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"Context is everything" – arbitrator interprets "serious illness" in Ontario Nurses' Association Collective Agreement

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Many employers in the health care sector will be familiar with collective agreement provisions that operate to convert vacation leave pay to sick leave pay where an employee's vacation is interrupted by "serious illness". These types of provisions have been hotly-contested between employers and unions for well over twenty years. The recent decision in *Peterborough Regional Health Centre and Ontario Nurses' Association* (December, 2018) represents a positive step forward in how such provisions will be interpreted. It should be noted that Emond Harnden's own Raquel Chisholm represented the Health Centre in these proceedings.

The controversial language that was the subject of the arbitration appears in Article 16.05 of the Ontario Nurses' Association central Collective Agreement. It states:

> Where an employee's scheduled vacation is interrupted due to serious illness which commenced prior to and continues into the scheduled vacation period, the period of such illness shall be considered sick leave.
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> Where an employee's scheduled vacation is interrupted due to serious illness requiring the employee to be an in-patient in a hospital, the period of such hospitalization shall be considered sick leave.
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> The portion of the employee's vacation which is deemed to be sick leave under the above provisions will not be counted against the employee's vacation credits.

By way of brief background, the Union commenced a grievance relating to the Health Centre's policy dealing with the application of Article 16.05. The Union also commenced a number of grievances on behalf of individual employees. In each such grievance, the grievor suffered from some medical condition that began prior to their scheduled vacations.

The policy grievance was resolved at the outset of the hearing by the Health Centre's unilateral withdrawal of the policy. The parties then agreed to a case-managed process in which the parties agreed to review the documentation relating to each individual grievor. Although this resulted in a number of the grievances being resolved, 15 remained. For each individual grievance the arbitrator was charged with determining whether Article 16.05 applied. This required the arbitrator to first determine how the term "serious illness" should be interpreted.

In addition to these tasks, the arbitrator also had to consider two additional arguments put forward by the Union. The first was the Union's view that all of the grievances should be allowed on the basis that the Health Centre's review of the various conversion requests was "tainted" by reliance on its original policy. The second was the claim by the Union that lieu days and statutory holidays could also be converted to sick leave.

Interpretation of "serious illness" in Article 16.05

In terms of the proper interpretation of the term "serious illness" the Union argued that the term should be read in a way that is consistent with the threshold to qualify for sick pay under the Hospital of Ontario Disability Plan ("HOODIP"). This in turn would mean that an employee suffered from a "serious illness" if she was "unable to perform her regular duties due to illness or injury." The Union furthered this argument by asserting that a "Human Rights lens" must be applied to the interpretation of "serious illness". This would mean that the threshold question would be whether a particular illness qualifies as a disability requiring accommodation. The Union cautioned that failure to apply this Human Rights lens could result in the creation of a hierarchy of disabilities.

The Health Centre relied on a number of arbitral decisions to oppose the Union's claim that the interpretation of "serious illness" should be consistent with the sick pay/disability threshold in HOODIP. The Health Centre argued that the parties had already created a hierarchy of disabilities. All such disabilities could attract accommodation and/or sick pay under HOODIP if the employee was scheduled to work but unable to perform their duties due to illness or injury. Article 16.05 however identified only two circumstances involving disabilities that resulted in the conversion of vacation pay to sick leave. These occurred if the employee was scheduled to be on vacation but such vacation was interrupted by a "serious illness" which commenced before the vacation (16.05(a)), or the employee was hospitalized during the vacation by virtue of a "serious illness" (16.05(b)).

In terms of the Union's argument advocating for a "Human Rights lens", the Health Centre noted that none of the grievors had been discriminated against by being denied compensation and/or accommodation. As a result, no human rights claim was triggered. The hierarchy of disabilities was a direct result of the contract language that the parties themselves negotiated. Instead of a Human Rights lens, the Health Centre advocated for a "reasonable person standard" that would take into account numerous factors derived from the arbitral jurisprudence. This was the approach that was ultimately accepted by the arbitrator. In fact, the arbitrator accepted the Health Centre's position on each of the legal arguments set out above.

In making her determination, the arbitrator noted that the reasonable person standard was in fact difficult to apply, but nevertheless set out a number of the factors that can be considered in determining whether the employee suffered from a "serious illness". These included:

- the nature of the illness;
- the nature of the medical care involved;

- the treatment required;
- the length of illness;
- whether accommodation was possible but not whether it was offered;
- whether extensions of time off were granted for solely "preventative" or "precautionary" reasons;
- whether the return to work occurred coincident with the end of vacation leave;
- physician's recommendations;
- patient compliance with physician recommendations;
- the intensity of the illness through the vacation;
- whether extensions are requested by the employee or provided by the physician with the knowledge that a vacation leave is being taken; and
- impact on the activities of daily living.

The arbitrator mentioned that the above factors did not represent a closed list and agreed with the Health Centre's view that no particular factor was conclusive. Terms like "acute", "severe" and "major" were noted to be more indicative of a "serious illness", as opposed to words like "mild", "minor", and "some discomfort", but were nevertheless not determinative. On this point the arbitrator simply stated, "context is everything."

The Health Centre's application of the reasonable person standard, as endorsed by the arbitrator, was also validated in the arbitrator's decision. Of the individual grievances that remained for the arbitrator's review, seven were dismissed entirely, while only four were fully successful.

In terms of the arbitrator's rejection of the application of a "Human Rights lens" the arbitrator accepted the Health Centre's argument that none of the grievors' had been discriminated against by virtue of being denied any benefit. Furthermore, the arbitrator stated:

> To import a human rights analysis to such a scenario is to make distinctions and create comparator groups that have nothing to do with discrimination or disadvantage. Thus, I reject ONA's human rights lens argument in terms of the interpretation of article 16.05(a).

Was the Health Centre's review of the grievances "tainted" by its withdrawn policy?

As noted above, the Union argued that all of the grievances should be allowed on the basis that the hospital's review was tainted by reliance on its policy, notwithstanding that it was withdrawn by the Health Centre. Once again, the Health Centre was successful on this question. The arbitrator noted that following the voluntary withdrawal of its policy, the Health Centre agreed to a case-managed process. This required significant time and resources to review the documentation associated with each individual grievance and ultimately the Health Centre applied the reasonable person standard. In the arbitrator's view the grievances around the policy were settled by the Health Centre's voluntary

withdrawal of it.

Can lieu days and statutory holidays be converted to sick leave under Article 16.05?

In advancing its position on this issue, the Union argued that Article 16.05 created a restriction on a general right. The general right was argued by the Union to be an employee's right to sick leave, statutory holidays and lieu days. Article 16.05, as argued by the Union, operates to restrict that general right by requiring a "serious illness" in order to convert vacation leave to sick leave. Statutory holidays and lieu days were not restricted in the same way and were therefore properly convertible into sick leave.

The Health Centre countered this argument by relying on the normal rules of interpretation – different words mean different things. If the parties had intended to permit the conversion of lieu days or statutory holidays to sick leave, they would have done so in a clear way. The Health Centre submitted that Article 16.05 created a benefit, and the reference to only "vacation leave" clearly indicated an intention to limit the benefit to vacation leave only. The Health Centre further argued that in order to confer a financial benefit, the parties require a very clear intention.

Once again, the arbitrator accepted the Health Centre's position on this issue. She noted that Article 16.05 did not refer to lieu days or statutory holidays, which are different concepts and earned and accumulated on different basis. She also agreed with the Health Centre that Article 16.05 created a benefit, not a restriction as argued by the Union, and this view was supported by the arbitral jurisprudence. Finally, she noted that "Strong language would be required to extend the benefit of conversion to sick leave."

In our view

This decision is clearly a significant win for employers with collective agreements that contain the same or similar language. It provides useful guidance by confirming the application of the reasonable person standard and by setting out a number of the factors that should be considered when determining whether there is a serious illness. It also confirms that statutory holidays and lieu days do not fall within the reach of Article 16.05.

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