter and for sleeping at work. The termination was upheld.

E. Cases About Redeployment Regulations

Heritage Green Nursing Home v Service Employees International Union, Local 1**,** (Herlich, July 27, 2020) 2020 CanLII 50475

Regulation 77/20 allows LTC homes to redeploy staff as needed to respond to, prevent, and alleviate the outbreak of COVID-19. In this case, the LTC home implemented 12 hour shifts instead of 7.5 hour shifts as a response to the pandemic. The collective agreement required the home to pay overtime for shifts in excess of 7.5 hours per day. Arbitrator Herlich found that the home was required to pay a premium for any hours in the new shift schedule in excess of 7.5 hour per day. He found that:

> If the effect of the Order is to shield the Employer from the economic cost consequences of its redeployment choices by overriding collective agreement provisions, I would have expected clear language to that effect.

Ontario Nurses' Association v Corporation of the County of Essex (Sun Parlour Home for Senior Citizens)**,** (Gedalof, November 30, 2020) 2020 CanLII 93596. See also ***Healthcare, Office and Professional Employees Union Local 2220 v Chartwell Seniors Housing Reit (The Woodhaven)****,* (Gedalof, October 5, 2020) 2020 CanLII 73977 which is a preliminary award in a case where the union is challenging the constitutionality of the redeployment regulation.

In the Sun Parlour case, the employer relied on the redeployment Regulation applicable to LTC homes to cancel an employee's union leave and require her to return to work. The award is a preliminary ruling that considers whether the regulation gives the employer *carte blanche* discretion to do what it considers to be "reasonably necessary" to address the pandemic *or* if the exercise of the various measures identified under s.3 of the regulation (including the authority to cancel leaves notwithstanding the provisions of a collective agreement) is subject to the "reasonably necessary" standard set out in s.2 of the regulation. The Association argued that the exercise of authority under s.3 must be "reasonably necessary" to "respond to, prevent and alleviate the outbreak of the coronavirus (COVID-19) for

residents". The Employer argued that the exercise of its authority under s.3 of the Regulation is unfettered and stands independent of the constraints in s.2. The arbitrator adopted the Association's interpretation.

F. Case About Mandatory COVID-19 Testing

***Caressant Care Nursing & Retirement Homes v Christian Labour Association of Canada*,** (Randall, December 9, 2020) 2020 CanLII 100531

In this case, Arbitrator Randall found that the home's mandatory COVID-19 testing policy applicable to all staff (including asymptomatic staff) was reasonable. The home relied on the recommended testing requirements under Directive #3 as it was written at the time. Arbitrator Randall concludes as follows:

> I agree with the Union that the testing policy is not perfect and not a panacea. Obviously, testing has innate shortcomings as outlined by Ms. McColgan. And not testing residents, given that they make up the majority of people in the Home, negatively effects the utility of the mandatory employee testing.
>
> However, I strongly disagree with the Union and/or Ms. McColgan characterizing testing as a limited surveillance tool. That is not accurate. A negative test may be of limited value to the individual employee tested but it is of high value to the Home; and a positive test is of immense value to both the employee and the Home. A positive test leads to identification, isolation, contact tracing and the whole panoply of tools used in combatting the spread of the virus. Arguably, the only way the testing could be improved is to increase its frequency, but that is not a proposal likely to have legs in the bargaining unit.

G. Case About Family Status Accommodation and Self-Isolation Requirements

United Steelworkers Local 2251 v Algoma Steel Inc., (Jesin, July 20, 2020) 2020 CanLII 48250

In this case, the grievor lived in the US and worked in Canada. He was separated and his children lived in the US. He was required to cross the US border to see his children. The employee obtained an exemption from the travel restrictions imposed

by public health. However, the employer instituted a policy that required any employee who crossed the border to self-isolate for 14 days. Arbitrator Jesin ordered the employer to accommodate the employee and permit him to work without the self-isolation requirement.

H. Update on Bill 124

***Participating Hospitals (Ontario Hospital Association) v Ontario Nurses' Association*,** (Stout, O'Byrne, Hughes, June 8, 2020) 2020 CanLII 38651

Arbitrators have consistently rejected union arguments to avoid the application of Bill 124. In the central interest arbitration award, the board of arbitration refused to add a new level to the wage grid.

See also ***Tabor Manor v Christian Labour Association of Canada***, (Kaplan, Kleiner, Schachter, September 16, 2020) 2020 CanLII 66104, ***Hospital for Sick Children v CUPE, Local 2816.01***, (Kaplan, Ball, Herbert, October 19, 2020) 2020 CanLII 77150, ***Groves Memorial Community Hospital v Ontario Public Service Employees' Union***, (McNamee, Robbins, O'Byrne, July 20, 2020) 2020 CanLII 49891, ***Ontario Public Service Employees Union, LOCAL 5113 v Sunnybrook Health Sciences Centre,*** (Schmidt, Moore, O'Byrne, November 12, 2020) 2020 CanLII 88351, ***Sunnybrook Health Sciences Centre—st. John's Rehab v Ontario Public Service Employees Union Local 569***, (Steinberg, O'Byrne, Moore, June 24, 2020) 2020 CanLII 41894, ***Hamilton Jewish Home for the Aged v Service Employees International Union Local 1 Canada*,** (Slotnick, Wray, Gooding, November 5, 2020) 2020 CanLII 85624, 2021 CanLII 6204, ***Knollcrest Lodge v United Food and Commercial Workers Canada, Local 175*** , (White, Kleiner, Caley, January 30, 2020) 2020 CanLII 6760 (ON LA), ***Shepherd Village Inc. v Service Employees International Union Local 1 Canada*** (Randall, Kleiner, Wray, July 29, 2020) 2020 CanLII 51703 ***F.J. Davey Home v Canadian Union Of Public Employees, Local 4685-00***, (Stout, Zabek, Garzouzi, February 17, 2021) 2021 CanLII 10816 (and many more).

• Other Labour Arbitration Cases of Interest in the Hospital Sector

A. Case About Theft and Addiction and Employer's Right to IME in Arbitration Process

St. Joseph's Healthcare Hamilton v Ontario Nurses' Association, (Misra, August 13, 2020) 2020 CanLII 57218

In this case, the grievor was terminated for theft of drugs. She was addicted to opioids and underwent treatment. She was seeking reinstatement to her employment. The hospital sought an IME for the purposes of defending the grievance. ONA asserted that the employee's addiction was the reason that she stole from the hospital and for that reason should not be treated as disciplinary matter. The hospital wanted their own expert to assess the grievor to provide an opinion on the grievor's accountability and to advise them on the cross examination of the union's medical experts. The order was granted.

B. Case About Name Tags

Humber River Hospital v Ontario Public Employees Union, (Stout, September 10, 2020) 2020 CanLII 70470

The union grieved asserting that the requirement that employees wear a badge that included their last name was unreasonable. The union argued that requiring names to be displayed was a health and safety risk and a breach of privacy. The grievance was dismissed. The policy had been in place for some time with no evidence of any harassment or violence issues. The hospital completed a risk assessment and identified the name badges as low risk. Regarding privacy, the arbitrator confirmed that an employee's name falls within the exception under *FIPPA* as information that "identifies the individual in a business, professional or official capacity" and that is not personal information subject to protection of privacy.

C. Case About Employees Taking Lunch in the Unit and Overtime

Waypoint Centre For Mental Health Care v Ontario Public Service Employees Union, (Hayes, October 1, 2020) 2020 CanLII 71321

The grievors in this case claimed payment for overtime for being "required to take their ½ hour lunch break at their desks due to considerations of health and safety." The grievors claimed that they could not leave their colleague alone in the Extra Care Area if they left to eat lunch in the staff room. It was their choice to stay, not the direction of the employer. Arbitrator Hayes concluded that there was an appropriate avenue to address the safety concern and it was not for the employees to decide amongst themselves that for safety reasons they would take their lunches in the unit and then claim overtime.

D. Case About HOOPP Contributions and Delay Raising Issue

South Bruce Grey Health Centre v Ontario Public Service Employees Union, (Hayes, October 7, 2020) 2020 CanLII 73641

Three employees alleged that the hospital failed to make appropriate HOOPP contributions due to scheduling irregularities, pregnancy and parental leaves and other events. The last "event" occurred more than 14 years before the grievance was filed. The grievance was dismissed due to delay. The employees received HOOPP statements each year that confirmed their service accrual. One of the employees had raised a concern years prior and did not pursue it. The hospital was also prejudiced as no records had been kept that it could use to defend the grievance due to an amalgamation and the passage of time.

E. Case About Temporary Job Postings

Trillium Health Partners v Canadian Union of Public Employees, Local 5180**,** (Herman October 19, 2020) 2020 CanLII 77140

Arbitrator Herman confirmed that there are no provisions in the CBA that limit the hospital's right to post temporary vacancies. As long as the process followed by the hospital is reasonable, the vacancies can be posted if and as the hospital sees fit. In addition, the requirement to equalize hours among part-timers does not prevent the hospital from utilizing temporary postings.

F. Case About Recent Related Experience Not Including Probationary Period

Northumberland Hills Hospital v Canadian Union of Public Employees, Local 2628**,** (Sheehan, O'Byrne, Herbert, November 18, 2020) 2020 CanLII 108767

The board of arbitration confirmed that when calculating recent and related experience under article 9.07(B) of the collective agreement, you only include related experience up to the date of hire. You do not include the probationary period the employee serves after they are hired.

G. Case About Employee Health File and PHIPA

Orillia Soldiers' Memorial Hospital v Ontario Public Service Employees' Union, Local 383, (Abramsky, November 25, 2020) 2020 CanLII 91949

Arbitrator Abramsky found that it was a violation of the *Personal Health Information Protection Act, 2004* (PHIPA) for the hospital to provide a copy of the grievor's Occupational Health file to legal counsel for a labour arbitration proceeding without consent or an arbitrator's order. Arbitrator Abramsky confirmed that the Occupational Health file is personal health information and not employment information.

H. Case About HOODIP and Public Holidays Extending the 15 Week Entitlement

St. Joseph's Healthcare Hamilton v Canadian Union of Public Employees, Local 786, (Misra, Shaw, Herbert, December 7, 2020) 2020 CanLII 97979

The grievor was absent for the full 15 weeks of HOODIP entitlement. There were 3 holidays that occurred during her absence. The arbitrator found that the paid holidays extended the 15-week HOODIP disability period and ordered the hospital to pay the employee three additional sick days after the end of her 15-week absence.

I. Case About Elimination of Positions and Filling Position During 5 Month Notice Period

Winchester District Hospital v CUPE, Local 3000, (Kaplan, Butler Malette, Herbert, December 9, 2020) 2020 CanLII 98764

In this case, an RPN retired. The hospital eliminated the position and did not fill it during the 5-month notice period. It also did not convene a formal redeployment committee after it notified the union of the elimination. The board of arbitration found that the failure to convene a redeployment committee was a breach of the collective agreement worthy of some compensation. However, the board did not find that the hospital should have posted a temporary position for the 5-month notice period where there was no work that needed to be done during that time frame. The chair of the board, Arbitrator Kaplan, found as follows:

> Obviously one corollary of this is that no arbitration board would sanction pay for work that would otherwise not be required and compel a Hospital to post and fill an unnecessary full-time position for the five-month notice period; certainly not in circumstances where there is no identifiable affected

employee. Another corollary of this is that no arbitration board would require a Hospital to pay damages to an imaginary person who was identified, or came forward, years after the fact for work that never needed to be performed; a person who was covered by a different collective agreement and who had not grieved when she or he had an opportunity to do so, again where the work was not required.

J. Case About Termination for Accessing Co-Worker's Patient Records

William Osler Health Centre and Teamsters Local 419 (Nyman, January 7, 2021) 2021 CanLII 126

This case involved the termination of a Clerical Associate with 29 years of service and a clean disciplinary record. The grievor was alleged to have accessed the personal health records of her co-workers and denied that she had done so. Arbitrator Nyman accepted the evidence of the hospital (audit records of Meditech access) as proof that the grievor accessed the records and did not accept the grievor's explanations for the records (that another employee accessed her terminal in her absence). The grievance was dismissed.

K. Case About Report Time and Entitlement to Overtime

Markham Stouffville Hospital and CUPE 3651 (Burkett, January 19, 2021) 2021 CanLII 9807

In this case, Arbitrator Burkett ruled that RPNs required to attend work 15 minutes prior to the start of their shift to take report from the outgoing RPN should be paid for their time. However, he also found that the union was estopped from claiming same until after the collective agreement expired.

L. Case About Premiums for Cancelled Overtime Shifts

Children's Hospital of Eastern Ontario v Labourers' International Union of North America, Liuna Local 3000, (Parmar, February 11, 2021) 2021 CanLII 11358

Two full-time and one part-time employee sought a premium for hours worked when the hospital failed to provide the required notice of a cancelled overtime shift. The union relied on the following collective agreement provision:

ARTICLE 17 – HOURS OF WORK AND SCHEDULING

17.02 Cancelling of Shifts

Full-Time

The Hospital will endeavour to provide as much advance notice as is practicable of a change in a posted schedule. Changes to the posted work schedule shall be brought to the attention of the affected employees. Where less than forty eight (48) hours of notice of change is given to a full-time employee, the employer will pay time and one half (1.5) of the employee's regular straight time hourly rate for all hours worked on the employee's next schedule.

Part-Time

Where a regular part-time employee's scheduled shift is cancelled or unilaterally changed by the Hospital with less than twenty-four (24) hours notice, he/she shall receive time and one-half (1.5) of the regular straight time hourly rate for all hours worked on his/her next shift.

Arbitrator Parmar rejected the grievances of the two full-time employees because the overtime shifts were not part of the "posted schedule". Instead, the shifts were added after the schedule was posted. However, for the part-time employee, the issue was whether the "scheduled shift" had been cancelled. For part-time employees, the posted schedule was updated regularly after the initial posting with part-time employees required to provide their additional availability after the schedule was posted. She concluded that once the employee confirms they will work a shift, the shift becomes a "scheduled shift", and the premium applies if the shift is cancelled without sufficient notice.

M. Case About Information Requested in First Instance Medical Certificates

Hamilton Health Sciences v Ontario Public Service Employees Union, (Steinberg, February 22, 2021) 2021 CanLII 13253

In this case, the union filed a policy grievance alleging that changes made to the Medical Certificate of Disability (MCD) form required more information than was reasonable or necessary for short-term sick benefits. Arbitrator Steinberg accepted the union's argument. The addition of a check box on the MCD indicating which part of the body was engaged by the injury or illness and a check box relating to functional and cognitive abilities was not necessary in a first instance medical report

where the employee was only required to establish that they met the definition of total disabled under HOODIP.

N. Case About "Capping" Vacation Accrual

Humber River Hospital v National Organized Workers Union, (McNamee, February 4, 2021) 2021 CanLII 9809

The hospital allowed full-time employees to carry over vacation to the next year. However, if an employee accumulated twice their annual entitlement, they were denied the right to accumulate any additional vacation until they had utilized some of the accumulated time. The union alleged this "capping" of vacation violated the collective agreement. Arbitrator McNamee accepted the union's argument, finding that nothing in the collective agreement permitted the hospital to deduct or withhold any portion of an employee's vacation entitlement. The hospital could however require full-time employees to take the vacation allotted to them within a 12-month period.

O. Case about Temporary Assignment of Duties and Entitlement to a Higher Rate of Pay

Humber River Hospital v National Organized Workers Union, (Stout, March 3, 2021) 2021 CanLII 16000

The union alleged that the grievor, a Health Records Clerk, had been temporarily assigned the duties and responsibilities of the higher rated Clerical Coordinator position and was entitled to the difference between the two rates of pay. The duties involved the "wrong patient process" – correcting errors made by Registration Clerks and the "duplicates process" – merging duplicate health records created by the electronic health records system.

The union's claim primarily concerned the "duplicates process" work. Prior to 2013, this work was performed by both Health Records Clerk and Data Quality Clerks. By 2015, the duplicates process work was being exclusively performed by the Clerical Coordinators. In 2016, the grievor volunteered to be trained to perform the work and began performing the work alongside the hospital's Clerical Coordinators. In 2019, the "wrong patient" work was reassigned to the Data Quality Clerks and the "duplicates process" was shared between three (3) Health Records Clerks on a rotating basis. The grievor argued that until the work was reassigned to her classification, she had been performing Clerical Coordinator work and was entitled to the corresponding rate.

Arbitrator Stout dismissed the grievance. He found that he had jurisdiction to determine a grievance crystallized under an expired collective agreement because failure to appropriately compensate an employee was a recurring duty which crystalized every time the employee was not appropriately compensated. However, he concluded that the grievor was not performing the central core duties or responsibilities of the Clerical Coordinator position and was not entitled to a higher rate of pay. Over the years the duplicates process work had been assigned to different classifications, including Health Records Clerks and involved duties that were within the Health Records Clerk classification. These duties were not central core work of the Clerical Coordinators who had been assigned these "lower classification" duties to fulfill a hospital need.

P. Case About the Jurisdiction of an Arbitrator to hear a Long-Term Disability Benefits Grievance

***Humber River Hospital v Ontario Nurses' Association*,** (Slotnick, February 24, 2021) 2021 CanLII 13472

The grievor had suffered a workplace injury for which she received compensation from the WSIB. The WSIB later determined the grievor's injuries had resolved and rejected her claim for compensation for permanent impairment. The hospital stopped long term disability benefits after its insurer determined the grievor did not meet the "any occupation" definition of total disability. The union appealed the WSIB's ruling and grieved the hospital's decision to stop LTD benefits since some of the grievor's injuries were not work related. The hospital objected to the arbitrator's jurisdiction to hear a grievance that arose from a compensable workplace injury. Arbitrator Slotnick ruled that without hearing the evidence, he could not determine whether the grievor's alleged inability to work was mainly rooted in her workplace injury. He also declined to defer the grievance hearing until there was a final decision of the WSIB because there was no danger of double recovery under the collective agreement.

Q. Case about Reassignment of Employees

Kingston Health Sciences Centre v Canadian Union of Public Employees, Local 1974 (Bernhardt, January 31, 2021) 2021 CanLII 5447

The hospital reorganized several hospital units resulting in the elimination of permanent positions on those units. Affected employees would be reassigned to vacant positions. The hospital then established a new inpatient unit and offered

affected employees positions in the new unit. The union argued the positions in the new unit should have been posted and not part of the reassignment process. Arbitrator Bernhardt denied the grievance, finding no requirement in the collective agreement to prevent reassignments to different units. Management's right to assign work was not abridged by clear language in the agreement which provided only that reassigned positions did not need to be posted and that the hospital had to provide choices for reassigned employees.

R. Case Upholding a Termination for Dishonesty

International Union of Operating Engineers v North York General Hospital, (Jesin, March 15, 2021) 2021 CanLII 18894

The grievor was on modified duties for a shoulder injury and was observed lifting weights at a gym. He was terminated for dishonesty and insubordination for failing to follow directions at work. The grievance alleged unjust termination and harassment because of his sexual orientation, religion, and his injury. Arbitrator Jesin found no evidence to establish there was unlawful harassment. He concluded that the grievor's claims for harassment were a deflection from his unwillingness to perform assigned tasks. Arbitrator Jesin accepted the hospital's evidence that the grievor performed lifting that was inconsistent with his restrictions and had just cause for terminating the grievor. The arbitrator also exercised his discretion and anonymized the witness whose testimony ultimately led to the grievor's dismissal due to the nature of the evidence regarding the witness's alleged sexual orientation.

S. Case about Payment for Time Spent Obtaining Recertification

Grand River Hospital Corporation v Ontario Nurses' Association, (Slotnick, March 18, 2021) 2021 CanLII 20916

The union argued that the hospital was required to pay nurses for the time they spent outside work hours obtaining recertification for advanced cardiovascular life support (ACLS). The union relied on Article 9.07 of the central agreement which reads as follows:

> 9.07. The Hospital will endeavour to schedule mandatory in-service programs during a nurse's regular working hours. When a nurse is on duty and authorized to attend any in-service program within the Hospital and during her or his regularly scheduled working hours the nurse shall suffer no loss of regular pay. When a nurse is required by the Hospital to engage in any learning opportunities outside of her or his regularly scheduled working

> hours, the nurse shall be paid for all time spent on such learning opportunities at her or his regular straight time hourly rate of pay.

The hospital argued that ACLS recertification was not a "learning opportunity" within the meaning of Article 9.07 but about evaluating existing skills. Arbitrator Slotnick rejected the hospital's argument, finding that ACLS procedures and equipment change over time and recertification sessions presented an opportunity for learning, using hands on practice, and getting feedback from other participants and the instructor – testing was only a small portion of the recertification.