IN THE MATTER OF THE ONTARIO LABOUR RELATIONS ACT

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

ONTARIO POWER GENERATION INC.

- The Employer

-and-

THE SOCIETY OF ENERGY PROFESSIONALS

– **The Union**

In The Matter of the Grievance
Of Angela Taggart Concerning
Termination of Sick Leave Benefits

Interim Award #3
Re-accumulation of sick leave

BEFORE : Kathleen G. O'Neil, Single Arbitrator

APPEARANCES: *For the Union*

Adrienne Telford, Counsel

For the Employer

David Wakely, Counsel

Submissions heard by telephone conference July 18, 2011

I N T E R I M A W A R D

This decision deals with a request by the Society for an order requiring the employer to make *ex gratia* payments pursuant to an interim order made on January 20, 2011. The employer takes the position that the issue underlying the request concerns the interpretation of provisions of the collective agreement dealing with re-accumulation of sick leave, an issue that is not subsumed in the original grievance, and thus the previous interim order does not require them to resume sick leave payments.

Context and Positions of the Parties

The dispute before me arises in the context of an August 12, 2010 grievance claiming the reinstatement of sick pay benefits, which were terminated as a result of the employer's dissatisfaction with the medical information provided in support of the grievor's absence from work. The remedies claimed in that grievance included requests for a declaration of violations of various provisions of the collective agreement and statutes, retroactive reinstatement of the grievor's salary and sick leave entitlements, as well as general damages.

On January 10, 2011, an interim order was made granting the Society's request for *ex gratia* payments equivalent to sick leave payments, until the matter was resolved, similar to those granted in another case between the same parties, *Ontario Power Generation and The Society Of Energy Professionals, Re: Pos grievance*, (Shime), dated October 20, 2005 affirmed, in respect of the jurisdiction under the collective agreement, by the Divisional Court in a decision dated January 5, 2007 reported as 154 A.C.W. S. (3d) 607, 2007 C.L.L.C. 220-010, [2007] O.J. No. 72.

After the January 21, 2011 hearing date in this matter, the employer reinstated the grievor's sick pay retroactive to the date it had been discontinued, August 9, 2010. Sick leave payments continued until February 25, 2011, when the grievor ran out of sick pay credits. Despite the reinstatement of sick leave payments, the Society wished to set further hearing dates to deal with a number of other issues. The employer objected, written submissions were received, and a second interim decision was given on March 21, 2011, in which it was found that there were some issues left from the original grievance that warranted a further hearing, but that certain other issues constituted an expansion of the original grievance, and thus, in the absence of consent, would not be heard in the context of this grievance. In most relevant part, I found as follows:

> I agree with the employer that the focus of the grievance as written is on the termination of sick leave benefits on August 9, 2010. There is no reference to a pattern of behaviour or of harassment. As well, the remedies requested are mainly framed as flowing from the employer's decision to terminate STD benefits. Although the grievance clearly makes reference to the non-discrimination and harassment article of the collective agreement, as well as the Human Rights Code, it is within the framework of the focus on the specific event of the termination of benefits in August 2010. Although the parties could, on consent, consolidate other issues relating to the grievor, I am not persuaded that the grievance as written gives me jurisdiction over any other issue but the termination of benefits in August, 2010 and remedies flowing therefrom. Specifically, I do not find that the allegation of a pattern of harassment, management's request that the grievor attend an independent medical examination, a demand that the grievor attend a return to work meeting in September 2010, or any issues flowing from the employer's recent communication with the grievor concerning LTD are encompassed by the grievance before me. All of these additional matters would require quite specific additional evidence and remedies, as compared to that related to the suspension of sick leave benefits in August 2010. As such, dealing with them would constitute an expansion of the grievance, which has not been agreed to by the employer.

Since then, a number of other issues have arisen between the parties, including one concerning the grievor's right to re-accumulate sick leave effective July 1, 2011. The Society grieved this issue by way of policy grievance dated May 4, 2011, which claims as remedy, among other things, compensation for all affected employees, a group which I understand to include the grievor. I am not seized of that grievance, and there has been no consent to consolidate it with the one before me. However, the Society argues that the issue of re-accumulation as it relates to Ms. Taggart arises out of my continuing remedial jurisdiction from the August 2010 grievance. In that context, the Society's position is that I should rule on the dispute between the parties concerning the claim that Ms. Taggart had the right to re-accumulate credit in her sick leave bank as of July 1, as a result of her years of service.

As well, the Society takes the position that the January 10, 2011 order to make *ex gratia* payments equivalent to sick leave until the matter is resolved should be interpreted to mean that the employer is required to make *ex gratia* payments from July 1, onward, until the grievance of which I am seized is fully resolved.

Counsel for the Society submits that my remedial jurisdiction from the original grievance includes the grievor's right to be put in the position she was in before the termination of benefits in August 2010, including the right to re-accumulation of sick leave the following July 1. Noting that for the grievor, time is of the essence, the Society offered to adjourn the policy grievance *sine die* while I deal with this issue in the context of Ms. Taggart*'s* grievance.

By contrast, the employer argues that none of the issues which have arisen since my March 21, 2011 decision are encompassed by the original grievance and that I should not take jurisdiction over the re-accumulation issue, or two other issues concerning the grievor's vacation pay and a return to work proposal. Employer counsel argues that my ruling on March 21, 2011 constitutes issue estoppel in that I have already found that my jurisdiction is limited to the issues arising from the termination of sick leave benefits last summer, and not new issues that have arisen since. As to the interpretation of the order for *ex gratia* payments, counsel for the employer says the order has to be interpreted consistent with the collective agreement, which in the employer's view, provides no further possibility of payment equivalent to sick leave once her sick leave credits have been exhausted. It is the employer's position that to award further *ex gratia* payments would be amending the collective agreement as the grievor has received what she is entitled to as far as sick benefits are concerned.

In reply, counsel for the Society argues that the issue is not about amending anything in the collective agreement, that the appropriate analysis in regards to an interim award for *ex gratia* payments is one of irreparable harm if the grievor does not have income in the interim. Noting that the *ex gratia* payment order provided a mechanism to recapture any amounts that the grievor would be found not be entitled to, counsel argues that the same reasons that led to the order for *ex gratia* payments in the first place should extend to their extension from July 1, 2011 onwards. Further, counsel argues that issue estoppel does not apply because the March 21, 2011 ruling only applied to the issues that had arisen at that point, such as those relating to long-term disability. Since no arguments were made about re-accumulation of sick leave at that time, counsel argues that no ruling was made about that issue.

Disposition

Having considered the submissions made in the context of the previous interim orders made in this matter, I do not find there to be sufficient grounds to grant the order requested by the Society. When the employer reinstated sick pay retroactive to August 2010, and continued it until the exhaustion of the grievor’s sick credits in February 2011, it resolved the issue of the claim for retroactive sick pay claimed in the grievance before me. It is true that the Society claimed other remedies in that grievance, and that I have agreed with the Society’s position that they warrant a further hearing, which is scheduled to continue in the fall. However, the *ex gratia* payments were designed to be equivalent to the amount of sick leave claimed, not to cover all new issues that arose in the interim. The current issue as to re-accumulation of entitlement was not raised as part of the balancing of issues at the time the award for interim *ex gratia* payments was made, and thus it was not something contemplated by it. Consequently, although, as argued by counsel for

the Society, the wording of the original order could be interpreted to include the Society's request, in context, I do not see the current request as a matter of compliance with the original order.

Further, on a more general level, the issue of re-accumulation of sick leave which has recently arisen between the parties is new, and I am not persuaded that it is properly considered to be included in the grievance of which I am seized. The dispute concerning re-accumulation of sick leave represents a disagreement over the interpretation of the collective agreement provisions having regard to entitlement to re-accumulate sick leave at certain service dates and the interaction between this and the long-term disability provisions. The dispute before me in the original grievance relates to the sufficiency of the medical information the employer had before it and whether damages should flow to the grievor because of the employer's treatment of her surrounding the termination of her short term sick leave benefits in August 2010. These are very different legal issues, even if they both relate to pay while sick and are experienced as a continuing problem by the grievor. However convenient it might be in the Society's view for me to hear this or other issues that have arisen between the parties, the employer has not consented to consolidate these issues. Without such consent, arbitrators are not entitled to expand their jurisdiction beyond the bounds of the grievance with which they are seized. To make a fresh order for *ex gratia* payments in reference to the recently claimed re-accumulation of sick leave would not be appropriate in the absence of jurisdiction over that dispute.

For the above-noted reasons, the request of the Society is denied.

Dated at Toronto this 21st day of July, 2011

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Kathleen G. O'Neil
Single Arbitrator