HR HealthCheck

Management Rights, Sick Leave under HOODIP and More

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In our first *HR Healthcheck* of 2020, we discuss two cases you need to know about. The first deals with whether a scheduled medical procedure under conscious sedation falls within the “sick leave” provisions of HOODIP. The second case considers management rights under the central CUPE collective agreement and a Hospital’s right to transfer employees.

Arbitrator Dismisses Grievances Claiming Sick Leave for Scheduled Medical Procedures under Conscious Sedation

By: Julia M. Nanos, Danika Winkel

When is an employee entitled to paid sick leave for being “totally disabled” under a disability income plan?

In *Thunder Bay Regional Health Sciences Centre and O.N.A.* (20 January 2020, Randazzo) (unreported) Arbitrator Randazzo considered the meaning of total disability and addressed whether an employer must provide paid sick leave to employees who are rendered incapacitated on the date of a scheduled medical procedure that requires conscious sedation, when these employees would otherwise have been capable of attending work.

The arbitration was the result of grievances filed by the Ontario Nurses Association (ONA) on behalf of two registered nurses employed by the Thunder Bay Regional Health Sciences Centre (Hospital). Like all patients undergoing a colonoscopy, Grievor #1 was required to undergo a number of preparatory steps prior to the procedure, including the cessation of solid foods and the ingestion of laxatives both prior to and on the day of the procedure. On the day of the procedure, she was also administered narcotic medications that rendered her incapable of performing her duties as a registered nurse. Grievor #2, who had a history of Crohn’s Disease, underwent an ileoscopy with similar preparatory restrictions. She, too, was unable to work on the date of her procedure due to the administration of narcotics and other preparatory medications, as well as due to a lack of food.

Both Grievors were denied sick leave for the day of their procedures. ONA grieved, arguing that both the narcotic drugs and the other preparatory steps undertaken by the Grievors rendered them “totally disabled” for the purposes of the Hospitals of Ontario Disability Income Plan (HOODIP).

The Hospital asserted that, while both Grievors may have been “totally disabled” on the day in question, the incapacity was not “due to injury or illness” as required under HOODIP.

Arbitrator Randazzo dismissed the grievances, finding in favour of the Hospital. The Arbitrator stated that “the Grievors’ colonoscopy/ileoscopy procedures are medical diagnostic appointments for the monitoring of health concerns and for Grievor #2, the monitoring of an ongoing health problem or concern,” they were not as a result of illness. He also affirmed the Hospital’s position that the “dietary preparations and medications administered are not to be considered in isolation and should be considered as part of the colonoscopy/ileoscopy procedure.” Accordingly, the Grievors’ totally disability was a result of the procedure itself having been scheduled on a day of work, not due to an injury or illness. As a result, they were not entitled to sick leave.

This decision is helpful as it affirms that HOODIP requires that an employee’s total disability result from injury or illness in

order to be entitled to sick leave. In this award, the “total disability” arose from the preparatory requirements of attending and undergoing a medical diagnostic appointment, not an “illness” for the purposes of entitlement under HOODIP.

The Hospital was represented by Julia Nanos of Hicks Morley.

Arbitrator Affirms Management’s Right to Assign Work

By: Amanda P. Cohen

The recent decision of Arbitrator Fishbein in Scarborough Health Network and CUPE, Local 5852 reaffirmed management’s inherent right to transfer employees and clarified the appropriate approach to interpreting the seniority provisions in Article 9.08 of the central CUPE collective agreement.

In November of 2016, the Scarborough Hospital and Rouge Valley Health System were amalgamated into Scarborough Health Network (Hospital). The new amalgamated Hospital subsequently bargained its first collective agreement with CUPE. The parties were unable to resolve a number of issues between them and went to interest arbitration before Arbitrator Gedalof, who awarded new “mobility” language that had been proposed by the Hospital. The language outlined the assignment of each employee to a home site and the ability of the Hospital to move employees from their home site to other three sites – Birchmount, General and Centenary – within the Hospital. The purpose of this language was to increase mobility between the sites post-amalgamation.

The Hospital subsequently decided to restructure a number of units within the Hospital – including centralizing its finance department. The department was previously located at different sites and the Hospital planned to move it to the Centenary site. The employees in the payroll department were provided with letters advising of this change. Further, ten of the employees were advised that the relocation would also involve some scheduled rotation among the sites. All three of the Hospital’s sites are within 10 to 12 km of each other, which meant that no employee was being moved more than 12 km from their previous work location.

The Union grieved this move. It acknowledged that the new mobility language allowed the Hospital to compel an employee to travel between sites while on duty. However, CUPE argued that the language did not entitle the Hospital to change or compel the changing of an employee’s “home work site.” The Union argued that in the absence of such a right, the Hospital’s action amounted to an “elimination of a position,” which triggered the seniority rights under Article 9.08 of the collective agreement. It argued that by failing comply with Article 9.08 (e.g. by providing notice, developing a Redeployment Committee), the Hospital had violated the collective agreement. The Union also argued that the Hospital was constrained from attempting to argue that the move constituted a “reassignment” under Article 9.08(A)(b) as such a claim had not been outlined in the initial notification letters to the payroll department employees and because the preconditions for the use of the reassignment language had not been met.

The Hospital made three arguments in response. First, the transfer of employees from one location to another was a mere exercise of management rights and the provisions in Article 9.08 were not triggered. Second, the transfer does not engage the new mobility language and even if it did, the mobility language allowed the Hospital to schedule at all of its sites, including rotating scheduling among sites. Finally, even if the provisions in Article 9.08 had to be applied, the movement of the finance employees constituted a “reassignment” under Article 9.08(A)(b).

Arbitrator Fishbein adopted the reasoning of the Hospital. He started by noting that the management rights clause expressly outlined the exclusive right of management to assign and transfer employees. He also rejected the idea that the same job involving the same duties, hours and rates but moved to a “reasonably accessible nearby location” amounted to an

elimination of the position. In making this finding Arbitrator Fishbein favoured the authorities of the Hospital, which supported the idea that there was no proprietary right to a particular work location.

Arbitrator Fishbein moved on to comment on the Hospital's new negotiated mobility language. He noted that the language specifically outlines the parties' agreement for mobility between sites. He acknowledged that the provision created a "home work site" for each employee, but found that this was not intended to restrict the Hospital's ability to relocate an employee from the employee's home site. The Arbitrator specifically concluded that "in view of the history of the mobility language, the proposals and ultimately the Gedalof award, I cannot interpret the collective agreement as the union wants – to restrict the hospital's ability to transfer employees unilaterally altogether in the face of language that was explicitly directed to grant the hospital the greater mobility rights it successfully sought in the Gedalof award."

Arbitrator Fishbein concluded by noting that even if the above were not true, he would find that the Hospital's actions fell under the reassignment language in Article 9.08(A)(b), stating that the preconditions of this provision had been followed. He also rejected the Union's argument that the Hospital was somehow restricted in relying on this language by failing to mention a reassignment or the application of Article 9.08 (A)(b) in their notification letters to the impacted employees.

The Hospital was represented by Amanda Cohen of Hicks Morley.

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