IN THE MATTER OF AN ARBITRATION

BETWEEN:

MOUNT SINAI HOSPITAL

(“the Hospital”)

and

ONTARIO NURSES’ ASSOCIATION

("the Association")

Hospital Grievance for Reimbursement for Board of Directors Leave pursuant to Article 11:03

Before:
Larry Steinberg, Arbitrator

Appearances:

For the Hospital:
Mark H. Mason, Counsel
Maryanna Malfara, SR Manager, Human Resources
John Coutts, Manager, Accounts Receivable

For the Association:
Elizabeth McIntyre, Counsel (September 27, 2016)
Philip Abbink, Counsel
Linda Haslam-Stroud, Association Provincial President
Dan Anderson, Advisor
Patti Lalla, Bargaining Unit President
Simran Prihar, Senior Legal Advisor (July 27, 2017)

Hearings held in Toronto Ontario on September 27, 2016, April 13, June 12 and July 27, 2017; Written Submission from the Hospital September 18, 2017

Overview

[1] For many years the parties have disagreed about aspects of the Association's obligation to reimburse the Hospital in respect of Board of Directors Leave granted to Andy Summers ("Summers") pursuant to Article 11:03 of the Central Collective Agreement.

[2] On October 14, 2008 the Hospital filed a grievance claiming the amount of $60,000.00 which it alleged was owed to that point in time and any other amounts that were subsequently unpaid until an arbitration decision was received.

[3] The parties agreed to proceed by way of a Statement of Agreed Facts ("SAF"), which is attached as Appendix 1 to this award. They also agreed to bifurcate the proceeding by obtaining a ruling on the interpretation of Article 11:03 and to subsequently address remedy, if necessary (SAF, para. 33). Finally, without prejudice to its relevance, the parties also agreed to call bargaining evidence from November 2013 when Article 11:03 was amended (SAF, para. 32).

[4] The disagreement between the parties is about which days and for which things the Association is required to reimburse the Hospital while Summers is absent on Board of Directors Leave.

[5] After considering the evidence and argument of the parties, I am of the opinion that prior to April 1, 2014, the Association is required to reimburse the Hospital for all salary and applicable benefits (including paid vacations, sick leave and holiday pay) when Summers is not working for the Hospital. After April 1, 2014, the Association is required to reimburse for salary and 19% of salary only for the time Summers is working for the Association and nothing more. The Association is not required to reimburse the Hospital for statutory remittances during either time period.

Collective Agreement

[6] When the grievance was filed Article 11:03 read as follows:

> A nurse who is elected to the Board of Directors of the Ontario Nurses' Association, other than to the office of President, shall be granted upon request such leave(s) of absence as she or he may require to fulfill the duties of the position. Reasonable notice sufficient to adequately allow the Hospital to minimize disruption of its services shall be given to the Hospital for such leave of absence. Notwithstanding Article 10.04, there shall be no loss of seniority or service for a nurse during such leave of absence. Leave of absence under this provision shall be in addition to the Association leave provided in Article 11.02 above. <u>During such leave of absence, the nurse's salary and applicable benefits shall be maintained by the Hospital and the Union agrees to reimburse the Hospital in the amount of the full cost of such salary and applicable benefits</u>. (emphasis added)

[7] In collective bargaining in November 2013, and effective on April 1, 2104, the parties agreed to amend the last sentence of Article 11:03 by the addition of the phrase "19% in lieu of" so that it reads as follows:

> During such leave of absence, the nurse's salary and applicable benefits shall be maintained by the Hospital and the Union agrees to reimburse the Hospital in the amount of the full cost of such salary and **<u>19% of salary in lieu of</u>** applicable benefits. (emphasis added)

[8] The parties have asked for a determination of the issues under both versions of the collective agreement.

Collective Bargaining Evidence

[9] Evidence about bargaining that resulted in the amendment of Article 11:03 was given by Linda Haslam-Stroud ("Haslam-Stroud"), provincial President of the Association, Dan Anderson ("Anderson"), Chief Negotiator for the Association and its Chief Spokesperson in the 2014-2016 round of negotiations that took place in or about November 2013, David McCoy ("McCoy"), Director of Labour Relations for the Ontario

Hospital Association (“OHA”) and Bob Bass (“Bass”) lead negotiator for the Participating Hospitals[1] during the 2014-2016 round of bargaining.

[10] It is important to highlight the context in which the negotiations regarding Article 11:03 took place. The issue of the application of Article 11:03 had been in dispute between the Hospital and the Association for many years (SAF, paras. 19 to 23). In addition, the Hospital (in 2008) and two other hospitals (in 2009 and 2012) filed grievances about it (SAF, paras. 16 and 24).

[11] Both Haslam-Stroud and Anderson were very familiar with the issues surrounding Article 11:03. In view of the lengthy history of the dispute and the potential budgetary consequences for the Association, they testified that they were bound and determined to bring finality to the issue of the Association’s obligations (preferably in a manner that accorded with their knowledge of past practice) in connection with Article 11:03 leaves.

[12] It is fair to say that McCoy and Bass did not share the same level of knowledge and institutional memory about Article 11:03. However, McCoy testified that he was aware of the issue from the 2011 round of bargaining and was aware of the dispute generally but testified that the issue, in the context of 2014 central bargaining, was a not priority for the Participating Hospitals or the OHA.

[13] Bass was not aware of the issue until it was raised by the Association. Even then, he testified that the issue did not have a significant impact on total compensation due to the small number of people on Article 11:03 leave. His main concern was that whatever the percentage number was going to be, he wanted to ensure that it not be used to justify an increase in the percent in lieu for part-time employees which would have very significant economic consequences for the Participating Hospitals.

[14] It was against this backdrop that on November 20, 2013, in the final days of bargaining, the Association tabled a proposal to amend Article 11:03 by deleting the

[1] The OHA is not a bargaining agent. The bargaining and resulting collective agreement are between the Participating Hospitals (which includes the Hospital) and the Association. The OHA coordinates and facilitates the process of collective bargaining on behalf of the Participating Hospitals.

phrase “applicable benefits”. This would have the effect of requiring the Association to only reimburse the Hospital for the salary of their members serving on the Board of Directors.

[15] Anderson explained that this proposal made it easy to calculate the cost of the benefits and was what most of the hospitals were doing before the Hospital “jumped into the fray”. There was also some discussion about who paid for statutory remittances (Anderson explained that the hospitals did) and Haslam-Stroud, in response to a statement from Bass that the issue really only concerned four meetings a year, explained that the work of members of the Board of Directors was more than that. Bass observed that the idea of Article 11:03 was that the hospital should not incur any cost for having employees serve on the Board of Directors.

[16] The next day, Bass provided the Participating Hospital’s counter-proposal which was 25%. Haslam-Stroud pressed Bass on what was included in the number because she wanted to be very sure that when the parties left the bargaining table there was a clear understanding of what was being compensated and that going forward the matter was finally resolved.

[17] Bass justified the number by referring to 13% in lieu of benefits applicable to part-time nurses, 7.5% for statutory remittances and 8% in respect of vacation for a total of 28.5% which the was rounded down to 25% for ease of application. Bass also testified that this number would represent a good approximation of what the cost was to the Hospital when an employee was on Article 11:03 leave. He also testified that the number represented a strategic number in that his concern was that it not be used to increase the percent in lieu applicable to part-time nurses and that the number was not costed in any detail at all.

[18] Anderson responded to the effect that the Association did not pay vacation or statutory benefits (i.e. remittances); only Extended Health benefits, dental, life insurance and LTD. The Hospital argued that this statement amounted to a statement of future intentions such that whatever was covered by the number actually agreed to would not

include these amounts. The Association argued that this statement was Anderson pointing out that historically the Association did not reimburse for vacation and statutory remittances.

[19] I accept the Association's view of the statement. In the context of the discussions taking place at the time, it is more likely than not that the Association, as part of the bargaining process and in responding to the initial Participating Hospital's proposal, observed that the proposal included more items than the Association had historically reimbursed for. Having observed Anderson and Haslam-Stroud during their testimony, if the statement was meant to convey a rejection of the proposal on a go-forward basis because of what it included, that point would have been made loud and clear.

[20] All the witnesses agreed that after this initial discussion, there was no further discussion about what would be covered by the payment in lieu or the days on which it would be paid. They all agreed that from that point on it was simply about "finding a number". After several passes, the parties agreed on 19% which is reflected in the current language.

[21] There was general agreement that the discussion about Article 11:03 concerned amounts owing when Board members were performing their duties as a member of the Board. But there was no evidence of specific discussions about whether Board members like Summers were considered to be on Article 11:03 leave when they were on vacation, sick leave, paid holiday leave or any other type of leave.

[22] For example, Haslam-Stroud was asked what her understanding was when Bass presented his offer at 25%. She replied that "for any day an employee was on Board leave of absence, the Association would reimburse the Hospital for the member's hourly rate plus the percentage." She was not asked if that included days on which the employee was not performing work for the Association.

[23] Similarly, Anderson did not testify about any conversation at bargaining specifically referencing the days the employee was performing work for the Association.

[24] McCoy testified that his “perception” of the discussions was that the parties wanted to solve a dispute that had been ongoing for a number of years. In cross-examination he indicated that he understood the dispute to be in relation to which days and for which things the Association was required to reimburse the Hospital. When asked if it was his understanding that the Association did not pay for days on which Board of Directors duties were not being performed, he agreed and listed paid sick days, paid leaves, vacation, jury duty. Finally, he indicated that his understanding was the negotiation concerned the percentage to be paid for each day which is covered by Article 11:03 leave.

[25] Bass had little or no understanding of the ongoing dispute. He testified that he would have to rely on others to explain why Article 11:03 was an issue and why the Participating Hospitals made a proposal. When asked in cross-examination if it made sense for the Association to pay twice for vacation (i.e. as part of the percentage of applicable benefits and again when the employee took the vacation), Bass indicated that the matter was not discussed in the context of taking long leaves of absence for Article 11:03 leaves. He indicated that he read Article 11:03 to apply to single days and he indicated that he was not aware that people were taking long periods of consecutive time as Article 11:03 leave.

Argument

Hospital

[26] The Hospital’s position is that, based on the intent of Article 11:03, it should not bear any of the cost of having an employee absent on Board of Directors Leave.

[27] The Hospital asserts that the bargaining evidence is irrelevant and the case should be decided by the application of the well-established rules of contract interpretation. The Hospital argued that even if the bargaining evidence is relevant, it does not demonstrate that the parties agreed to anything that would alter the meaning of Article 11:03 going forward.

[28] The Hospital notes that the language of Article 11:03, on its face, does not contemplate lengthy leaves of the kind granted to Summers. The Hospital argues that this is clear from the fact that the provision requires that employees seeking the leave give "reasonable notice" of the leave so as to not disrupt the services provided by the Hospital. Obviously, since Summers has been continually absent on Article 11:03 leave for over a decade, the concept of reasonable notice as used in the language has no application.

[29] The Hospital argues that the language of Article 11:03 in its reference to "applicable benefits" must be given a broad meaning and includes more than the health and welfare benefits that the Association asserts is the extent of its obligation. The Hospital says this follows from the fact that the parties could have used limiting words in the language (i.e. "health and welfare benefits") but didn't. And, moreover, the language indicates that it is the "full" cost of the "applicable benefits" that is subject to reimbursement which must include all benefits (including statutory remittances) if the provision is to be effective in achieving its goal of being cost neutral for the Hospital.

[30] The Hospital also refers to the language of various other provisions of the collective agreement which contain language referencing analogous provisions to support its argument that Article 11:03 must be read broadly to encompass all costs and benefits associated with Board of Directors leave. These include Article 6.02 ("pay for all time spent"), Article 6.04(b) ("salary and applicable benefits" to be maintained by employer but Association to reimburse only for "full cost of such salary"), Article 10:04 (reference to "subsidized benefits"), Article 11:02 (hospital to maintain "nurses' salary and applicable benefits or percentage in lieu of fringe benefits" and Association to reimburse hospital "in the amount of the daily rate of the full-time nurse or in the amount of the full cost of such salary and percentage in lieu of fringe benefits for a part-time nurse").

[31] The Hospital urges that the fundamental rules of collective agreement interpretation (words must be given their plain and ordinary meaning unless the structure of the provision or the agreement as a whole indicates a special meaning, all words must be given meaning, different words are presumed to have different meanings unless this

would lead to an absurd result or is inconsistent with the scheme and structure of the agreement and that any one provision must be interpreted and applied in light of the other provisions of the agreement) must lead to the conclusion that its interpretation should prevail.

[32] The Hospital argues that when all of the provisions of the agreement are analyzed it is obvious that Article 11:03 has the broadest provisions in relation to benefits and that the "full cost" of the "applicable benefits" must mean that the Hospital is to be fully reimbursed for all its relevant benefit costs (both contractual and statutory) in respect of an employee on Board of Directors Leave.

[33] Therefore, the Hospital argues that for the period prior to March 31, 2014, the Association was required to reimburse the Hospital for salary for days that Summers was not performing work for the Hospital. This includes periods when he was performing work for the Association and periods when he was not performing work for the Association such as vacation leave, paid holidays, sick leave and various other leaves (i.e. jury duty). In addition to salary during such periods, the Hospital asserts that the Association was required to reimburse the hospital's share of the benefits paid on Summers' behalf and statutory remittances.

[34] The Hospital argues that the bargaining history is not relevant in this case for the simple reason that it does not indicate any meeting of the minds regarding the content of "applicable benefits" or the issue of which days the Association was required to reimburse the Hospital. The Hospital asserts that the very limited discussion about what was included in the percentage number followed by the statements by Anderson about what the Association did and didn't pay meant that there was never an agreement of what was included in the percentage.

[35] The Hospital argues there was no specificity or meeting of the minds regarding what was included in the 19% that was ultimately agreed to and noted that in order to draw a conclusion about what was agreed to the bargaining evidence must be clear and unequivocal which was not the case here.

[36] The Hospital submits that post April 1, 2014, the Association should be required to pay the entire cost (salary plus 19% of salary) for days Summers is not working for the Hospital (which includes vacations, statutory holidays, sick days) and statutory remittances.

[37] The Hospital cites *Maple Leaf Consumer Foods v. U.F.C.W.,Local 175,* 2011 CarswellOnt 7142, 205 L.A.C. (4th) 393 (Surdykowski), *Ridge Meadows Home Support Society v. B.C.G.E.U.,* 1996 CarswellBC 3011, 59 L.A.C. (4th) 94 (Munroe), *Re Dufferin Peel Catholic District School Board and OECTA (Dziedzina)*, 2012 CarswellOnt 14819, 226 L.A.C.(4th) 283 (Davie), *Re York County Hospital and O.N.A.* 1 L.A.C.(4th) 276 (Burkett)("*York County*"), *Straight Crossing Joint Venture v. I.U.O.E.* 1997 Carswell NS 591, 64 L.A.C. (4th) 229 (Christie), *WHL Management Ltd. Partnership v. U.F.C.W., Local 175*, 2011, CarswellNat 6563, 204 L.A.C. (4th) 89 (Monteith) and Brown & Beatty, *Canadian Labour Arbitration*, paras. 3:4420 and 4:2110

Association

[38] The Association argues that reimbursement under Article 11:03 only applies to the very days on which the member of the Board is on leave and performing work for the Association pursuant to that provision. In the Association's view, this follows logically from the fact that leaves are mutually exclusive, that is to say, it is not possible to be on more than one form of leave at any one time. Since vacations, holidays and sick days are leaves, the Association argues that an employee cannot be on those leaves and Article 11:03 leave at the same time.

[39] The Association argues that statutory remittances are not "applicable benefits" under Article 11:03 which, it submits, are limited to collective agreement benefits. The Association's argument in this regard focuses on the principle that the same words in the collective agreement should have the same meaning.

[40] In the Association's view, "applicable benefits" includes similar elements as are covered by the percentage in lieu applicable to part-time nurses. The Association refers

to Article 6.04(b) (Leave for Central Negotiations) which requires, in part, that the Hospital maintain salary and applicable benefits for full-time nurses and salary and percentage in lieu for part-time nurses.

[41] The Association also refers to Article11:02(a) (Association Leave) which requires the Hospital to maintain "a nurse's salary and applicable benefits or percentage in lieu of fringe benefits" as further evidence of that the parties intended to treat "applicable benefits" as equivalent to the percentage in lieu.

[42] The Association argues that since the percentage in lieu covers holidays, pension (for nurses who do not participate in HOOP) and collective agreement benefits, the inference is that applicable benefits is meant to parallel these same items.[2]

[43] In reviewing the extrinsic evidence, the Association relies on the fact that Haslam-Stroud, Anderson and McCoy all believed that the discussion about reimbursement for Article 11:03 leave was in respect of days when the member was actually performing work for the Association and that Bass testified that he could not contradict the understanding of the others.

[44] The Association points out that the amount initially proposed by the Participating Hospitals (25%) was an amount all agreed would have represented full cost recovery for the absence of the employee, and that through the give and take of bargaining, the Participating Hospitals compromised by accepting less than full cost recovery and that the Association agreed to pay more than what it had historically paid. The Association asserts that since the goal of the parties was to finally resolve the reimbursement issue going forward, there could be nothing more that the Association was required to reimburse for.

[2] The Association was not consistent in its position regarding what it agreed was included in "applicable benefits". For example, Exhibit 3 indicates Article 12 (which includes LTD) and 17 benefits are included but in its written submissions LTD is not included in its Overview but is included in its Conclusion and SAF, para. 11(a).

[45] The Association asserts that Article 11:03 is ambiguous since “applicable benefits” is unclear and that the bargaining evidence clearly indicates not only that such benefits (and salary) were only to be reimbursed for days worked for the Association, but also, that nothing more was to be reimbursed over and above 19% of salary.

[46] The Association also refers to the *York County Hospital* case. The Association disagrees with the result in that case, but relies on it for support of its position that an employee can only be on one type of leave at any one time.

[47] In addition to *York County Hospital*, the Association refers to *Noranda Metal Industries Ltd., Fergus Division and International Brotherhood of Electrical Workers, Local 2345 et al*, (1993) 44 O.R. (2d) 529 (C.A.), *Leitch Gold Mines Ltd. et al. v.Texas Gulf Sulphur Co. (Incorporated) et al.,* [1969] 1 O.R. 469 (H.C.J.), Brown & Beatty, *Canadian Labour Arbitration*, para 3:4400.

Hospital Reply

[48] The Hospital reiterates its argument that “full cost” in Article 11:03 applies to both salary and “applicable benefits”. The Hospital argues that this indicates the intent of the parties that the Hospital should bear none of the cost associated with Article 11:03 leaves.

[49] With respect to the extrinsic evidence, the Hospital maintains its position that the evidence in this case is not conclusive and specific enough to allow it to be used to inform the outcome of this case. In the Hospital’s view, there was no mutual understanding and therefore the bargaining evidence is not relevant.

[50] With respect to the Association’s argument that leaves are mutually exclusive, the Hospital observes that there was never a request by Summers for leave (vacation or sick) other than the original request for leave pursuant Article 11:03. The Hospital asserts that the reality is that the parties have considered Summers’ leave to be a continuous Article 11:03 leave without interruption for sick leave or vacation leave.

[51] With respect to statutory remittances, the Hospital does not dispute that Summers remains an employee of the and that it must remit on his behalf. The Hospital does assert however that these statutory remittances form part of his compensation package as part of “applicable benefits” that the Association is required to reimburse to the Hospital.

[52] The Hospital argues strongly that it is impossible to ascertain what is and is not included in the 19% figure agreed on by the parties, whether or not one takes into account the extrinsic evidence.

[53] The Hospital notes that in the *York County Hospital* case, the effect of the decision is to affirm that sick leave is considered an “applicable benefit” under Article 11:03.

Analysis and Decision

[54] Both parties seek declarations regarding the Association’s reimbursement obligations pursuant to the language of Article 11:03 of the collective agreement prior to March 31, 2014, including 2008 when the grievance was filed and since April 1, 2014 when it was amended in collective bargaining. Before I deal with the specific issues in dispute in this matter, some general observations are in order.

[55] First, I disagree with the Hospital that Article 11:03 was not intended to cover lengthy leaves of absence for the purpose of serving on the Board of Directors. Article 11:03 used to have a limit of 50 days annually that an employee could be absent on Article 11:03 leave. In 1986 the Association argued before a board of arbitration (Simmons, Winkler and Mayne) that such a limit no longer met its needs. The board agreed and deleted the restrictive language from the collective agreement. No other restrictions have been imposed on the length of Article 11:03 leaves.

[56] The reality is that since 1986, the Association has not only grown in size but the issues that it must address have increased in complexity. As a result, and as appears from para. 14 of the SAF, the facts of this case and Haslam-Stroud’s testimony, members elected to the Board of Directors are now required to commit a significant number of

working days to Board business that ranges from 100% for Summers, McKenna and Clark, to 60%-70% for Parker, to 50% for MacDonald.

[57] Second, the Hospital argues that the purpose of Article 11:03 was to ensure that there was no cost to the Hospital of Article 11:03 leaves. The Hospital argues that this view is supported by describing the Association's reimbursement obligation to be the "full" cost of salary and applicable benefits. I think this is a reasonable view of the purpose and language of Article 11:03.

[58] Third, Article 11:03 provides that a nurse elected to the Board of Directors "…shall be granted upon request such leave(s) of absence as she or he may require to fulfill the duties of the position." The leave is for a specific purpose and the Association's reimbursement obligations are tied directly to the leave. If the reason for the absence of the nurse from his/her nursing position with the Hospital no longer exits, then it would be expected that, in the normal course, Article 11:03 leave would terminate and the nurse would return to work with the Hospital.

Prior to March 31, 2014

[59] Article 11:03 only applies when an employee requests and is granted leave to serve on the Board of Directors. The article requires the Hospital to maintain the nurse's salary and applicable benefits and the Association is required to reimburse the Hospital for the "full cost of such salary and applicable benefits."

[60] The dispute between the parties centres on two aspects of employees on Article 11:03 leave—the "which day" aspect and the "for what" aspect.

For What

[61] The "for what" aspect of the dispute is about what is encompassed in "applicable benefits". The Hospital approaches this issue from the premise that it should not bear any

costs associated with an employee on Article 11:03 leave and asserts that “applicable benefits” includes not only all collective agreement benefits but also statutory remittances.

[62] Both parties acknowledge that the collective agreement must be read as a whole and refer to other provisions of the collective agreement as supporting their respective interpretation. It is fair to say that when dealing with the question of benefits, the parties have been consistent only with respect to the inconsistency of the language they have used. The parties have variously referred to “fringe benefits” (Articles 6:04(b), 11:02 and 19:01(b) and (c), “applicable benefits” (Articles 6.04(b),11:03, 11:04 and 11:12(a)), “subsidized employee benefits” (Article 10:04), “applicable benefits or percentage in lieu” (Article 11:02).

[63] I start with the concept of “subsidized employee benefits” in Article 10:04 (Seniority—Effect of Absence (Full-Time)). The provision states that if an absence exceeds 30 continuous calendar days the nurse “…will become responsible for full payment of any subsidized employee benefits in which she or he is entitled to participate during the period of absence.” The provision further provides that for approved leaves in excess of 30 continuous calendar days, “... the nurse may arrange with the Hospital to prepay the full premium of any applicable subsidized benefits…”

[64] In my view, the subsidized benefits referred to are Article 12 and 17 benefits. Some of these benefits are self-funded by the Hospital. Some are provided by insurance plans, the premiums for which are either paid for wholly or in part by the Hospital.

[65] Most important for present purposes, Article 12.01 provides for a short-term sick leave plan paid for entirely by the Hospital.

[66] I do not understand that the Association disputes that Article 12 and 17 benefits are part of “applicable benefits” (see Exhibit 3—email from Anderson to Judith Whitfield dated November 3, 2008 and SAF, para. 26). It follows therefore that sick leave benefits are included in “applicable benefits”.

[67] The next concept that is relevant is that of “fringe benefits”. Article 19.01 (c) concerns compensation for part-time nurses and provides that their hourly rates “…include compensation in lieu of all fringe benefits which are paid to full-time nurses…” The provision further specifies that holiday pay and pension are included in the percentage in lieu.

[68] The Association referred to Article 11:02 dealing with Leave for Association Business and argues that this provides a basis to conclude that the parties intended to equate “applicable benefits” with the percentage in lieu. I agree that there is some merit to the argument.

[69] Article 11:02 provides that during such leaves “…a nurse’s salary and applicable benefits or percentage in lieu of fringe benefits shall be maintained by the Hospital and the local Association agrees to reimburse the Hospital in the amount of the daily rate of the full-time nurse or in the amount of the full cost of such salary and percentage in lieu of fringe benefits of a part-time nurse…”

[70] Therefore, if “applicable benefits” is intended to be equivalent to the percentage in lieu and since the percentage in lieu is intended to include all the fringe benefits payable to full-time employees and specifically includes holiday pay (Article 19:01 (c)), then “applicable benefits” must also include holiday pay.

[71] That leaves vacation pay. I can think of no meaningful distinction for present purposes that would distinguish vacations with pay from holidays with pay as a fringe benefit for full-time nurses within the meaning of Article 19. Each is a benefit and each provides compensation for employees when they are not at work. In the context of a provision which is intended to ensure that the Hospital is not burdened with the costs of the leave and in the context of the broad language of the collective agreement, the inclusion of vacation pay in the term “applicable benefit” is appropriate.

[72] To summarize, I am of the view that paid vacations, sick leave and holidays are "applicable benefits" under Article 11:03. However, whether any of these must be reimbursed will be subject to the analysis of the "which day" aspect of the dispute.

[73] Where does this leave the Hospital's claim for statutory remittances? Respectfully, I am of the opinion that the language of the collective agreement does not support an argument that such payments are included in the concept of "applicable benefits".

[74] There is no doubt that such remittances impose a cost on the Hospital. It is also the case that such matters are not normally considered to be "benefits" in a collective bargaining context. This is confirmed by the fact that there are very few references to such matters in the collective agreement and none which reflect an approach that suggests that these costs are treated in the same way as the benefit costs identified above. In my view, it would take very clear and explicit language in the collective agreement to equate statutory remittances with those matters which have been clearly treated and defined as benefits.

Which Days

[75] The "which days" dispute can be simply stated. The Hospital asserts that it should be reimbursed for salary and applicable benefits for the entire time the employee is absent from work on Article 11:03 leave regardless of whether the employee is actually performing work for the Association or is absent due to vacation, holidays, sickness or other leaves. The Association asserts that it is only responsible to reimburse the Hospital for the days the employee is actually performing work for the Association.

[76] This is a much more difficult issue than the previous one since there is nothing in any provision of the collective agreement which sheds light on the issue. There is some past practice at other hospitals, however, the Hospital was not aware of this (SAF. para. 14).

[77] As result, the basis for the Hospital's argument is common sense—if the purpose of the relevant part of Article 11:03 is to ensure that a leave is cost neutral to the Hospital, and if the employee is not and has not performed any work for the Hospital for over a decade since he has been continuously absent on Article 11:03 leave, how can it be that the Hospital is required to pay the costs of vacations, holidays and sick time without reimbursement from the Association?

[78] For its part, the Association made a very technical argument regarding the nature of leaves, whether leaves are mutually exclusive, when the leaves begin and end, etc.

[79] The Hospital's argument is compelling. It is even more compelling in the case of Summers who has not performed work for the Hospital in more than a decade and has not ever in that time requested any other type of leave from the Hospital. It is difficult to identify a rationale that shifts the costs to the Hospital for the days he is not actually working for the Association.

[80] The Association's technical argument springs from the provisions of the collective agreement. The Association argues that leaves are mutually exclusive and that employees can only be on one leave at a time. Therefore, if an employee is on Article 11:03 leave that employee cannot also be on a vacation leave, holiday leave or sickness leave. The Association asserts that this means that Article 11:03 can only apply to the very days on which Board leave is taken. The Association argues, in effect, that Summers moves seamlessly from one type of leave to another, without any involvement by the Hospital who would normally approve such leaves in accordance with the collective agreement and hospital policies.

[81] Both parties referred to the decision of Arbitrator Burkett in *York County* as the only reported award dealing with the same or similar matters as this case. In that case, the grievor requested 19 days of leave pursuant to Article 11:03 which included March 19, 23, 24 and 25. During the evening of March 22 the grievor experienced a dental issue. She called the Hospital to request that she be placed on sick leave. She was unable to

attend to her Association duties on March 23 and 24 but recovered enough to attend to those duties on March 25 and following.

[82] The issue was whether the grievor was to be compensated through the sick leave plan on March 23 and 24, as asserted by the Association, or whether she was to be compensated by the Hospital subject to reimbursement by the Association under Article 11:03, as asserted by the Hospital.

[83] The Association argued that it was only required to reimburse the hospital if the nurse performs service for the Association (the same position it takes in this case) and urged that where the nurse requests sick leave prior to a leave under Article 11:03, it cannot be said that she continues on Association leave and therefore the Association was not obligated to reimburse the hospital for the period of the sick leave.

[84] The hospital argued that it was not possible to change status from Association leave to sick leave and therefore the grievor remained on Association leave and the Association was required to reimburse the hospital.

[85] Arbitrator Burkett noted that unlike Article 11:04 leave (ONA President), there is no notice required before returning to work at the conclusion of Article 11:03 leave. He stated (at para. 9):

> "…In the face of the short-term leaves contemplated under Article 11:03 we do not consider the absence of a requirement for notice before returning to work as indicating that the parties were of the view that a leave under art. 11:03, as distinct from a leave under art. 11:04, could not be ended prior to its designated term. …We cannot accept that it would have been the intention of the parties to force an employee to embark upon a union leave when the employee is unable to satisfy the purpose of the leave because of illness or some other reason…."

[86] The Arbitrator then turned to whether the same result would occur where the employee falls sick during the Article 11:03 leave and not prior to it. Arbitrator Burkett observed (at para. 10):

> "…As we have observed, Article 11:03 does not expressly address the issue that has been raised. The clause is silent thereby causing us to adopt a common sense approach that produces, as the parties would surely have intended, an equitable result. In taking this approach we reject the 'black and white' approach positions advanced by the respective parties….there is no language expressly stipulating that once on an art. 11:03 leave an employee cannot revert to active employee status prior to the expiry of the leave. Conversely, there is no language to expressly stipulate that if an employee becomes 'totally disabled' while on union leave under art. 11:03 the employee nevertheless remains on union leave."

[87] In the absence of express language regarding the issue, and consistent with the common-sense approach he referred to, Arbitrator Burkett articulated the following test to determine whether an employee is on Article 11:03 leave or active employee status when they fall ill:

> The test that is suggested by a reading of art. 11:03 in conjunction with 12:01 and the remainder of the collective agreement is one of assessing the primary affiliation of the employee at the relevant time having regard to the purpose for which the leave was granted, the timing and the duration of the illness."

[88] In the case before him, Arbitrator Burkett held that the employee's primary affiliation at the relevant time was to the Association and therefore she remained on Article 11:03 leave when she fell ill on the two days in question.[3]

[89] Both parties made extensive submissions about the *York County* case. The Hospital asserted that in that case it did not appear that the Association disputed that sick leave benefits were part of "applicable benefits" and urged a similar approach in this case.

[90] The Association argued that the decision affirms its argument that an employee cannot be on more than one leave at a time since the issue was whether the grievor was

[3]The Association nominee agreed with the approach adopted but would have decided that the grievor reverted to sick leave since she was not off on one continuous Article 11:03 leave as referred to by the arbitrator, and in fact, was not on such leave on the day she requested sick leave. The Association referred to this factual error in its submissions. On the facts, the Association is correct. However, this does not detract from the persuasive authority of the decision since the error was to treat the grievor as being on a continuous Article 11:03 leave which is precisely the situation that exists with Summers.

on Article 11:03 leave or sick leave. The Association further argued that the decision is consistent with its position that when Summers was on vacation or was sick or on a paid holiday, he was not able to fulfil the purpose of Article 11:03 leave and therefore could not be on that leave. While the Association was critical of Arbitrator Burkett's conclusion in *York County*, it did not take issue with his analytical framework centred on primary affiliation.

[91] In reply, the Hospital noted that while *York County* dealt with a sick leave benefit which was included under "applicable benefits", the analysis extends to any item that the Hospital is required to pay for the benefit of the employee. The Hospital notes that on the facts of this case, as a practical matter, Summers has been an employee of the Association (although not recognized as such in the language of the collective agreement) and not the hospital and his only affiliation has been to the Association.

[92] Unlike the case before Arbitrator Burkett, we are concerned in this case with an employee who has not given notice to the Hospital from time to time of his need for Article 11:03 leave, has not given the Hospital notice that he wishes to take sick leaves, vacation leaves or holiday leaves, has not been subject to the provisions of the collective agreement or Hospital policies regarding Hospital approval about when and how such leaves are scheduled but has been subject to documentation and approval by the Office of the President of the Association and has been absent from the workplace for a continuous period of time that is now in excess of a decade (SAF, para. 12).

[93] Based on these facts, it is not surprising that the Hospital argues that Summers is, from a practical but not a legal perspective, an employee of the Association. I agree with the Hospital that it follows from the facts that, applying the analysis adopted by Arbitrator Burkett, there is little doubt that Summers' affiliation for leave purposes remains to the Association even when he is on vacation leave, sick leave and holiday leave. This is, to borrow from Arbitrator Burkett, the common-sense conclusion that is derived from the common-sense approach he articulated in *York County* and produces an equitable result. It cannot have been the intention of the parties to ignore the reality that it is the Association

that grants vacation, sick days and holidays to Summers without any Hospital involvement.

[94] I note that *York County* was decided in 1988 and that the language of Article 11:03 at that time was identical to the language in the collective agreement before me. No changes have been made to the language to alter the approach in *York County* and I was not advised that either party presented proposals to do so at bargaining or at arbitration since *York County* was decided. I conclude that the parties have been content with the approach, if not the result, articulated in that case.

[95] I have not lost sight of the Association's technical argument, and in a general way, do not take issue with the principles it asserts about the fact that leaves under this collective agreement are mutually exclusive and employees on Article 11:03 leave remain employees of the Hospital. However, in the context of applying the specific language of Article 11:03 and the *York County* approach to the facts of this case, the Association's argument runs counter to the facts, common-sense and labour relations reality.

[96] Accordingly, I am of the opinion that, on the specific facts of this case, Summers' affiliation remained throughout to the Association and he remained on Article 11:03 leave while in receipt of paid vacation, holiday pay and sick pay. These are "applicable benefits" under Article 11:03 and are subject to reimbursement by the Association to the Hospital.

April 1, 2014 to present

[97] Both parties agree that the language of Article 11:03 is ambiguous and that resort to extrinsic evidence in the form of what occurred at bargaining in 2013 when the language was changed is appropriate. They differ however on the relevance of the evidence. The Association asserts that the evidence is relevant and the Hospital asserts that it is not.

[98] I find that the evidence is relevant to the issues before me.

[99] The evidence was clear that bargaining regarding the language of Article 11:03 was intended to solve "the Mount Sinai" dispute that had been ongoing for many years. It was generally known that the dispute involved the "for what" and the "which days" issues.[4] It was in that context that the parties agreed to amend the language by including the highlighted language "…full cost of such salary and 19% of salary in lieu of applicable benefits." This language was well-known to the parties since it has been part of Article 19 for some time in relation to benefits for part-time nurses.

[100] Bass justified the Participating Hospital's offer of 25% by reference to certain benefits. I accept his evidence that the number was not scientifically arrived at and that he wanted to maintain some ambiguity regarding what was included in order to head-off any potential arguments based on the amount to be used to increase the percent in lieu in Article 19.

[101] In this regard, the approach was the same as that in Article 19 which Bass testified was left deliberately vague except for holiday pay and pensions. It is "just a number" that can be easily understood and applied, and in most cases, it is not necessary to go behind the number.

[102] I have no doubt that the parties intended to find an amount that would represent an amount that the Association was to reimburse the Hospital in respect of all applicable benefits based on a percentage of salary. Going forward, the parties would be aware of exactly what was to be reimbursed by way of benefits for employees on Article 11:03 leave—19% of salary. It was no longer necessary to argue about whether any particular benefit was an "applicable benefit". The final number was "just a number". The Association agreed to pay more than it believed was required under the previous language and the Hospital agreed to accept less than what it believed was required under

[4] The Association was acutely aware of the dispute and brought the issue to bargaining. The level of knowledge on the part of the Participating Hospital bargaining team was uneven. Bass had little or no familiarity with the issue since he was retained solely for bargaining. McCoy, who worked full-time for the OHA, was somewhat familiar with the dispute and its component parts.

that language. The agreement represents a compromise of all issues encompassed in the “Mt. Sinai” dispute which is the very essence of collective bargaining.

[103] Since the parties intended to, and in my opinion, did in fact solve the “Mount Sinai” problem in the approach they adopted, there is nothing outside of 19% of salary to be reimbursed in respect of “applicable benefits”. That number is the entire agreement between the parties. This includes both the “for what” and the “which day” issues identified above since they were the focus of the “Mount Sinai” problem. It also makes labour relations sense. As the Association argued, it would make no labour relations sense to negotiate an amount to be paid for all benefits (including for example vacation) only to have the Association pay once again when, for example, an employee took a vacation, sick day or holiday.

[104] Therefore, the 19% of salary in respect of “applicable benefits” is to be calculated and reimbursed to the Hospital only for days Summers is working for the Association and not for days he is on vacation, sick leave or holidays. These. are “applicable benefits” the cost of which is incorporated into the agreed on amount of 19% of salary

[105] I acknowledge that there was no specific discussion regarding the “which days” issue. However, it was clear that it was part of the dispute with the Hospital that the parties set out to solve and that this was known to the Participating Hospitals at bargaining. If such an important element of the dispute was to be excluded from what was agreed to, it certainly would have been the subject of specific discussions and language.

Declarations

[106] As requested by the parties, I make the following declarations:

Prior to April 1, 2014

a) Applicable benefits include Article 12 and 17 benefits as well as vacations, sick leave and paid holidays.

b) The Association was required to reimburse the Hospital for salary and the Hospital's share of applicable benefits for Summers whether he was performing work for the Association or was absent from such work on vacation, sick leave or paid holidays.

c) Applicable benefits do not include statutory remittances.

April 1, 2014 to present

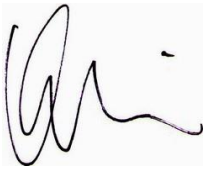
a) The Association is required to reimburse the Hospital in respect of applicable benefits at 19% of salary when Summers is performing work for the Association but not otherwise.

b) There are no other amounts to be reimbursed in addition to 19% of salary.

c) Applicable benefits do not include statutory remittances.

[107] As agreed by the parties (SAF, para. 33) I remain seized to deal with issues of remedy if requested to do so.

Dated at Toronto this 18th day of December 2017



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Larry Steinberg

APPENDIX 1

STATEMENT OF AGREED FACTS

1. Mount Sinai Hospital ("the Hospital") and the Ontario Nurses Association ("the Association") are parties to a collective agreement. The collective agreement has been renewed on April 1st of 2008, 2011, 2014 and 2016.

2. The Hospital participates in the central bargaining process between the Association and the Participating Hospitals as represented by the Ontario Hospitals Association.

3. Mr. Andrew Summers ("Summers") is a Registered Nurse who commenced fulltime employment with the Hospital on or about November 4, 1991.

4. Summers was elected to the Association's Board of Directors as the Vice President of Region 3 effective January 1, 2004.

5. From that period of time until April 2006, the Hospital continued to classify Summers as an active current employee and granted him Association leave lime to fulfill his obligations as he continued to practice and work in the Hospital's Emergency Department

6. Commencing in June of 2006, the Hospital changed its approach and classified Summers as absent due to a leave pursuant to Article 11.03 of the centrally negotiated language of the collective agreement.

7. Effective June 2006, a new system was put in place at the Hospital whereby Summers was to be paid his full-time salary based upon 7.5 hours per day multiplied by 5 days per week, essentially on an automatic basis, unless Summers informed the Hospital otherwise.

8. Since his election to the Board of Directors for the 2004 term the Hospital has continued to make all payments to Summers, and all payments and contributions required on his behalf to make him whole, including:

   (a) gross salary for the days of the leave of absence (not including deductions for income tax, Employment Insurance, Canada Pension Plan, Association dues, and the portion of the cost of premiums for subsidized benefits which is paid by the employee);

   (b) the Hospital's contribution to Employment Insurance, Canada Pension Plan and W.S.I.B.;

(c) the daily cost of the Employer Health Levy

(d) the Hospital's contribution to the payment of the cost of premiums for the following subsidized benefits, calculated on a daily basis: Hospitals of Ontario Disability Income Plan, Semi-Private Hospital Coverage, Extended Health Care, Group Life, Dental and the Hospitals of Ontario Pension Plan.

9. In and about 2010/2011, Mr. Summers commenced submitting, to ONA, weekly Board member salary replacement forms for hours worked on Association time. The Hospital has no knowledge of this fact and no evidence to the contrary. The Hospital was then reimbursed for the total hours worked for the Association. On the same forms, Mr. Summers accounted for vacation days and statutory holidays. These days have not been reimbursed to the Hospital and form part of the current dispute between the parties. The details of which days are reimbursed and which are not, are specified by ONA in the hospital invoices which are returned to the hospital.

10. The totality of hours attributable to Association days, stats and vacation is equal to full-time employment under the hospital collective agreement. ONA has provided the Hospital with copies of documentation for the last several years showing how the time is accounted for. The documentation is subject to approval by the Office of the President of the Ontario Nurses' Association.

11. No reimbursement for benefits was paid to Mount Sinai Hospital by the Ontario Nurses' Association from December 8, 2003 until April 1, 2006. Benefit reimbursement started with the April 13, 2006 payroll for the days and the benefits as ONA determined appropriate as follows:

(a) Reimbursement was paid to the Hospital for: HOOPP, semi-private, extended health, dental, group life, accidental death and dismemberment and long-term disability.

(b) Reimbursement was not paid for vacation pay, statutory holidays, HOOPP (on vacation pay and statutory holidays), Hospital costs for CPP, EI, Health Tax, WSIB and any other Hospital costs attributable to vacation pay and statutory holidays.

(c) Reimbursement was only paid for days that ONA agrees Mr. Summers was performing work for ONA.

12. The vacation time taken by Mr. Summers was subject to documentation and approval by the Office of the President as outlined above. The Hospital has not been involved in the approval/denial of Mr. Summers vacation requests and has not been aware of when Mr. Summers takes vacation since 2006. The Hospital has no knowledge of Mr. Summers sick leave usage since 2006.

13. Article 11.03 stated as follows:

> A nurse who is elected to the Board of Directors of the Ontario Nurses' Association, other than to the office of President, shall be granted upon request such leave(s) of absence as she or he may require to fulfill the duties of the position. Reasonable notice - sufficient to adequately allow the Hospital to minimize disruption of its services shall be given to the Hospital for such leave of absence. Notwithstanding Article 10.04, there shall be no loss of seniority or service for a nurse during such leave of absence. Leave of absence under this provision shall be in addition to the Association leave provided in Article 11.02 above. During such leave of absence, the nurse's salary and applicable benefits shall be maintained by the Hospital and the Association agrees to reimburse the Hospital in the amount of the full cost of such salary and applicable benefits.

14. In or about the fall of 2010, the Association alleges that the practice at other Hospitals for other ONA Board members was as set out below. The Hospital has no direct knowledge of the accuracy of this information at this time nor was the Hospital aware of the practices at other Hospitals.

Vicki McKenna

> Vicki McKenna has been a member of the Board of Directors from 2006 to present and is employed by London Health Sciences Centre. The practice with respect to this hospital is that reimbursement, under Article 11.03, has been made only with respect to salary for days attributable to Association business. There has been no reimbursement with respect to the following:
>
> - vacation pay
> - statutory holidays
> - employer's portion of costs for health and welfare benefits, including:
>   - HOOPP
>   - Semi Private
>   - Extended Health
>   - Dental
>   - Group Life
>   - Accidental Death & Dismemberment
>   - Long Term Disability
> - employer's portion of costs for statutory remittances, including:

- CPP
- EI
- Health Tax
- WSIB
- HOOPP on vacation pay and statutory holidays

- Any other Hospital cost on vacation pay and statutory holidays

Anne Clark

Ms. Clark has been a Board member since 2006 to the present time and is employed by Queensway Carlton Hospital. The practice with respect to reimbursement by ONA to this hospital is the same as is outlined above with respect to Ms. McKenna.

Karen MacDonald

Karen MacDonald was a Board member for ONA during the periods 2007 and 2008. Her Hospital is the Sault Area Hospital. Reimbursement by ONA to Ms. MacDonald's Hospital, under Article 11.03, is on the same basis as set out with respect to Ms. McKenna.

Diane Parker

Diane Parker has been a Board member for the years 2009 and 2010. Ms. Parker's Hospital is Thunder Bay Regional Hospital. Reimbursement by ONA to Ms. Parker's Hospital, under Article 11.03, is the same as set out with respect to Ms. McKenna.

Jeanne Soden

Jeanne Soden was a Board member for the period of 2006 to 2008 and was employed by Woodstock Hospital. The practice with respect to reimbursement to Woodstock Hospital by ONA, pursuant to Article 11.03, is as set out with respect to Ms. McKenna above, save and except for the proportion of the Hospital's cost of health benefits that was attributable to the days taken as Association leave. In 2007, the hospital requested reimbursement for Hospital remittances. This was declined by the Association and not further pursued by the hospital.

15. Ms. Anne Clark is no longer on the Board, her term having ended in December, 2016.

16. The parties are aware that there is a similar dispute regarding the interpretation of Article 11.03 outstanding between Queensway Carleton Hospital and ONA and between Thunder Bay Regional Hospital and ONA recognizing that the background facts in those cases vary. QCH filed a grievance on July 30, 2012; TBRH filed a grievance on June 24, 2009. The dispute at Queensway Carleton Hospital was scheduled for arbitration but has been adjourned pending the outcome of the present case.

17. The Hospital has continued to invoice the Association for all salary and the other items as it had been doing prior to the filing of the grievance.

18. The Association's position has remained that the Association is only responsible for the gross salary payable to Summers for the days spent in his role with the Association (which excludes statutory holidays and vacation days) and for the Hospital's contribution to the payment of the cost of premiums for the following benefits: HOODIP, HOOP, semi-private hospital coverage, extended health care, group life and dental benefits.

19. Attached as Schedule 1 (Exhibit #7) is the letter sent by the Hospital to Mr. Dan Anderson in October of 2007. No response was provided by the Association. The Hospital alleges that it made several attempts by phone to contact the Association to discuss these issues without success. The Association claims no knowledge of such attempts.

20. On August 25, 2008, the Hospital wrote to Anderson. That letter is attached as Schedule 2 (Exhibit #8).

21. On August 27, 2008, the Association responded with the letter attached as Schedule 3 (Exhibit #9).

22. On September 30, 2008, the Hospital responded to the Association's correspondence of August 27, 2008 with the letter attached as Schedule 4 (Exhibit #10).

23. The Association continued to pay the amount owed according to their interpretation of the Collective agreement.

24. On October 14, 2008, the Hospital filed the grievance with the Acting Bargaining Unit President. Ms. Patti Lalla. A copy of the grievance is attached as Schedule 5 (Exhibit #2)

25. On October 24, 2008, the Association made a verbal request for an extension of the timeline to provide its response to the grievance. The Hospital agreed to such an extension until November 3, 2008.

26. On November 3, 2008, the Association provided its response to the grievance which is attached as Schedule 6 (Exhibit #3).

27. The parties agreed to waive the subsequent grievance procedure steps and refer the matter directly to arbitration.

28. On November 14, 2008, the Hospital was advised that Summers had been re-elected to the position of provincial Vice-President for the Association for the term beginning January 1, 2009. Mr. Summers has continued to be re-elected to this position since that time and remains in that position today.

29. In February, 2011 the parties convened before Arbitrator Mikus, who subsequently advised that she was winding up her practice. As a result, the parties agreed to appoint Mr. Steinberg as a replacement.

30. In the fall of 2013, the Participating Hospitals (through the OHA) and ONA were engaged in the negotiation of a new collective agreement.

31. As a result of bargaining, Article 11.03 was amended on November 20, 2013, and the underlined portion below was added:

> A nurse who is elected to the Board of Directors of the Ontario Nurses' Association, other than to the office of President, shall be granted upon request such leave(s) of absence as she or he may require to fulfill the duties of the position. Reasonable notice – sufficient to adequately allow the Hospital to minimize disruption of its services shall be given to the Hospital for such leave of absence. Notwithstanding Article 10.04, there shall be no loss of seniority or service for a nurse during such leave of absence. Leave of absence under this provision shall be in addition to the Association leave provided in Article 11.02 above. During such leave of absence, the nurse's salary and applicable benefits shall be maintained by the Hospital and the Association agrees to reimburse the Hospital in the amount of the full cost of such salary and <u>19% of salary in lieu of</u> applicable benefits.

32. The parties reserved the right to call evidence of bargaining history, which they subsequently did, without prejudice to either party's position in relation to the relevance of such evidence.

33. The parties have agreed to bifurcate the hearing by obtaining a ruling on the interpretation of Article 11.03 first, and addressing remedy afterwards if necessary.