In The Matter Of An Arbitration

Between:

Cambridge Memorial Hospital Ltd.

("the employer")

- and -

Ontario Nurses Association

("the union")

And In The Matter Of A Grievance of Mariola Broda (ONA File # 201002475)

Owen V. Gray - Sole Arbitrator

Appearances:

For the Union:

Kate A. Hughes, Counsel
Amanda Darrach, Counsel
Marc-André Pelletier, Manager, EDST and Litigation, ONA
Kathi-Wilkins Snell, Labour Relations Office, ONA
Brenda Pugh, Bargaining Unit President, ONA Local 055
Mariola Broda, Grievor

For the Employer:

D. Brent Labord, Counsel
Cathy Vandervoort, Cambridge Memorial Hospital Ltd.
Kelly Henderson, Cambridge Memorial Hospital Ltd.

Hearing conducted in Cambridge, Ontario on November 4, 2011.

AWARD

[1] The grievor has been receiving long term disability benefits since January 2009. In May 2010 she was found to be "totally and permanently disabled" for purposes of her employer's pension plan, which meant that she could elect to either continue accruing service for purposes of the pension without cost, or retire and receive something the pension plan calls a "disability pension," in an undiscounted amount calculated on the basis of her current age and number of years of contributory service to that date. The grievor elected to continue accruing service rather than take early retirement. In June 2010, the employer's disability insurance carrier began deducting from her disability benefits the amount of the "disability pension" benefits that the grievor would have been receiving if she had elected to retire.

[2] The issue in these proceedings is whether such a deduction is contrary to the provisions of the collective agreement with respect to the disability plan, or to the provisions of the *Ontario Human Rights Code* that are expressly (and by operation of law) incorporated into the parties' collective agreement. It is common ground that these issues are arbitrable.

[3] The parties have agreed that I should first decide whether the deduction is contrary to the collective agreement's disability plan provisions. Counsel argued that issue on the basis of an agreed statement of fact and documents to which that statement refers. For reasons that follow, I find that the deduction is contrary to the disability plan provisions of the collective agreement.

The Collective Agreement

[4] The pertinent collective agreement between this hospital and ONA consists of "central agreement" terms negotiated between the union and a number of participating hospitals in 2008 and local terms negotiated

between the union and this hospital, covering a term that expired March 31, 2011. The provisions relevant to this dispute are "central" terms.

[5] Article 12 of the parties' collective agreement provides for short term sick leave and long term disability benefits:

> 12.01 The Hospital will assume total responsibility for providing and funding a short-term sick leave plan at least equivalent to that described in the 1980 Hospitals of Ontario Disability Income Plan brochure. Effective January 1, 2006, new hires will be covered under the 1992 Hospitals of Ontario Disability Income Plan.
>
> The Hospital will pay 75% of the billed premium towards coverage of eligible employees under the long-term disability portion of the Plan (HOODIP or an equivalent plan). The employee will pay the balance of the billed premium through payroll deduction. ...
>
> ...
>
> 12.05 Any dispute which may arise concerning a nurse's entitlement to short-term or long-term benefits under HOODIP or an equivalent plan may be subject to grievance and arbitration under the provisions of this Agreement. ...

The grievor was hired prior to 2006. Her entitlement is to coverage under the 1980 Hospitals of Ontario Disability Income Plan ("1980 HOODIP") or equivalent. Although the second paragraph of Article 12.01 uses "pay the premium" language, Article 12.05 makes it clear, and it is common ground, that a dispute about disability benefits is arbitrable.

[6] Article 17 of the parties' collective agreement requires that an employee become and remain a member of the hospital's pension plan – in this case, the Hospitals of Ontario Pension Plan ("HOOPP") – as the grievor did. The collective agreement does not prescribe the benefits to be provided by the pension plan.

The Disability Plan

[7] Central agreements between ONA and participating hospitals have provided for long term disability coverage under the 1980 HOODIP or an equivalent plan for a number of years. Generally speaking, 1980 HOODIP provides for payments of a percentage of a totally disabled employee's regular pay until she ceases to be totally disabled or reaches her or his 65th

birthday, whichever first occurs. The percentage depends on the length of the employee's continuous service up to the first day of absence. Those payments may be reduced by the amounts of certain other payments received by or available to the disabled employee, such as CPP disability benefits. This dispute focuses on the permitted reductions.

[8] At the relevant time, 1980 HOODIP coverage was being provided to this hospital by Desjardins Financial Security ("Desjardins"). The parties have put before me the language of both the original 1980 HOODIP policy and the policy provided by Desjardins at the relevant time. There is no suggestion that the Desjardins policy language is not the equivalent of the original 1980 HOODIP policy in any respect material to this dispute. The language of the Desjardins policy with respect to reductions in benefits is the following:

> REDUCTION OF LONG TERM DISABILITY BENEFITS, LIMITATIONS AND EXCLUSIONS
>
> 1) Reductions
>
> Long Term Disability Benefits otherwise payable to the Member under this Benefit will be reduced by
>
> a) any benefits the Member is eligible to receive under any Workers' Compensation Act, Workplace Safety and Insurance Act or similar legislation; and
>
> b) any amount the Member is eligible to receive under a government plan including benefits under the Canada Pension Plan or the Quebec Pension Plan including early retirement benefits but excluding
>
> i) benefits payable on behalf of his Dependents; and
>
> ii) any increase in benefits due solely to cost-of-living, after benefit payments commence; and
>
> c) any Old Age Security benefits initially payable; and
>
> d) any indemnity payable for loss of time under any government plan requiring or providing automobile insurance benefits on a no-fault basis; and
>
> e) with regards to HOODIP 1992 — the amount of any disability or retirement pension receivable from an employer's pension plan and disability income benefits payable under any other disability income plan toward which the Participating Employer contributes; or

> f) with regards to HOODIP 1980 — the amount of any disability payments which are available to the Member under any other plan toward which the Participating Employer contributes or under the Participating Employer's pension plan.
>
> As used in paragraphs e) and f) above, "receivable" and "available" mean that the Member receives or is eligible to receive the income described in the said paragraphs.

The Pension Plan

[9] HOOPP underwent a significant change effective January 1, 2006. Both before and after that change a plan member who is determined to be totally and permanently disabled has and had two options. She could continue to accrue service for pension purposes without having to make contributions to the plan (hereafter referred to as "free accrual"), thus increasing the monthly pension payments that she could begin receiving when she retired at a later date, or she could retire immediately and begin receiving what the plan describes as a "disability pension."

[10] The change in 2006 substantially affected the disability pension option. For disability pensions applied for prior to January 1, 2006, the monthly amount was based on the employee's actual contributory years of service *plus* the years of service that the employee would have accrued thereafter up to age 65. For disability pensions applied for after 2005, the monthly payments are based only on service up to the date that the employee elects to retire on that basis, so those payments are smaller than the pension payments that the employee would begin receiving at age 65 if she elected free accrual instead.

The Grievor

[11] The grievor was born in October of 1952. She became a Registered Nurse in 1993. The hospital hired her as a casual nurse in July 1998. She became a full-time employee in April 1999. In June 2008 she went on short term sick leave and began receiving short term benefits under Article 12. Her application for long term disability benefits was approved effective mid January 2009, based on her inability to perform the duties of her pre-

disability occupation. Her entitlement to benefits on that basis expired in mid June 2009, and continued thereafter on the basis of the plan's "any occupation" definition of total disability.

[12] In February 2010 the disability insurer wrote to the grievor, in part, as follows:

> As indicated in your Approval letter of June 12, 2009, the benefits provided by your Group Plan are designed to be integrated with benefits available under the Canada Pension Plan and your Hospital of Ontario Pension Plan (HOOPP). It is therefore essential that you apply for Canada Pension Plan Disability Benefits and the HOOPP benefit (see your Employer for more details).

[13] The grievor applied for the CPP Disability benefit. Her application was approved. She did not challenge the insurer's entitlement to deduct the amount of that monthly benefit from the amount it was otherwise obliged to pay her.

[14] The grievor did not apply for HOOPP benefits when the disability insurer first asked. It pressed her to apply, in order to determine the amount of the disability pension benefit that would be paid to her if she elected to take it. It warned her that it would be deducting the value of that benefit from its disability payments from and after June 2010, and that if she did not assist in ascertaining that amount by making application for the benefit then its deduction would be based on its own estimate of the benefit. She then applied "under duress," as she put it in correspondence with the insurer.

[15] Her application resulted in confirmation by the pension plan that for purposes of that plan she was considered totally and permanently disabled, and that she was entitled to elect whether to continue "free accrual" or to retire as of May 2010 and receive a disability pension of $1100.00 per month. If she elected not to retire and continued accruing service instead, the pension on which she could retire at age 65 was estimated to be $1875.00 per month. She elected to continue accruing service rather than take the disability pension. To put these figures in perspective, if she had

not been disabled she would have been entitled to retire in May 2010 on a pension of $1060.00 per month up to age 65 and $900.00 thereafter.

The Issue

[16] The issue between the parties is whether the monthly payments that the grievor would have received under the pension plan if she had given up free accrual and retired was an amount that was "available" to her within the meaning of paragraph (f) of the HOODIP provision quoted in paragraph [8] even though she had not given up free accrual, had not retired and was not receiving the payments.

[17] Whether the circumstances in which the grievor made the application to HOOPP amount to "duress" or not, the employer agrees that her having done so in those circumstances does not prejudice her position. For its part, the union concedes that if the grievor had freely and voluntarily elected to take early retirement on a disability pension under the pension plan, the disability pension payments that she actually received would have been deductable from the amount otherwise payable under the disability insurance plan.

Positions of the Parties

[18] Central to union counsel's argument is that the policy language in issue must be interpreted in accordance with rules of interpretation summarized in *Non-Marine Underwriters, Lloyd's of London v. Scalera* [2000] 1 S.C.R. 551 at paragraph 71 (some citations omitted):

> (iii) Reasonable Expectations
>
> 71 Where a contract is unambiguous, a court should give effect to the clear language, reading the contract as a whole ... . Where there is ambiguity, this Court has noted "the desirability ... of giving effect to the reasonable expectations of the parties" ... . Estey J. stated the point succinctly in *Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888, at pp. 901-2:
>
> > [L]iteral meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more

> reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result ... . Said another way, the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract.

Counsel also referred to similar observations in *MacDougall v. MacDougall*, [2005] O.J. No. 5171 (C.A.), and *Brissette Estate v. Westbury Life Insurance Co.; Brissette Estate v. Crown Life Insurance Co.*, [1992] 3 S.C.R. 87.

[19] Union counsel observed that before 2006, a nurse's electing to retire on a disability pension under HOOPP did not involve any reduction in the pension payments that she would otherwise have received at and after age 65 if she had elected free accrual instead. She argued that an election of the sort now provided for under HOOPP would not have been in the contemplation of the parties when the disability plan provisions were agreed to in collective bargaining many years ago, and that its language cannot have been intended to have the result contended for by the employer.

[20] The main thrust of union counsel's argument is that in agreeing that disability benefits would be reduced by "the amount of any disability payments which are available to the Member ... under the Participating Employer's pension plan," the parties would not have intended "available" to describe a payment that the employee could not receive without giving up something else of value. She relied on *Abdulrahim v. Manufacturers Life Insurance Co.* (2003), 65 O.R. (3d) 543 (S.C.J), where an injured worker elected to sue the third party manufacturers of the machinery that injured him rather than claim workers compensation benefits. The carrier of the workplace disability insurance policy by which the worker was covered took the position that those benefits were nevertheless payments the worker "receives or is entitled to receive" within the meaning of the policy, and that it was therefore entitled to deduct them from amounts it was otherwise

obliged to pay the worker. Justice Himel accepted the insured's argument that the quoted words were ambiguous. She found they were not meant to force an insured to give up her or his right to pursue a statutorily permitted action against a tortfeasor, and that therefore the injured worker was not "entitled to receive" the benefits in question when he did not give up his right to sue.

[21] Union counsel also submitted that the use of different language in clauses e) and f) to describe permitted reductions demonstrates an ambiguity in the language of f) that is in issue here.

[22] In addition to the decisions already mentioned, union counsel referred in argument to *Eaton Yale Ltd. and C.A.W., Local 251* (1997), 48 C.L.A.S. 5, *Eaton Yale Ltd. and C.A.W., Local 251* (1998), 51 C.L.A.S. 324, *Hennig v. Clarica Life Insurance Co.*, [2001] A.J. No. 1375 (Q.B.) *Hennig v. Clarica Life Insurance Co.*, [2003] A.J. No. 243 (C.A.), and *London (City) and London Civic Employees' Union, Local 107* (2004), 77 C.L.A.S. 433.

[23] Employer counsel observed that HOOPP is not incorporated into the collective agreement: *Re Grand River Hospital Corporation and ONA* (2010), 200 L.A.C. 363 (Howe). He submitted that changes in HOOPP benefits are not a collective agreement matter, and that it is not my function to judge whether the 2006 changes to it are unfair. The employer's obligations with respect to disability benefits are defined by 1980 HOODIP, which is incorporated into the collective agreement by reference: *Niagara Health System and ONA*, unreported decision of J. Parmar dated September 14, 2010. He argued that if party expectations are relevant to the interpretation of the disability plan provisions of the collective agreement, they must be expectations that would have existed when the pertinent collective agreement was made in 2008, well after the 2006 changes to HOOPP.

[24] Employer counsel argued that the language of item (f) of the payment reduction provision is clear, and that giving its words their ordinary meaning does not have a commercially unreasonable result. He submitted

that that language says that if disability payments under the employer's pension plan are available, then they are deductable, and this is so whether the insured is receiving the payments or not. He submitted that the word "available" casts a broad net, broad enough to include the disability pension payments available to the grievor from HOOPP.

[25] Employer counsel referred to the meaning assigned to "available" in a provision requiring that overtime work be offered to "regular employees available to perform ... overtime" in *Canada Post Corporation and CUPW*, unreported decision of C. McKee dated November 19, 1984, where the issue was whether there was an obligation to offer work to employees other than those who normally work in the facility in which the need for additional work arose. He also referred to *Ontario Nurses Association and Ontario Nurses Association Staff Union*, an unreported decision of K. Burkett dated February 28, 1989, where the issue was whether disability insurance under which an employee was not entitled to benefits by reason of an existing condition satisfied a collective agreement requirement that "all full-time employees be eligible for coverage without evidence of insurability."

[26] Employer counsel noted that in *Lacoste v. Clarica Life Insurance Company and Mutual Life Assurance Company of Canada*, an unreported decision dated March 23, 2010, (Ont. S. C.), the court found that the amount of a disability pension that a nurse had begun receiving from HOOPP in 2004 reduced the amount otherwise payable to her under the 1992 HOODIP. According to the decision, the reductions provided for in that version of HOODIP included payments under

> 3. A retirement income plan providing income that becomes payable after the Member is no longer actively at work, whether or not the retirement income is related to disability.
>
> 4. A disability income to which the disabled Member is entitled under any other disability income plan toward which the Participating Employer contributes,

The court held that the HOOPP disability pension payments fell within both of these categories, as to the second of them on basis that the HOOPP

benefits were paid because the plaintiff was disabled, that the employer had contributed to HOOPP and that the benefit was taxable income in the hands of the plaintiff. Employer counsel argued that HOOPP disability pension payments were available to the grievor here because she was capable of doing what was necessary to receive them.

[27] In the course of his argument, employer counsel referred to the decision of Justice Perrell in *Ruffolo and Lepage v. Sun Life Assurance of Canada*, 2007 CanLII 50284 (ON S.C.), aff'd 2009 ONCA 274 (CanLII), leave denied 2009 CanLII 50808 (SCC), in which Justice Perrell observed at paragraph 86 that where a contract is unambiguous, a court should give effect to the clear language.

[28] In reply, union counsel noted that the language in question was first agreed to many years before any question arose of the effect of an election under the current HOOPP provisions. She observed that the disability pension in issue in *Lacoste* was a pre-2006 disability pension that the affected nurse had elected to receive. She observed that in the paragraph cited from *Ruffolo*, Justice Perell had also acknowledged that a literal meaning should be rejected if it leads to an unjust result:

> [86] Where a contract is unambiguous, a court should give effect to the clear language, reading the contract as a whole: *Brissette Estate v. Westbury Life Insurance Co.*, [1923] 3 S.C.R. 87; *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24 (CanLII), [2000] 1 S.C.R. 551; However, if there are alternative interpretations, the court should reject an interpretation or a literal meaning that would make the provision or the agreement ineffective, superfluous, absurd, unjust, commercially unreasonable, or destructive of the commercial objective of the agreement: *Consolidated-Bathurst Export Ltd.* v. *Mutual Boiler & Machinery Insurance Co.*, *supra*; *Scanlon* v. *Castlepoint Dev. Corp.*, (1993), 11 O.R. (3d) 744 (C.A.); *Aita* v. *Siverstone Towers Ltd.* (1978), 19 O.R. (2d) 681 (C.A.).

Reasons for Decision

[29] The grievor could only have received a HOOPP "disability pension" if she had given up the right to accrue service until age 65. Electing free accrual meant that she would receive pension payments of $1875 monthly after she reached age 65. The disability pension would pay only $1100

monthly from and after June 2010. She chose free accrual, and has not received "disability pension" payments.

[30] I have concluded that in those circumstances deduction of the amounts she could have elected to receive is not authorized by the terms of 1980 HOODIP. I accept the union's interpretation that "payments ... available" in the relevant provision does not refer to payments that the employee can receive under a plan only by surrendering some other substantial right or entitlement under that plan, unless the employee has actually done that.

[31] Read as a whole, Article 12 of the collective agreement obliges the employer to provide disability coverage that is at least equivalent to the coverage provided by a policy that was in effect in 1980: 1980 HOODIP. That policy provided for certain reductions in the amounts payable, including a reduction for "disability payments" that are "available" to the insured under any other plan toward which the insured's employer contributes or under that employer's pension plan. The union concedes that the payments in issue here would be deductable if the grievor were actually receiving them, so there is no dispute that they are, or would be, "disability payments." The issue is only whether such payments are "available" to an insured who has not elected to give up free accrual in order to receive them. That was not the issue addressed in *Lacoste*, where the insured had elected to receive and had begun receiving a pre-2006 HOOPP disability pension – a not surprising choice in light of the very generous nature of the disability pension available at that time.

[32] The union does not suggest that when, years ago, the bargaining parties first used the 1980 HOODIP policy to define the employer's obligation to provide long term disability coverage, they exhaustively defined the payments that would reduce amounts payable under that policy. The policy used general language capable of applying to payments and plans of a sort that may not have existed at that time.

[33] The bargaining parties amended Article 12 effective January 1, 2006, to provide that the employer's obligation to provide disability coverage for employees hired in and after that year would be defined by reference to a different policy: 1992 HOODIP. Apart from that change, which does not apply to this grievor, the employer's obligation has not changed nor, necessarily, has the benchmark policy that defines that obligation. Changes to HOOPP effective January 1, 2006 could have changed the *consequences* of the 1980 HOODIP provision thereafter, but they could not have changed the *meaning* of that provision, particularly not when the union had nothing to do with making those changes. Thus, it does not matter to the issue I have to decide whether or not the union was conscious of the HOOPP changes when it entered into the collective agreement under which this grievance arises. Whatever they knew, in 2008 the parties simply chose to renew the existing language, whatever it meant.

[34] I agree entirely with employer counsel that it is not my function to judge the "fairness" of the changes made to HOOPP in 2006. The issue is simply whether the "disability pension" provided for in the changed plan makes disability payments "available" to the grievor in the sense meant by that word in the 1980 HOODIP description of the things that can reduce amounts payable under that plan.

[35] In *Ruffolo, supra,* the court was concerned with whether CPP benefits available to children of a disabled person could reduce the amount payable to that person under the wording of a particular workplace disability insurance policy. It does not appear from that very comprehensive decision that the insured employee would have had to give up anything else to which he might otherwise have been entitled under the CPP in order for his children to receive the CPP benefits in question. The particular issue before me was clearly not before the court there.

[36] A question similar to the one before me was addressed in *Abdulrahim, supra,* but in a distinguishable context. Justice Himel found that an insured

would not be “entitled to receive” the benefits for which the insurer sought to make a deduction if he would have to give up a valuable right in order to receive the benefits and had chosen not to do so. The analysis in that case includes the observation that the right that the insured had chosen to retain was one to which the insurer was subrogated under the policy in issue – that is, the insurer could recover its disability payments from any damages for income loss that the insured might later recover from the alleged tortfeasors. That is one feature that distinguishes the bargain in issue there from the one in issue here. Here, the insurer has no express right under the policy to recover the payments it makes before the insured reaches age 65 from payments that the insured later becomes entitled to receive as retirement income after age 65.

[37] In *Abdulrahim* the court found “entitled to receive” ambiguous in the context in which that dispute arose. I find “available” ambiguous in this context. I do so not because clauses (e) and (f) of the reduction provision use different language, but because the word “available” is clearly capable of more than one meaning in the circumstances. To put the range of possible meanings bluntly, it could mean obtainable if a price is paid, as it often does in retail advertisements, or obtainable without expending substantial time, effort or money, as it can in other contexts.

[38] A disabled employee could use savings, or borrow against assets, to purchase an annuity that would pay her the equivalent of the disability benefits to which she is entitled. Because she could, on the employer’s interpretation of the word such payments would be “available” to the employee whether she bought the annuity or not. The only reason those “available” payments would not reduce the employee’s disability benefit is that they would not be from a plan to which the employer contributes and also, perhaps, that they would be equally available to the employee if she were not disabled.

[39] But suppose the employer were to add to its pension plan, or to some other existing or new “plan” to which it makes some contribution, a feature

that entitles employees, on proof of disability, to purchase just such an annuity – perhaps at a slight, employer-funded discount relative to what it would cost on the open market. In this hypothetical the payments from that annuity would be "disability payments" – because disability is a prerequisite to entitlement to purchase it – under a plan to which the employer contributes. On the employer's interpretation of "available," then, the amount of the payments from the annuity that the disabled employee could buy under this hypothetical employer plan would be deductable from the employee's disability benefits whether the employee actually purchased the annuity or not, thereby reducing disability benefits under the disability plan to little or nothing in every case. Thus, the employer's interpretation of "available" can make both the collective agreement provision and the policy to which it refers "ineffective, superfluous, absurd, unjust, commercially unreasonable, or destructive of the commercial objective of the agreement" in the sense intended by Justice Perell and the authorities he quoted in paragraph 86 of his decision in *Ruffolo*.

[40] Although here the employee is not required to pay out-of-pocket in order to receive the payments in question, she is required to give up a right that has very real economic value to her – the right to accumulate service that will translate into a much higher monthly pension payment from and after age 65 than she would receive after that age if she took the disability pension option. This is not a case in which the only thing that stands in the way of the employee's actually receiving the payment in question is her making an application for it. She has to give something of substantial economic value to get the payments.

[41] On the principles of interpretation summarized in *Non-Marine Underwriters*, *supra*, and *Ruffollo, supra*, I find that the word "available" in the payment reduction provision of 1980 HOODIP does not have the meaning contended for by the employer. I conclude that disability pension payments under HOOPP were not and are not "available" to the grievor for

purposes of 1980 HOODIP, and that no deduction should have been made from the grievor's disability benefits in that regard.

[42] The grievance is allowed. I direct that the employer ensure that the grievor henceforth receives the disability payments to which she is entitled without the deduction in question, and reimburse the grievor any amounts previously deducted on that basis together with interest thereon. I remain seised with any issue about implementation of this decision that the parties are not able to resolve themselves.

November 29, 2011

"Owen V. Gray"