HUNTER-LIBERATORE-LAW

Healthcare Update – May 2023

Healthcare Related Cases of Interest

a) Independent Assessment Committee: an arbitrator has no jurisdiction to declare Local Health Integration Networks are common employers. Furthermore, except for the chairperson, "independence" is not a requirement for a parties' nomination to the IAC.

- ***Erie St. Clair Health Integration Network v Ontario Nurses' Association*** **(Rogers, May 8, 2023)**

The union filed a policy grievance challenging the employer's nomination of Laura Waller to serve on the Independent Assessment Committee (IAC) which assessed professional practice or workload complaints. The employer, Erie St. Clair Health Integration Network (ESC) was one of 14 LHINs governed by a single Board of Directors, the members of which were cross appointed to the boards of each of the 14 LHINs; Ms. Waller was employed as Director – Patient Services at the Southwest LHIN. The union argued that Ms. Waller had a reasonable apprehension of bias preventing her service to the IAC. The common boards in all the LHINs meant the LHINs should be treated as common or related employers and Ms. Waller should be regarded as an employee of ESC and not solely an employee of the Southwest LHIN.

Arbitrator Rogers found that Ms. Waller could not be treated or considered an employee of ESC. Section 1(4) of the *Labour Relations Act* permitted the Ontario Labour Relations Board ("OLRB") discretion to treat two or more entities as constituting one employer. In subsection 4(5) of the *Local Health System Integration Act* ("LHSIA"), the Legislature expressly precluded the OLRB's exercising that jurisdiction as it applied to any LHIN. Labour arbitrators consequently had *no* such authority either under the Act or the collective agreement to declare that LHIN's were common employers. Arbitrator Rogers further found that except for the IAC chairpersons, the parties' nominees were not required to be independent. The grievance was dismissed.

b) Consecutive Weekend Premium: under this collective agreement a shift swap or a call in breaks the chain of consecutive weekends and disentitles a nurse to the premium however, the hospital cannot skip a nurse when offering additional shifts if it will result in consecutive weekend premium being owed on a subsequent weekend.

- ***Wingham and District Hospital v Ontario Nurses' Association*** **(McNamee, May 8, 2023)**

The Union filed a grievance claiming that the grievor, a registered nurse, was entitled to premium pay for several consecutive weekends which she worked in July and August 2021. The relevant collective agreement provisions read as follows:

> **D-6**
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> vii) Staff who are on vacation and have indicated in writing to the Scheduling Office that they are available for calls. Where an on offer of an additional tour will result in premium pay the call order will be as follows:
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> viii) Full-time staff on the home unit who have not indicated unavailability for this shift or overtime call-ins, are called and offered the shift at premium pay in order of seniority. If the shift is not accepted,
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> **D-14**
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> (d) A full-time employee shall receive premium pay for all hours worked on a fourth (4th) consecutive and subsequent weekend until a weekend off is scheduled, save and except where:
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> > i) The weekend has been worked by the employee to satisfy specific days off requested by such employee; or

ii) The weekend is worked as a result of an exchange of tours with another employee; or

iii) The employee has requested weekend work.

The grievor had worked the following weekends:

Weekend #	Date	Type	Was Premium paid? OT or CWP?
Weekend 1	Jun 18	Scheduled	
Weekend 2	Jun 26/27	Scheduled	
Weekend 3	July 3/4	Scheduled	
Weekend 4	July 11	Shift swap	No – none claimed
Weekend 5	July 18	Call-in	Yes, OT paid. ONA claims CWP
Weekend 6	July 23/24	Scheduled	No. ONA claims CWP
Weekend 7	Jul 31/Aug 1	Scheduled	No. ONA claims CWP
Weekend 8	Aug 8	Scheduled	Yes, CWP paid
Weekend 9	Aug 15	Shift swap	No – none claimed
Weekend 10	Aug 21/22	Off	

The union argued that due to a combination of pre-scheduled shifts, two shift exchanges, and a call in, the grievor had worked on nine consecutive weekends between June 18 to August 15. While the grievor could not claim premium pay for the shift change weekends, that shift could be considered when determining whether there was a consecutive chain of weekends worked attracting premium pay for *subsequent* weekends. The employer argued that the shift swap on July 11, and the call in on July 18, both broke the chain of consecutive weekends prior to a scheduled weekend off. As a result, the grievor's work on July 23/24 and July 31/Aug 1 were, at best, her second and third consecutive weekends worked, and did not attract the consecutive weekend premium.

Arbitrator McNamee found that Article D.14(d) of the collective agreement required consecutive weekend pay only for the 4th and consecutive weekend

until the nurse "is scheduled for a day off." In this case, the grievor was scheduled off on July 11 and July 18; at no point during the nine consecutive weekends which she worked, except on August 8, did she work on four consecutive weekends without a scheduled weekend off. She had not been scheduled to work July 11 or 18 and although she worked those dates, those weekends were not scheduled and therefore broke the chain of consecutive weekends for purposes of the article. The arbitrator concluded that a shift swap or a call in *did* break the chain of consecutive weekends for the purposes of Article D.14(d)

The arbitrator did find however that the hospital could not skip the grievor when offering additional shifts, even if this would result in a consecutive weekend premium being owed:

> In this case... the collective agreement specifically sets out the order for offering additional shifts, including a provision to the effect that premium time tours are to be offered first to full-time staff on the home unit by seniority (and then, by seniority, to other groups of staff) so long as they have not previously indicated unavailability, or in some cases, have indicated availability. In this case, the grievor was presumptively the senior full-time nurse on the unit in question (or at least the senior full-time nurse who grieved) and she had obviously satisfied any indicia of availability requirement. In the circumstances, the hospital was required to offer her the July 18 call-in shift. There is nothing in the language which would justify skipping her as a result of the scheduled shifts which were to follow.