Healthcare Update: January 2022

COVID-19-Related Cases of Interest

a) Comp Time: Voluntary option to pay out at straight time is breach of collective agreement

- ***Simcoe Muskoka District Health Unit v Ontario Nurses' Association,*** **(Newman, Heffernan, Abbink, December 13, 2021)**

The province agreed to cover some of the unprecedented payroll costs arising out the pandemic in a one-time payment in 2020. Thereafter, on November 23, 2020, the employer communicated directly to union members, advising them that they "have the option to have all of [their] comp time paid out in December 2020 at straight time". The collective agreement provided for no such option.

The Board of Arbitration was tasked with answering three questions: 1) did the communication constitute a violation of the collective agreement; 2) if it did, was it permitted by operation of Ontario Regulation 116/20: Work Deployment Measure for Boards of Health (the "Order"), and 3) If not, what was the remedy?

The majority concluded that in directly offering bargaining unit members the option of a December 2020 buy-out of their comp time at straight time, the employer violated the collective agreement. Article 13.04 identified the circumstances under which comp time would accrue, and Article 13.05 provided details on how the comp time would be administered. The employer's offer to buy out accumulated comp time was an effort to amend that bargain and constituted a violation of the contract.

The employer's breach was not excused by the Order. While the Order authorized the employer to take any measures reasonably necessary to address the COVID-19 outbreak, it did not authorize the employer to take measures to address the cost consequences of the pandemic. The parties remained bound by the collective agreement in respect of all matters other than those pertaining to work redeployment and staffing. As a remedy, the employer had to compensate the union in an amount equal to an additional half day's wage for each of the fourteen bargaining unit members who received the early buy-out of their accumulated comp time.

Arbitration Cases of Interest

a) Education Allowance: Monthly allowances for nurses with BScN maintained

- ***Norfolk General Hospital v Ontario Nurses' Association,*** **(Slotnick, November 30, 2021)**

For nearly a decade, the Hospital paid a monthly education allowance of $80 to some nurses who had obtained a Bachelor of Science in Nursing (BScN). The Hospital ended those payments, prompting the union to file a grievance alleging that the Hospital was required to continue paying the allowance by the plain meaning of the collective agreement. Alternatively, if the language was ambiguous, its intended meaning could be discerned from the Hospital's consistent practice of paying the allowance to anyone who established that they possessed a BScN.

The collective agreement provided that, "[w]here the Hospital considers that additional education preparation is required for a job, then such preparation shall be paid for…." The Hospital argued that it had never required a BScN for any nursing job, so no one was entitled to the allowance. Furthermore, the language in the collective agreement required payment for "preparation" for the degree, not for possession of it.

Arbitrator Slotnick determined that the case should be decided based on the plain meaning of the words of the collective agreement. In his assessment, the "preparation" referred to by the clause had to be completed before the nurse was eligible for the allowance. The case law cited also supported an interpretation requiring the allowance to be paid once the nurse received the applicable credential. Paying of the allowance was evidence that the Hospital had decided that any registered nursing job qualified for the allowance, since nurses who inquired were advised that the only thing required for payment was proof of a BScN.

The grievance was allowed, and the Hospital was ordered to reinstate payment of the allowance and to provide retroactive payments from the cut-off date. The payments, however, need not continue indefinitely: the Hospital retained discretion to determine whether it still considered the additional preparation of a BScN as a requirement for a job.

b) *Pyramiding Premiums: Team-lead nurses entitled to multiple premiums, including overtime*

- ***Ontario Nurses' Association v Sinai Health System*, (Nyman, December 7, 2021)**

The issue before the arbitrator was whether nurses were entitled to receive both overtime and team-leader premiums for the same hours worked. Specifically, was a nurse entitled to both premiums if the nurse was performing team-lead duties while working hours that qualify as overtime hours?

ONA argued that in these circumstances nurses were entitled to both premiums. The Hospital argued that in these circumstances, nurses were only entitled to the overtime premium.

Arbitrator Nyman found that nurses were entitled to both premiums. Although there was a rebuttable arbitral presumption that employees were not to receive two premiums that served the same purpose for the same hours of work, it was always open to the parties to confirm the rule, or to expand or narrow its application through the specific language in the collective agreement. In this case, notwithstanding the collective agreement provision against pyramiding, the language also provided that the team-lead premium was payable in addition to other premiums, including overtime. The grievance was allowed.

c) *Double-Time Premium: "Call-in" premium applies to nurses returning to work within 24 hours of last shift*

- ***Cambridge Memorial Hospital v Ontario Nurses' Association*, (McNamee, December 15, 2021)**

The union claimed that the grievor was "called in" to work and was thus entitled to double time pursuant to Article 14.06 of the Central Agreement between the parties. The grievor had completed her last regularly scheduled tour at 7:00 a.m. on June 8. She had left the hospital following her last regularly scheduled tour, and she was then called at home during the afternoon of June 8 (which was a scheduled day off), and asked whether she wished to work an extended tour commencing at 7:00 p.m. that evening, which she did.

The employer argued that calling a nurse on her day off and asking if she can pick up an extra shift was not a "call-in" as anticipated under 14.06 because the Hospital was not mandating that she return and there was no emergency.

Arbitrator McNamee allowed the grievance finding that the grievor was entitled to the call-in premium when called back in with less than 24 hours notice, even though she could have refused the shift. He further determined that a full-time nurse was entitled to the call-in premium in the following circumstances:

- the nurse returns at the employer's request within 24 hours as set forth in Article 13.01;
- the nurse comes in at the employer's request for a part-tour; or
- the nurse is ordered to come in whether for a full- or part-tour.

A nurse was not entitled to the premium when they were asked to come in for a tour which was not covered by Article 13.01 and agreed to. The practical implication was that anytime a full-time (or part-time) nurse was called and offered a shift within 24 hours of their last shift, the double-time premium applied. For that reason, Arbitrator McNamee clarified that the "24-hour period" started as soon as the employee leaves the hospital from the end of their last shift.

d) Payment Pending WSIB: Employee injured at work entitled to payments while awaiting LOE decision

- ***Trillium Health Partners v Canadian Union of Public Employees, Local 5180*, (Steinberg, December 29, 2021)**

The grievor sustained a workplace injury to her foot that was reported to the Workplace Safety and Insurance Board (WSIB). The grievor applied for Loss of Earnings (LOE) benefits from the WSIB and requested Short Term Disability (STD) income replacement benefits from the Hospital, as provided by article 13.03 of the CUPE central collective agreement.

The Hospital refused the grievor's request, arguing that the grievor had suffered a compensable workplace injury and could not avail herself of the STD benefits under the Hospital's sick leave plan. The WSIB denied the grievor's request for LOE benefits.

The grievor appealed the WSIB decision and the union filed a grievance claiming the grievor was entitled to the income replacement benefits while awaiting the WSIB's final decision on her appeal. Arbitrator Steinberg allowed the grievance. He found that the collective agreement provided payments to employees who sustained an injury at work while they awaited determination from the Board on their claim for LOE benefits; the provision did not refer only to compensable claims. The grievor met the eligibility requirements for payment and was entitled to the benefit.

The arbitrator did note, however, that if the grievor's appeal was unsuccessful, she would not be entitled to HOODIP STD benefits because of the exclusionary language in the Plan, which did not permit compensation for workplace-related injuries.

e) Consecutive Weekend Premiums: Premium awarded, whether or not nurse indicated weekend availability

- ***Halton Healthcare Services Corp. v Ontario Nurses' Association*, (Gedalof, January 4, 2022)**

The grievor was offered and accepted an additional shift on a weekend that she had previously advised she would be available if called for work. She accepted the shift (though she was free to refuse it) and believed she was entitled to a premium.

The Hospital argued that where nurses provide weekend availability, they were not entitled to the weekend premium. This was a longstanding practice and ONA's numerous attempts to amend the premium language to address the issue through bargaining had failed.

Arbitrator Gedalof upheld the grievance, finding that a nurse who provides their availability was not requesting weekend work, simply indicating that they were open to considering a request from the Hospital. The fact that the Hospital had a longstanding practice of applying the provision in a contrary manner did not, on its own, render the provision ambiguous. The Collective Agreement, properly interpreted, provided for the payment of the premium in the grievor's circumstances. The matter was remitted to the parties on the issue of remedy.

f) *Wage Rate for Newly Created Position: Rate not determined by external comparators*

- ***Sinai Health v National Organized Workers Union*, (Herman, January 4, 2022)**

The union challenged the wage rate of a new classification of Perioperative Services Attendant (PSA) created by the Hospital. The union indicated that it intended to call evidence of how the PSA classification was considered and treated at another hospital.

In response, the Hospital raised two preliminary objections. First, it asserted that the arbitrator had no jurisdiction to consider evidence from other hospitals in determining the appropriate wage rate and could only consider other classifications in the bargaining unit. And second, that the grievances should be dismissed, as the union had not particularized any other relevant evidence in support of its case.

Arbitrator Herman found that the collective agreement between the parties precluded him from considering external evidence of how other hospitals rated the PSA classification. However, he declined to dismiss the grievance, which, on its face, objected to the wage rate applied to a classification that was created after the Hospital eliminated three other classifications. It should not have been any surprise to the Hospital that the union intended to call evidence of the duties and responsibilities of the three eliminated classifications, and the Hospital was not prejudiced because the union did not expressly identify the classifications in issue in its particulars.

g) *Work of the Bargaining Unit: Article 11.01 does not guarantee a set ratio where work is shared between bargaining units*

- ***Trillium Health Partners v Canadian Union of Public Employees, Local 5180*, (Goodfellow, January 10, 2022)**

Renal Assistants (RAs), Registered Nurses (RNs), and Biomedical Technologists (Techs) all performed hemodialysis-related duties at the Hospital, though RAs did not work at the Hospital's Mississauga site. The Hospital then announced the development of an Acute Dialysis Team (ADT) of RNs and Techs at the Mississauga site that did not include RAs.

The union claimed that the RNs and Techs were performing work of the bargaining unit. The union argued that work historically performed by the RAs was being performed by employees not covered by the collective agreement and that the ratio of RN-to-RA work had been significantly altered by the introduction of the ADT. The remedy requested was to have RAs added to the acute team.

The Hospital argued that the union was seeking to expand the work of the bargaining unit, not protect it. Arbitrator Goodfellow agreed. He found that the collective agreement serves to protect the type and volume of work normally performed within the unit. It did not ensure any particular ratio of work, hours, or jobs within the bargaining unit. And there was no evidence of any loss of RA hours or positions; in fact, RA hours had slightly increased. The grievance was dismissed.

h) HOODIP Sick Pay Reinstatement: Sick leave reinstated after three weeks of modified work and reduced hours

- ***North Bay Regional Health Centre v Canadian Union of Public Employees, Local 139*, (Luborsky, January 17, 2022)**

The grievors were unable to work in their full-time positions due to an illness or injury recognized as a "disability" under the Human Rights Code. They were entitled to up to 15 weeks of sick pay under terms of the Hospitals of Ontario Disability Insurance Plan (HOODIP) incorporated within the collective agreement.

The union alleged that the Hospital violated the collective agreement when it refused to reinstate the grievors' full sick-pay entitlement after they returned to work on modified/reduced duties for three continuous weeks following the health-related absences. The narrow issue raised by their grievances was the time required (and basis of its calculation) to entirely replenish their 15 weeks of short-term sick-leave entitlement, where they returned on modified duties and reduced hours.

The Hospital argued that an employee assigned to modified duties on a reduced shift schedule would need to work at least 112.5 hours on the assigned duties, which is the equivalent of three weeks of full-time work, to recharge the 15-week sick-leave entitlement.

Arbitrator Luborsky disagreed and allowed the grievances. He found that the phrase, “three continuous weeks” in the HOODIP brochure refers to a calendar period. Provided the employee worked whatever scheduled was agreed upon between the parties, the employee qualified for reinstatement of the full future sick pay of 15 weeks.

i) Workplace Violence: Dismissal upheld for workplace assault where grievor showed lack of remorse during the investigation

- ***Michael Garron Hospital v Service Employees International Union, Local 1 Canada*, (Wilson, January 26, 2022)**

The grievor was employed as a porter and had 22 months of service and a 3-day suspension on his record when the Hospital terminated him for being violent towards a co-worker. The Hospital received complaints from employees and conducted an investigation, which concluded that the grievor assaulted his co-worker.

Arbitrator Wilson found that the grievor engaged in workplace misconduct warranting a disciplinary response. His actions fell within the definition of violence in the Hospital’s Workplace Violence Prevention Policy, as well as the Occupational Health and Safety Act, and his behaviour was particularly serious given his aggressive and escalating pursuit of his co-worker. The grievor was not contrite, was dishonest during the investigation, and showed no remorse or recognition of the seriousness of the incidents.

The grievor’s relatively short service and the discipline on his file weighed against him. The arbitrator concluded that there was just cause for discharge and no compelling mitigating factors to warrant interference with that penalty. The grievance was dismissed.

Employment Cases of Interest

a) Secondment Agreements: Two-year secondment not a fixed-term agreement

- ***Nader v. University Health Network*, (Superior Court, January 19, 2022)**

The plaintiff was employed as an Executive Vice President with the University Health Network (UHN) and commenced his employment in 2016. In August 2019, he was seconded to Ontario Health for a 2-year term, pursuant to a Secondment Agreement; his position at UHN was backfilled. Ontario Health terminated his secondment after a year, at which time the plaintiff's former position was not available. Unable to find a comparable position for the plaintiff, UHN terminated his employment on a without cause basis.

The plaintiff filed suit, alleging the Secondment Agreement was a fixed-term agreement. Therefore, termination entitled him to salary and related compensation for the balance of the term outstanding at the time of his termination, in addition to payment for 12 months, as set out in the UHN Employment Agreement for termination without cause.

The defendants argued that the plaintiff was only ever employed by UHN and that the termination of his employment and secondment entitled him only to the 12 months specified under the UHN Employment Agreement.

The Court found that the Secondment Agreement was not a fixed-term employment agreement since the Agreement contained terms confirming that the plaintiff remained a UHN employee under his original contract of employment. The plaintiff was therefore not entitled to payment of the balance of the two years that the parties contemplated as the probable duration of his secondment.

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