IN THE MATTER OF GRIEVANCE DATED OCTOBER 14, 2014, ON BEHALF OF JODI BAHT;

AND IN THE MATTER OF AN ARBITRATION OF THE SAID GRIEVANCE

BETWEEN:

HEALTH SCIENCES ASSOCIATION OF SASKATCHEWAN,

UNION,

AND:

SUN COUNTRY REGIONAL HEALTH AUTHORITY,

EMPLOYER.

AWARD
February 22, 2016

T. F. (TED) KOSKIE, B.Sc., J.D.,
ARBITRATOR

Dates of Hearing: August 25, 26 and 27, 2015

Place of Hearing: 88 Grace Street, Weyburn, SK

Appearances: Peter J. Barnacle for the Union
Stephen McLellan for the Employer

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I. BACKGROUND

[1] By letter dated October 14, 2014, Health Sciences Association of Saskatchewan ("HSAS") lodged a grievance (the "Grievance")[1] alleging that the Sun Country Regional Health Authority ("SCHR") improperly denied paid sick leave to its member, Jodi Baht ("Baht"), for three (3) standby shifts in violation of the Collective Bargaining Agreement (the "CBA")[2] and any other applicable statutory provisions. On November 4, 2014, SCHR denied[3] the Grievance, alleging Baht was ineligible for sick leave, maintaining sick leave is only available when an employee is absent from work and that standby is not "work."

[2] On November 24, 2014, HSAS wrote to SCHR referring the Grievance to arbitration.[4]

[3] The parties agreed I:

a) would serve as Arbitrator to hear the grievance; and

b) had been properly constituted and had jurisdiction to hear and determine the Grievance.

II. FACTS

[4] Baht completed her Primary Care Paramedic ("PCP") training in 2003 and was subsequently licenced as an Emergency Medical Technician ("EMT"). EMT falls within the definition of Emergency Medical Services ("EMS"). Specific reference is made within the CBA

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[1] Exhibit U-2(a), Grievance letter from HSAS to SCHR dated October 14, 2014–Note: The parties agreed to amend the Grievance to include part of a third shift (October 3, 2014)

[2] Exhibit U-1, CBA between HSAS and Saskatchewan Association of Health Organizations ("SAHO") for the period of April 1, 2009 to March 31, 2013–Note: The parties agreed this CBA was in effect and applied to the SCHR at the time of this Grievance.

[3] Exhibit U-2(b), Letter from SCHR to HSAS dated November 4, 2014

[4] Exhibit U-2(c), Letter from HSAS to SCHR dated November 24, 2014

to address the uniqueness of EMS employees.[5] EMS "has to be staffed"–its employees work around the clock. It is physical work. An integral part involves the operation of ambulances. Ambulance services could not operate without a substantial part of its EMS roster being casual.[6] That is why, in part the CBA has a distinction between full time ("FT") and other than full-time ("OTFT") employees.[5] Some casual employees work close to full time hours.

[5] Charles Daniel Eddy ("Eddy"), EMS Director testified SCHR has two major EMS centres–Estevan and Weyburn–with four (4) ambulances based at each. Oxbow is the next level of community. They are staffed by FT and OTFT employees. The FT and some casuals are scheduled. Other staff are not scheduled, but available as needed. There are sixteen (16) service sites, more than one-half (½) of which do not have FT staff, but are run by casuals that are scheduled and expected to be timely and fit for duty.

[6] Baht commenced employment with SCHR in June 2003.[6] She initially worked in a permanent part-time ("PPT") capacity at SCHR's Oxbow facility as both a Special Care Aid and EMT. There were four (4) employees at Oxbow–one (1) FT and three (3) OTFT. One (1) ambulance was located there. When scheduled, Baht's priority was EMT duty.

[7] Baht transferred to SCHR's Estevan facility in 2006. Though Baht appears to have predominantly worked as a casual EMT, there were various periods when she worked in a temporary full-time ("TFT") capacity.[7] Her duties basically comprised:

a) stabilizing and transporting patients to hospital–mostly in Estevan, but sometimes bypassing Estevan to Regina;

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[5] Exhibit U-1, §12 & §15

[6] Examination in Chief, Garnet Dishaw ("Dishaw"); Cross Examination, Eddy

[5] Examination in Chief, Dishaw

[6] Exhibit U-3, Employee Information Report (Baht)

[7] *Ibid.*

b) transferring patients from one hospital to another or other appropriate places; and

c) emergency standby for local events.

[8] Three (3) ambulances–called a "First Car," "Transfer Car" and "Third Unit"–were located at Estevan. The permanent full-time ("PFT") staff would take and use the First Car for all first calls. Casual staff (on call) would use the Transfer Car when the First Car was busy and for transfers. Opposing shift employees would use the Third Unit when the first and second cars could not serve a particular need.

[9] In October 2014, SCHR employed eight (8) FT, three (3) OTFT and several relief workers at Estevan. Ideally, the FT employees were to cover the First Car and the OTFT employees the Transfer Car. SCHR produced a monthly schedule that remained consistently the same for each month of the year.

[10] SCHR scheduled Baht for the Transfer Car for October 3 - 7, 13 - 16, 22 - 26 and 31, 2014.[8] When scheduled for the Transfer Car, Baht is on call twenty-four (24) hours. There were subsequent changes to show she took day shifts–ten (10) hours each–instead on October 25 and 31 and a night shift–fourteen (14) hours–instead on October 26.

[11] The twenty-four (24) hour on call period starts at 6:00 a.m. on one day and ends at 6:00 a.m. on the next day. SCHR pays Baht five dollars ($5.00) for each hour on standby with a minimum payment of eight (8) hours each day.[9] If called in, SCHR pays Baht:

a) her regular rate–thirty dollars and seventy-seven cents ($30.77) per hour–for a minimum of three (3) hours; and

b) overtime after twelve (12) hours.

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[8] Exhibit U-4, October 2014 Schedule

[9] Exhibit U-1, CBA, §15.11(c)(iii)

If released, she goes back on standby. If called in again within the twenty-four (24) hour period, SCHR pays Baht a minimum of two (2) hours at time and one-half (1½) and double time for hours worked beyond three (3).[10] Again, if released, she goes back on standby.

[12] Baht is a single parent with two (2) teenage daughters at home with her. When on call:

a) Baht must have a cellular telephone with her;

b) there is zero tolerance for alcohol and other impairing substances;

c) some days there are no calls, other days calls are frequent;

d) if Baht gets a call, she has ten (10) minutes to get to the station;

e) Baht would be disciplined if she was not available while on call.

Though part of her job, being on call severely limits Baht's life style.

[13] On October 3, 2014, Baht:

a) commenced being on call at 6:00 a.m.;
b) was called in at 12:30 p.m.;
c) went back on call at 3:30 p.m.;
d) was called in at 4:00 p.m.;
e) went back on call at 6:15 p.m.; and
f) reported ill with a migraine headache and asked to book off at 7:45 p.m.[11]

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[10] Exhibit U-1, CBA, §15.12(a)

[11] Exhibit U-5, Baht Payroll Record; Exhibit U-6, Written Work Record A (Week Starting September 28, 2014); Typed Work Record A (Week Starting September 28, 2014); Also, see notations on Exhibit U-4, October 2014 Schedule

Baht remained ill for October 4 and 5, 2014, but went back on call on October 6, 2014.[12]

[14] Based on the records,[13] Baht testified that, based on the records, she lost, due to her illness, on:

a) October 3, 2014:

   i) a two (2) hour call-in that would have resulted in three (3) hours of pay at time and one-half (1½); and

   ii) the remainder of her standby amounting to eight and one-quarter (8¼) hours;

b) October 4, 2014:

   i) a three (3) hour call-in that would have resulted in three (3) hours of pay at regular time; and

   ii) standby amounting to twenty-one (21) hours; and

c) October 5, 2014:

   i) standby amounting to twenty-four (24) hours.

[15] SCHR has not paid Baht for these lost hours. Baht had hours of sick leave banked and available that well exceeded same.[14] She says these credits are something she earned and wants to access same for payment. She says access to same should be no different for casual, as opposed to full time, employees.

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[12] *Ibid.*

[13] *Supra*, footnote 10

[14] Exhibit U-8, Employee Status Report; Exhibit U-9, Portability of Benefits Report; Cross Examination, Eddy

[16] Baht testified that her manager said she was not entitled to sick leave benefits for the hours lost. Baht disputes that position saying she was paid sick leave when she took time off for surgery in December 2011. She said SCHR paid her based on her hours of work over the prior fifty-two weeks.[15] Lori Speers ("Speers"), Regional Director of Payroll, testifying for SCHR, says she is not sure how this was calculated, but it "appears" to be contrary to SCHR practice[16] and "thinks" it may be an error.

[17] Baht also testified that other employees have received pro-rated sick leave pay. She also gave the following examples:

a) Daniele Stephany, a relief worker, who was paid even though not scheduled; and

b) Brookelyn Hientz, a casual employee.[17]

[18] SCHR did not deny sick leave was paid to Baht in December 2011, but could not explain why. It did take issue with the latter examples given by Baht, saying the employees were "likely" on a shift, not a call in, thereby explaining why they would be paid sick leave.

[19] Dishaw, testifying for HSAS, says he has not heard of this issue before this grievance. He accounts for this by saying the usual practice is for employees to locate someone to fill in for them. This usually results in an exchange of shifts and is considered simpler and more practical. It is either done through the EMS Co-ordinator or by the employees themselves who then let the Co-ordinator know. He did say that it was HSAS' understanding, however, that when a schedule is posted and confirmed, a casual employee is entitled to be paid sick leave. He testified the

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[15] Admitted by Eddy in Cross Examination

[16] Exhibit E-5, Payroll Screenshot

[17] Exhibit U-6, Written Work Record A (Week Starting September 28, 2014), p. 2; Typed Work Record A (Week Starting September 28, 2014), p. 2

October 2014 Schedule[18] is an example of a posted and confirmed period.[19]

[20] SCHR has a different view of when sick leave is paid. Testifying for SCHR, Eddy, Director of EMS, said when a schedule is posted and confirmed, a casual employee is entitled to be paid if sick for more than two (2) weeks. On cross examination, Eddy admitted SCHR uses the average hours worked in the prior fifty-two (52) weeks to calculate what should be paid. However, he said they do not pay for the first two (2) week period.[20]

III. AWARD

[21] I find Baht entitled to sick leave for the standby shifts–on October 3, 4 and 5, 2014–she was unavailable due to illness.

[22] I find there is no basis upon which HSAS should be estopped from claiming access to same on behalf of Baht and other SCHR employees it represents.

[23] I allow the Grievance and direct SCHR to pay Baht sick leave for her shifts on October 3 (partial), 4 and 5, 2014.

[24] I will remain seized of the question of any matter that may arise out of implementing this decision. I will reconvene the hearing at the request of either party.

IV. DISPUTE

[25] The issues herein are as follows:

a) is Baht entitled to sick leave for the standby shifts–on October 3 (partial), 4 and 5,

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[18] *Supra*, footnote 8

[19] On Cross Examination, Eddy agreed and conceded this was based on the CBS, §15.03(a) & §15.03(b).

[20] This was confirmed by Speers on Cross Examination.

2014–she was unavailable due to illness; and

b) if the CBA is interpreted to mean Baht is entitled to access her sick leave credits, should HSAS be estopped from claiming access to same on behalf of Baht and, presumably, other SCHR employees it represents?

V. REASONS

A. CBA

[26] The relevant provisions of the CBA are as follows:

ARTICLE 1 - DEFINITIONS

. . .

1.02 "Casual Employee" is a person who:

(i) works on a call-in basis and is not regularly scheduled; or

(ii) is regularly scheduled for a period of three (3) months or less for a specific job.

Casual Employees shall be entitled to all benefits and rights in accordance with both the Benefit Plan Documents and the Collective Agreement.

. . .

1.05 "Day" shall mean the twenty-four (24) hour period calculated from the time the Employee commences work.

. . .

1.09 "EMS" shall mean emergency medical services where Emergency Medical Technicians, Emergency Medical Technicians- Advanced, Paramedics and Emergency Medical Dispatchers are employed.

. . .

1.11 "Full-Time Employee" shall mean an Employee who is regularly scheduled to work the hours of work defined in Article 15.01.

. . .

1.21 **"Standby" shall mean any period during which an Employee is not on regular duty but must be available to respond without undue delay to a request to return to duty.**

. . .

ARTICLE 12 - SICK LEAVE

12.01 Definition Of Sick Leave

Sick leave means the period of time an Employee is absent from work because of disability due to illness or injury not covered by Workers' Compensation.

12.02 Reporting Of Absence

An Employee who will be absent from duty as a result of sickness or disability shall notify her immediate supervisor or designate as soon as possible prior to the commencement of her scheduled shift. By failing to do so, except in extenuating circumstances, the Employee shall be considered absent without leave and the Employer may make a deduction in pay for the time which expires between the time the Employee should have reported for work and the time at which the Employee reported their sickness or disability.

. . .

12.04 Accumulation Of Sick Leave Credits

Full-time Employees shall accumulate sick leave credits at the rate of one and one half (1½) days per month worked up to a maximum of one hundred and ninety (190) days. Other than full-time Employees shall earn sick leave credits on a pro rata basis.

Employees who currently have in excess of one hundred and ninety (190) days in their sick leave bank will be permitted to maintain their balance, but not accrue credits. If their sick leave bank drops below one hundred and ninety (190) days in the future, the Employee will be eligible to accrue credits again up to the established maximum of one hundred and ninety (190) days.

All new Employees to the bargaining unit will be given an advance of five (5) days [forty (40) hours] of sick leave credits.

12.05 Deductions From Sick Leave Credits

(a) For full-time Employees, a deduction shall be made from accumulated sick leave credits for all normal working hours (exclusive of Public Holidays) absent for sick leave.

(b) Part-time Employees shall have access to accrued sick leave credits during the posted and confirmed period for shifts scheduled prior to becoming ill. Outside the posted and confirmed period, access to accrued sick leave credits will be based on their letter of appointment or the average number of paid hours in the fifty two (52) weeks preceding the illness, whichever is greater.

(c) Casual Employees shall have access to accrued sick leave credits during the posted and confirmed period for shifts scheduled, prior to becoming ill. Outside the posted and confirmed period, a casual Employee who remains unable to work due to illness shall have access to sick leave credits based on the average number of paid hours in the fifty two (52) weeks preceding the illness, or since date of hire, whichever is less, provided the Employee has worked a minimum of 780 hours during that period.

(d) Casual EMS Employees shall have access to accrued sick leave credits during the posted and confirmed period for shifts scheduled. In addition, a casual EMS Employee who remains unable to work due to illness shall have access to accrued sick leave credits based on the average number of paid hours in the fifty two (52) weeks preceding the

illness, or since date of hire, whichever is less.

. . .

ARTICLE 15 - HOURS OF WORK

. . .

15.01 . . .

B. Emergency Medical Services Employees

(a) Hours Of Work:

Notwithstanding other provisions of this agreement, and consistent with The Ambulance Act, the standard hours of work for full -time Employees shall consist of scheduled shifts so as to ensure a forty-two (42) hour work week averaged over a period of sixteen (16) weeks and two thousand, one hundred and eighty four (2184) hours annually. Hours of work do .not include periods when the Employee is assigned standby as per Article 15.11.

Notwithstanding the above annual hours of work, where it is mutually agreed between the Employer and the Union, the parties may implement standard hours of work of one thousand, nine hundred and forty-eight point eight (1948.8) for EMS Services.

. . .

(d) Each day paid for sick leave, annual vacation , public holiday and paid leave of absence shall be considered a shift worked.

. . .

15.03 Scheduling Of Work

Where posted work schedules are required ;

(a) Provisional work schedules shall be posted forty-two (42) calendar days in advance in a place accessible to Employees.

(b) Work schedules shall be confirmed and posted no less than fourteen (14) calendar days in advance.

(c) When an Employee is required to change their shift from the posted and confirmed schedule, as a result of an Employer directive, the Employee shall be paid overtime at the rate of double time (2X) for all shift(s) so changed. It is agreed, however, that in emergency circumstances which could not have been foreseen by the Employer, the double time (2X) rate shall only be paid for the first five (5) shifts so changed.

(d) Where deviation from the posted and confirmed schedule results from Employee initiated changes or where there is mutual agreement with the Employee(s) and the Supervisor, such changes shall not be subject to overtime provisions unless overtime would have been paid irrespective of the change.

(e) Amendments to master rotations shall occur only after consultation with affected Employees.

. . .

15.09 Minimum Report Pay

(a) Any Employee reporting for work shall be paid no less than three (3) hours at the regular rate of pay;

(b) The Employer shall not implement scheduled shifts of less than three (3) consecutive hours.

. . .

15.11 Standby

(a) For the purpose of standby, a day means a twenty-four (24) hour period calculated from the time an Employee commences her scheduled shift or for an Employee not working a scheduled shift a day means the twenty-four (24) hour period calculated from the time she is assigned standby.

(b) Standby assignment shall mean any period during which the Employee is not on regular duty but is designated on standby, and must be available to respond without undue delay to any request to report to duty. Where ever possible, Employees shall not be assigned standby on scheduled days off.

(c) A standby payment shall be paid to each Employee so assigned on the following basis:

(i) $2.19 per hour for each hour on standby on a regular working day with a minimum payment for eight (8) hours.

or

(ii) $4.12 per hour for each hour on standby on days off and Public Holidays with a minimum payment for eight (8) hours.

(iii) OTFT EMS Employees shall be paid $5.00 per hour for each hour on standby with a minimum payment of eight (8) hours each day on standby.

(d) Hourly standby payments will cease, subject to a minimum payment of eight (8) hours of standby, for the length of time an Employee receives pay for reporting to work.

(e) Employees will not be scheduled for standby for more than seven (7) consecutive twenty-four (24) hour days. Except by mutual agreement Employees will be scheduled at least two (2) consecutive twenty-four (24) hour days off following the seven (7) day period.

15.12 Call Back

(a) Regular Call Back

Any Employee who is called back to work after having completed her regular work schedule and having left the work site, shall be paid at the rate of time and one-half (1-1/2) the regular rate for the first (1 51) three (3) hours and thereafter double (2x) the regular rate of pay, but with a minimum of two (2) hours at the rate of time and one-half (1-1/2) the regular rate.

(b) Call Back After Midnight Or On Public Holiday Or On Scheduled Day Off

Employees who are called back to work between the hours of 2400 (midnight) and 0700 hours or on Statutory Holidays or on their scheduled days off, shall be paid at the rate of double (2X) the regular rate of pay for all hours so worked with a minimum of two (2) hours at the rate of double (2X) the regular rate. However, should a call back referred to above, commence prior to 2400 hours (midnight) or continue after 0700 hours, such period of time (outside of the frame of 2400 and 0700) shall be paid at the rate of one and one half (1 1/2) times the regular rate of pay.

15.13 Call-In On Unscheduled Days- Part Time Employees

Where ever possible, a part time Employee shall not be assigned standby on days she is not scheduled unless mutually agreed otherwise. If mutual agreement is obtained regular work day standby rates will be paid and regular rates of pay will apply if called in. If mutual agreement is not obtained and the Employee is so assigned she will receive standby premium as per Article 15.11 (c) (ii) and if called in paid as per Article 15.12 (b).

15.14 Call-In Of Casual Employees

A casual Employee who is called in while on standby, and who has not been scheduled to work that calendar day, will receive regular rates of pay for all hours worked, subject to Article 15.01.

A casual Employee who is called in and is scheduled to work later that calendar day shall be paid overtime as per Article 15.04 for all hours worked on that calendar day which exceed the regular scheduled daily hours of work for full-time Employees in that work area.

15.15 EMS Services- Standby And Reporting To Work

(a) Full-time and Part-time Employees

A full-time or part-time Employee that is assigned standby and required to report to work, on either a Public Holiday or scheduled day off, shall receive pay in accordance with Article 15.12(b).

(b) Casual Employees

(i) A casual Employee required to report to work while on standby will receive regular rates of pay for all hours worked subject to Article 15.09. Overtime rates shall be paid for all hours worked in excess of eight (8) hours per day or the regular scheduled daily hours of work of a full-time Employee in the work area, whichever is greater. If such Employee is required to report back within the original three (3) hour period, such time will be deemed continuous with the original call and will not precipitate another three (3) hour minimum.

(ii) Employees who have previously been at work that day and are called back to work will receive call back pay in accordance with 15.12 (a).

(Iii) A casual employee that is assigned standby and required to report to work, on either a Public Holiday or after being assigned standby for greater than seven (7) consecutive days, shall receive pay in accordance with Article 15.12(a).

(c) After midnight provisions as per Article 15.12 (b) shall not apply.

B. IS BAHT ENTITLED TO SICK LEAVE FOR THE STANDBY SHIFTS SHE WAS UNAVAILABLE DUE TO ILLNESS?

1. BURDEN OF PROOF

[27] Citing Brown and Beatty,[21] counsel for SCHR submits that:

> . . . the Union has the "ultimate" burden to establish on a balance of probabilities the Employer breached the collective agreement by not allowing the Grievor access to her accrued sick leave credits . . .

[28] Counsel for HSAS did not disagree with where the burden rests, but proffered the following comments of Arbitrator Alma Wiebe[22] in clarification of same:

> 37. The Employer argued that the onus rests with the Union to prove, on a balance of probabilities, that the Employer breached the Collective Agreement by denying family responsibility leave to the Grievor. The Employer argued further that in order to prove a breach of the Collective Agreement the Union must first meet the burden of establishing on a balance of probabilities that its interpretation of the Collective Agreement is more likely. In other words, the Union bears the burden of proving both the Agreement and the breach. The Employer argued that the onus on the Union is especially strong where a monetary benefit is claimed particularly where the benefit is paid to accommodate personal circumstances. The Union presented no argument on these points.
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> . . .
>
> 39. Arbitrator Zborosky in *HSAS and Regina Qu 'Appelle Health Region* (Chevalier) carefully analyzed the onus of proof with respect to Article 11.06(a) and concluded that the onus is on the Union to prove, on a balance of probabilities, that the employer's denial of the request for family responsibility leave violates the collective agreement. She specifically rejected the employer's argument that the union must also prove that its proposed interpretation of Article 11.06(a) is more likely than the employer's. She concluded that:
>
> > Once "entitlement" is proven under all of the criteria of Article 11.06(a), the Grievor is entitled to this leave. Given that there is no discretion to be exercised by the Employer, the onus does not shift to the Employer to justify a denial for exercising discretion to deny the leave. (para. 42)
> >
> > . . .
> >
> > To be clear, when interpreting a provision of the Collective Agreement, we are

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[21] Brown and Beatty in Canadian Labour Arbitration, Fourth edition (on-line at Labour Spectrum), (Aurora, Ont.: Canada Law Book, 2014), p. 3:2400

[22] *HSAS* v. *Saskatoon Health Region* (Wiebe, A. Nov. 13, 2009)

> initially charged with the task of discovering the intention of the parties, not with weighing evidence to determine which party has the "better" interpretation of the provision in question. It is only once we discover the parties' intention regarding the meaning of the provision in question that we determine the Union has proven, on a balance of probabilities, that the Collective Agreement provision applies to the particular fact situation giving rise to the grievance, thereby entitling the Grievor to redress for the failure to receive family responsibility leave. (para. 44)
>
> 40. I agree with Arbitrator Zborosky's conclusions with respect to the onus of proof.

[29] I agree with Arbitrators Wiebe and Zborosky.

[30] It is worthy of note that counsel for SCHR argues there is a difference between the evidentiary burden and what needs to be proven. With respect to the latter, he submits the following principles should apply:

> 11. . . .
>
> - there must be clear and cogent evidence that the Employer intended to allow employees, who are unable to accept a standby assignment, access to sick leave credits (i.e. a monetary benefit);
> - where the language of a collective agreement is clear, its express terms may be found to apply even if the literal interpretation is unfair or oppressive; and
> - arbitrators should not impose a monetary obligation that the employer did not bargain to pay.[23]

I agree with this proposition.

[31] Counsel for SCHR argues:

> 13. The underlying rationale for not imposing monetary obligations on employers that have not bargained to pay is clearly economic. Employer's biggest concern in negotiating collective agreements is the overall cost of the agreement. In order to remain viable, an employer must have a good idea as to what the financial implications of an agreement are and for this they use costing models . . .
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> 14. In this case, the Union seeks to impose a monetary obligation on the Employer without the Employer ever having had the opportunity to determine its overall cost and, more importantly,

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[23] *Golden Giant Mine and United Steel Workers of America, Local 9364*, [2004] CarswellOnt 9937, [2004] O.L.A.A. No. 600, 78 C.L.A.S. 39 (Marcotte)

> without the Employer being able to reject such a proposal or to demand financial concessions elsewhere in exchange.

Counsel for HSAS disagrees with the position set forth in the second paragraph.

[32] Counsel for SCHR goes on to argue:

> 12. An absence from work with pay is a monetary obligation that either must be imposed by legislation or agreed to by the Employer. In this case, the Employer did not agree to allow employees, who are unable to accept a standby assignment, access to sick leave credits.

Counsel for HSAS maintains SCHR did agree to such an obligation.

2. INTERPRETATION PRINCIPLES

[33] Counsel for HSAS submitted that my approach to interpretation of the CBA should be what is commonly called "the modern principle of interpretation." In explanation of same, he referred me to the following passages from the decision of Arbitrator Eliott:[24]

> 39 I use as my approach to the interpretation of collective agreements the same principle that the Supreme Court of Canada has adopted for the interpretation of legislation. I refer to this approach as the modern principle of interpretation. In my view, the modern principle of interpretation is a superior statement, as a guide to interpretation, than the rule stated in Halsbury's Laws of England to which Canadian texts refer, 14 which relies heavily on the "intention of the parties". The modern principle of interpretation is, I believe, particularly apt for interpreting collective agreements which, of course, are based upon legislation.
>
> 40 The modern Canadian approach to interpreting agreements (including collective agreements) and legislation, is encompassed by the modern principle of interpretation which, for collective agreements, is:
>
> > In the interpretation of collective agreements, their words must be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object, and the intention of the parties.
>
> 41 Using this principle, interpreters look not only to the intention of the parties, when intention is fathomable, but also to the entire context of the collective agreement. This avoids creating a fictional intention of the parties where none existed, but recognizes their intention if an intention can be shown. The principle also looks into the entire context of the agreement to

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[24] *Communications, Energy and Paperworkers Union of Canada, Local 777* v. *Imperial Oil Strathcona Refinery* (Elliott July 7, 2004)

determine the meaning to be given to words in dispute.

42 Before applying the modern principle of interpretation to this grievance I will identify the components of the modern principle and what they encompass. The modern principle of interpretation is a method of interpretation rather than a rule, but still encompasses the many well-recognized interpretation conventions. The modern principle directs interpreters:

1 to consider the entire context of the collective agreement

2 to read the words of a collective agreement

- in their entire context
- in their grammatical and ordinary meaning

3 to read the words of a collective agreement harmoniously

- with the scheme of the agreement
- with the object of the agreement, and
- with the intention of the parties.

. . .

48 Once an interpretation is settled upon, it should be tested by asking these questions:

- is the interpretation plausible–is it reasonable?
- is the interpretation effective–does it answer the question within the bounds of the collective agreement?
- is the interpretation acceptable in the sense that it is within the bounds of acceptability for the parties and legal values of fairness and reasonableness?

It is the modern principle of interpretation that I have used to analyze the collective agreement, evidence and argument and to make a decision on the grievance.

[34] Counsel for HSAS submitted this approach has been consistently applied and, in support thereof, referred me to *SUN* v. *Regina Qu'Appelle Health Region*,[25] *SEIU-West, Locals 299 & 333* v. *Extendicare (Canada) Inc.*[26] and *HSAS* v. *SCHR*.[27]

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[25] *SUN* v. *Regina Qu'Appelle Health Region* (Pelton, Cymbalisty & Grainger May 24, 2011), paras. 129 & 171

[26] *SEIU-West, Locals 299 & 333* v. *Extendicare (Canada) Inc.* (Pelton April 11, 2012), paras. 108, 109 & 123

[27] *HSAS* v. *SCHR* (Ponak May 5, 2015)

[35] Counsel for SCHR acknowledges that "in the labour arbitration world, a leading case on contractual interpretation is the decision of Arbitrator Elliott in *Imperial Oil Strathcona Refinery*. However, he argues the Supreme Court of Canada has in *Sattva Capital Corp.* v. *Creston Moly Corp.*[28] has now set out the "real modern approach."

[36] *Sattva* examined the development in the law with respect to the availability and applicability of extrinsic evidence. Ultimately, it was held that more recent willingness by courts to examine the "factual matrix" (or surrounding circumstances) at the time of formation of a contract meant that interpretation of contracts generally had shifted from its previous position as a question purely of law, to one (more often) of mixed fact and law.

[37] As such, the Court observed that contractual interpretation was increasingly focused on "a practical, common-sense approach not dominated by technical rules of construction" where the main concern "is the intent of the parties and the scope of their understanding."[29]

[38] Importantly, the Court in *Sattva* was careful to state that this shift did not displace the parol evidence rule, and that evidence in terms of the subjective intention of the parties continued to be precluded. The surrounding circumstances known to the parties at the time of contract formation, however, can be used as an interpretive aid for "determining the meaning of the written words . . . not to change or overrule the meaning of those words."[30]

[39] It should be noted that, in the labour arbitration sphere, there had been a shift in the law around interpretation from the traditional approach (which focused more on determining the intentions to the parties) to a "modern approach" described and implemented by Arbitrator Elliot.[31] It is noteworthy, however, that the intentions of the parties do remain a consideration under the modern approach and have not been removed entirely. Regardless of this shift, the

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[28] [2014] SCC 53

[29] *Ibid.*, at para. 47

[30] *Ibid.*, at paras. 59 & 60

[31] *Supra*, footnote 24

admissibility and applicability of extrinsic evidence (such as past practice) in a labour arbitration context remained consistent:

a) if, after analyzing a given term of a collective agreement, the meaning was not clear and unambiguous, then one could admit extrinsic evidence to serve as an interpretive aid; and

b) if, regardless of ambiguity, there was an unfairness argument, then extrinsic evidence could be admitted in order to determine the potential role of equitable estoppel.[32]

[40] In the present case, counsel for SCHR has submitted that the effect of *Sattva* on labour arbitration is that arbitrators are now free to admit extrinsic evidence without first determining there to be an ambiguity. However, he has posited that the same extrinsic evidence–insofar as it concerns a subjective quality–cannot ultimately be determinative.

[41] Counsel for SCHR presented a similar argument in *Sun Country*[33] to which counsel for HSAS replied that *Sattva* did not apply to labour arbitration as it was dealing with a commercial arbitration context.[34] Arbitrator Ponak discussed the applicability of *Sattva* and decided that it was unnecessary to make a determination as to whether *Sattva* applied, but did note that labour law has developed differently than commercial law and that the unique attributes of the former, including the history of that development, would be required for such a decision to be made.[35]

[42] It at first seems that the "modern approach" to interpretation in labour law is at cross-purposes with the Court's decision in *Sattva*. The former seems to move away from consideration of the intentions of the parties, while the latter explicitly states that courts have increasingly looked to such considerations. However, I am of the view the Court's decision in

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[32] Brown & Beatty, *Canadian Labour Arbitration* (4th Ed) at para. 2:2221

[33] *Supra*, footnote 24

[34] *Ibid.*, at para. 37

[35] *Ibid.*, at paras. 40 - 46

Sattva is able to operate without displacing the current labour arbitration approach if extrinsic evidence is broken down into chronological categories being:

a) A-type–extrinsic evidence before/at the time of contract formation; and

b) B-type–extrinsic evidence after the time of contract formation.

As well, the distinction between extrinsic evidence that reveals subjective intentions versus objective intentions is helpful in order to incorporate *Sattva* into the labour arbitration scheme for interpretation.

[43] In my view, it neither offends the ruling in *Sattva*, nor the current framework for interpretation in labour law if the following model–which for ease of reference, I will call this the "restated modern approach"–is applied:

a) Situation I–if there is ambiguity or, if no ambiguity, but estoppel, you can look to extrinsic evidence–A-type and/or B-type–that can be determinative, whether subjective or objective; and

b) Situation II–if no ambiguity and no estoppel, you can look to extrinsic evidence–A-type only–that can be determinative, only if objective (subjective cannot be determinative).

[44] SCHR's position appears to be that Situation II is the only option post-*Sattva* unless there is unfairness leading to estoppel. HSAS seems to take the position that *Sattva* does not apply at all, and therefore only Situation I is available.

[45] However, neither situation offends the other given the potential restriction on the type of extrinsic evidence up for consideration. In other words, this seems to strike a balance between preserving the current labour arbitration framework that has developed out of a need to consider the ongoing relationships that the parties usually have, and implementing the shift acknowledged by the Supreme Court which has put an emphasis on the "factual matrix" involving the parties

understandings of the circumstances at the time of contract formation.

[46] The criticism that might be leveled at this understanding of *Sattva's* place in labour law may be that, if there is no ambiguity/estoppel in relation to a given collective agreement, what objective extrinsic evidence about the circumstances before/at formation of that agreement could be relevant?

[47] It may well be that Situation II is only occasionally helpful, but a situation could be imagined where the parties' activities during the period up to the time of the CBA may be an instructive interpretive aid in assessing what appears to be otherwise clear language. It may be–albeit likely very rarely–that such evidence calls into question the clarity of the language (if, for example, past practice during a bargaining period was diametrically opposed to the language in the new agreement).

[48] Finally, it is noteworthy that Ponak in *Sun Country*[36] makes note of the fact that the Supreme Court has stated that "subjective intention of one party" is not determinative. This is important since it illustrates that labour arbitration does not necessarily develop in isolation of developments in other areas of law, and more importantly because it emphasizes that the exclusion of subjective evidence is not dispositive of the ability to look at extrinsic evidence/past practice.[37]

3. INTERPRETATION

[49] HSAS represents employees in health science professions or occupations in the provision of health care in Saskatchewan. One component of its membership was described as a "credentialed element." These employees have a degree, diploma, certificate or other post secondary education. This includes a portion of, but not all EMS employees. EMTs do fall within the scope of their representation. HSAS is certified to represent such employees in

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[36] *Supra*, footnote 27 at para. 43

[37] *Supra*, footnote 24 at para. 73

SCHR. In the course of same HSAS has negotiated a provincial CBA with SAHO that has been ratified by and therefore apples to SCHR.[38]

[50] The parties are *ad idem* that EMS employees are unique. EMS must be staffed and accessible throughout the health region around the clock. This can only be accomplished with a substantial part of that employment roster being casual and working between FT and OTFT. Specific provisions have been negotiated within the CBA to address that and other elements of their uniqueness.[39] For example, within the CBS, there are definitions for Casual Employee (§1.02), EMS (§1.09) and Standby (§1.21). In addition, there are unique provisions for EMS employees in Articles 11.09 (Educational Leave of Absence), 12.05 (Deductions From Sick Leave Credits), 15.01 (B. Emergency Medical Services Employees), 15.11 (Standby), 15.15 (EMS Services–Standby and Reporting to Work), 16.01 (Allocation of Additional Relief/Casual Work), 18.06 (Increment Date), 20.01 (Professional/Licensing Fees) and 25.06 (Uniforms) and Letter of Understanding #10 (Re: Work Assignment for EMS Employees).

[51] Though Baht predominantly worked as a casual EMT, there were various periods when she worked in a TFT capacity.[40] By virtue of Article 1.2 of the CBA, Baht is an EMS employee.

[52] Counsel for HSAS went directly to Article 12.05(d) which reads:

> Casual EMS Employees shall have access to accrued sick leave credits during the posted and confirmed period for shifts scheduled. In addition, a casual EMS Employee who remains unable to work due to illness shall have access to accrued sick leave credits based on the average number of paid hours in the fifty two (52) weeks preceding the illness, or since date of hire, whichever is less.

He argues:

a) the right to sick leave arises from a posted and confirmed period–something that is

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[38] Evidence in Chief, Dishaw

[39] Exhibit U-1, Evidence in Chief, Dishaw

[40] Exhibit U-3, Employee Information Report (Baht)

certain and not speculative;

b) the Article uses the word "shall," which means you get sick leave if you meet the requirements–you are sick during the period and have credits; and

c) this is the grammatical and ordinary meaning of the Article.

[53] Counsel for SCHR argues that the matter is not quite so simple.

a. Work Versus Standby

[54] Counsel for SCHR begins its argument by analyzing Article 12.01 and the definition of "sick leave" therein, which requires the employee to be absent from work because of a disability due to illness. Since "work"is not explicitly defined in the CBA, counsel argues that one must look elsewhere and turns to Article 15 which deals with "Hours of Work."

[55] Counsel notes that while the section still offers no explicit definition of "work," it does provide that "[h]ours of work do not include periods when the Employee is on assigned standby." Counsel emphasizes that work cannot possibly have been meant to include assigned standby since:

a) Article 15 references *The Ambulance Act* (which excludes "on-call periods" from its definition of work); and

b) Article 1.21 defines "standby" as periods when employees are "not on regular duty."

Counsel submits "standby" under Article 1.21 is defined in the same way under Article 15.11(d) which indicates that standby payments do not overlap with pay for "reporting to work."

[56] Counsel contends that there is an "interchange between 'reporting to duty' and 'reporting to work,'" specifically in terms of casual employees as found in Articles 15.15(b)(i) and

15.15(b)(iii), which dictate the rate of pay a casual employee will receive when reporting to work while on standby. In other words, counsel suggests that there is a clear distinction in the CBA between being on standby (which involves an obligation to potentially report to work) and being at work. Applying this argument to the matter at hand, Counsel states that Baht was not calling to advise she would be absent from work due to illness, but rather that she would be absent from standby due to illness.

b. Sick Leave Credits

i. For Full-time employees

[57] Counsel for SCHR next referred me to Article 12.05(a), which provides FT employees can deduct accumulated sick leave credits for all normal working hours when they are absent on sick leave. Counsel asserts it can be inferred that the rate of pay here would be normal hourly rates not overtime/premium rates, based on the inclusion of the term "normal" (working hours).

[58] The next inference counsel puts forward is that normal working hours are the standard hours of work as defined in Article 15.01B(a)–being forty-two (42) hours per week averaged over sixteen (16) weeks. He argues Article 15.01B(d) supports this inference as it states that each day of paid sick leave is considered a shift worked.

[59] Counsel for SCHR says that in the situation where a FT employee is absent from normal working hours and a standby assignment, he or she will not be paid for the standby assignment in the same way he or she would not be paid for overtime that a replacement employee performed.

ii. For Casual Employees

[60] Counsel for SCHR says that for casual employees who do not have defined normal working hours, Article 12.05(d) provides that accumulated sick leave credits can be deducted "during the posted and confirmed period for shifts scheduled." He submits that "shifts

scheduled" are exclusive of assigned standby because:

a) as aforementioned, standby is not the same as work; and

b) because assigned standby is not part of the "shift scheduled" for normal working hours of full-time employees.

Counsel argues that the word 'scheduled' does not fit with 'reporting to work from standby' because the latter does not involve advance knowledge of going to work.

[61] Counsel argues that the since Baht was absent from standby, she was:

a) not absent from work (therefore not under sick leave per Article 12.01); and

b) not able to access accumulated sick leave under Article 12.05(d) because she was not absent from a scheduled shift.

c. Shifts Scheduled Versus Standby

[62] Counsel for SCHR agues various provisions of the CBA provide that assigned standby is not a shift scheduled.

i. Reporting Absences

[63] Counsel for SCHR referred me to Article 12.02 which provides employees who do not notify they will be absent due to illness are considered AWOL and have pay deducted from the time they should have notified until the time they do. He argues employees on standby are not expected to report to work without being contacted, and do not know if/when they will report to work until they are contacted.

ii. Minimum Report Pay

[64] Counsel for SCHR referred me to Article 15.09 which he maintains provides that employees reporting to work are different from employees working scheduled shifts. He argues the former is entitled to minimum three (3) hours' pay and the latter cannot be scheduled for less than three (3) hours. For illustration purposes, he looks at Baht's time entries for October 6, 2014:

a) YD from 6:00 a.m. - 12:45 p.m.;
b) XZ for 12:45 p.m. - 3:45 p.m.; and
c) YD for 3:45 p.m. to 6:00 a.m.

[65] The codes below have the meanings adjacent to each:

a) YD is non-full time employees on standby;
b) XZ is casual employees reporting to work from standby;
c) SC is full-time employees standby code; and
d) XD is sick leave.

[66] Counsel for SCHR argues the codes indicate this was not a scheduled shift, because XZ was used thereby triggering the minimum three-hour regular pay.

iii. 24-Hour Clock for "Standby" - (Article 15.11)

[67] Counsel for SCHR referred me to Article 15.11 that provides for standby to be one (1) day that equals twenty-four (24) hours from an employee commencing a scheduled shift. He says similarly throughout the CBA, one (1) day equals twenty-four (24) hours from start of work. He then referenced entries for October 6, 2014. On that day, Baht was paid standby rates during YD and normal hourly rate for XZ. In contrast, a FT employee was on a scheduled shift, so went from 8:00 a.m. - 6:00 p.m. XZ and 6:00 p.m. - 8:00 a.m. SC. Counsel for SCHR appears to argue that the scheduled shift is indicated by the fact that regular pay was earned from the outset

of the FT employee's shift, with standby for the remainder, whereas for Baht, standby pay was earned, then regular pay, then standby again.

[68] Counsel for SCHR appears to reference the October 2014 work and standby schedule to point out that Baht was assigned standby on October 3 - 6, 2014, which would result in her twenty-four (24) hour day clock automatically starting at 6:00 a.m. at standby rates. On October 4, 2014, Baht entered XD 6:00 a.m. - 6:00 a.m. in the same way she entered YD 6:00 a.m. - 6:00 a.m. for a subsequent day when she was not required to report to work from standby. Counsel argues the entry having a start-time of 6:00 a.m. on October 4, 2014, illustrates that this was a standby assignment and not a scheduled shift.

4. THE PENSION PLAN

[69] Counsel for SCHR submits that the pension plan is objective evidence of background knowledge which was (or should reasonably) have been known by the parties during negotiation of the CBA. The pension plan treats basic salary and sick-leave credits as earnings, but excludes overtime and additional remuneration.

[70] Counsel submits that the CBA similarly makes deductions based on salary and sick-leave credits for full-time employees, and contends that the payment rates for standby–$2.19 for full-time employees and $5.00 for other employees–is akin to additional remuneration. Counsel states that SHEPP's earning policy supports categorizing standby pay as additional remuneration.

[71] Counsel argues that the parties would have known the terms of the pension plan when entering into the CBA and would not have circumvented pension plan exclusions by allowing employees to convert unpensionable earnings (standby pay) into pensionable earnings (sick leave pay).

5. *PRAIRIE NORTH HEALTH REGION* v. *SUN*

[72] Counsel identifies *Prairie North Health Region* v. *SUN*[41] as similar to the matter at hand, since it involved a nurse attempting to claim family leave for time she was assigned standby. Counsel contends that the CBA language in that case was far less clear than in the matter at hand.

[73] In that case, the grievance was dismissed, but the decision-maker noted that this was in part because the Union had not met its burden of proof. Counsel here submits that the findings would have been sufficient for the employer to have succeeded outright, and notes that the case did not seem to appreciate the conversion of pensionable from non-pensionable earnings.

[74] Counsel notes that the decision was made in the face of potential financial/personal hardship to the grievor, and that the decision-maker noted that monetary obligations should not be imposed through arbitration and should be subject to the parties' negotiations. Lastly, counsel notes that the benefit sought by the grievor has not subsequently been incorporated into subsequent CBAs for those parties and states that this is a result of the reality of negotiated agreement: the parties often have to live with less than ideal arrangements.

[75] Counsel says that the parties could have incorporated language into the current CBA that would allow access to sick leave credits for employees on standby and chose not to.

[76] In his argument, Counsel for SCHR has certainly left no stone unturned. Had I been dealing with a different employee classification, I must say I would have found his position to be compelling. However, I am here dealing with a Casual EMS Employee. According to the evidence before me, such employees are, unlike virtually all other employees within the bargaining unit, treated uniquely with specific provisions that apply only to them. My reading of these provisions brings about a result that is fatal to SCHR's position. I will elaborate.

[77] I start with Article 12.01. This is a provision of general application to all employees,

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[41] 2004 CarswellSask 978, 77 C.L.A.S. 259

including EMS. It speaks of "Sick Leave" being the period of time an employee is "absent from work." Since the CBA does not have a definition of "work," Counsel for SCHR refers me to Article 15 and its reference to *The Ambulance Act*.[42] He argues section 37 excludes "on-call periods" from its definition of work. When coupled with Article 1.21 that defines "standby" as periods when employees are "not on regular duty," Counsel argues there is a clear distinction in the CBA between being on standby and being at work and, therefore, Baht was not calling to advise she would be absent from work due to illness, but rather that she would be absent from standby due to illness.

[78] In order to analyze this argument, I will first look at section 37 of *The Ambulance Act*. It reads:

> ***Platoons***
> 37(1) In this section, "work" means the period during which an employee is required or permitted to be at the disposal of his employer, but does not include periods when the employee is on call.
>
> (2) An operator may divide his employees into platoons for work in accordance with one of the following systems:
>
> (a) under which one platoon is not on duty for work for more than 12 consecutive hours in each 24 hours and the other is not on duty for work for more than 12 consecutive hours in each 24 hours, with the average number of hours of work of each platoon over a period of 16 weeks not to exceed 42 hours per week and each platoon to alternate at least once every seven days from day work to night work or from night work to day work; or
>
> (b) under which one platoon is not on duty for day work for more than 10 consecutive hours in each 24 hours and the other is not on duty for night work for more than 14 consecutive hours in each 24 hours, with the average number of hours of work of each platoon over a period of 16 weeks not to exceed 42 hours per week and each platoon to alternate at least once in every seven days from day work to night work or from night work to day work.

First, this provision is not of general application. It is confined to that section of the *Act*–a provision setting up restrictions for hours a platoon employee is actually working. It excludes "periods when an employee is on call" for good reason. If it applied to such circumstances, it would undermine the on-call regime. Furthermore, I do not see SCHR's position assisted by

[42] S.S. 1986, c. A-18.1

Article 1.21. It ignores Article 12.05(d)–a unique provision for Casual EMS Employees–that provides such employees "shall have access to accrued sick leave credits during the posted and confirmed period for shifts scheduled." My plain reading is that this provision is allowing sick leave for on-call time in addition to any lost work time. I might add that the second sentence of Article 12.05(d) speaks about a casual EMS employee "who remains unable to work due to illness." This does not bring the matter back to the language of Article 12.01. It simply creates a preamble for calculation of payment consistent for the unique casual EMS provision in Article 12.05(d).

[79] Counsel for SCHR argued the importance of "costing" SCHR's financial obligations stemming from the CBA. He referenced an article by David J. Corry in support of same.[43] I will reference the first sentence of a passage therefrom in SCHR's brief:

> It is absolutely essential that both parties in collective bargaining have the ability to cost the value of the wage and benefits package proposed in collective bargaining.

I agree that costing is important. I also note that Mr. Corry referenced the importance to both parties.

[80] Counsel for SCHR argued:

> 14. In this case, the Union seeks to impose a monetary obligation on the Employer without the Employer ever having had the opportunity to determine its overall cost and, more importantly, without the Employer being able to reject such a proposal or to demand financial concessions elsewhere in exchange.

No evidence was presented to me on this point. I can only assume Counsel wants me to infer that to be the case. I decline to do that.

[81] I might also add there was no evidence presented that would prove or even suggest that prediction of and costing for sick leave for casual EMS employees would be any more difficult

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[43] David J. Corry, Collective Bargaining and Agreement, (Aurora, Ont Canada Law Book, Loose-leaf, December 2008) at p. 7-1

than other employees. On the other hand, I do have evidence of the necessity for EMS to be operational twenty-four (24) hours, every day. The evidence goes further to say SCHR can only accomplish that with a compliment of casual EMS employees. Under SCHR's argument, there would be no eligibility for loss due to illness–at least for the first two (2) weeks–of on-call and call-in times. Though not addressed by counsel for SCHR, presumably SCHR's position is sick leave would be available for shifts taken, but that is all. There is no guarantee a casual EMS employee will ever get anything but on-call time. Granted, there is a reasonable expectation of call-in time. The evidence shows that. However, there was no evidence presented to show predictability for call in days. I am of the view the scheme and object of the CBA are in part to address the uniqueness of and need for casual EMS employees. I do not believe the recruitment and retention of casual EMS employees would be addressed if they faced the prospect of earning sick leave credits, but be unable to reasonably predict if and when they can access them. I do not find that would be a plausible interpretation.

[82] Counsel for SCHR next argues Article 12.05(a). I have already summarized the argument. Suffice it to say, he draws upon the Article to suggest Baht was not able to access accumulated sick leave under Article 12.05(d) because she was not absent from a scheduled shift. Again, I cannot accept this position. The CBA creates different approaches between FT and casual EMS employees. It is clear FT employees have regular or normal working hours. Other work via overtime and the like is neither regular, nor normal. It is reasonable that would be excluded from sick leave. It is different with casual EMS employees. All that is nor mal and predictable to them is what is posted and confirmed. The only reasonable interpretation is that is their scheduled shift.

[83] Counsel for SCHR next agues various provisions of the CBA provide that assigned standby is not a shift scheduled. Again, I have already summarized that argument.

a) Article 12.02 does not help SCHR. Placed in their unique context, the words of this Article have a clear meaning. If a casual EMS employee will be absent from "duty" due to illness, there is a duty to report. Employees who do not so notify, will have pay deducted from the time they should have notified until the time they do.

b) Article 15.09 does not help SCHR. Counsel for SCHR argues the codes resulting from the application support the proposition that casual EMS employees do not work a scheduled shift. I cannot agree. We are simply seeing the operation of a CBA that creates different approaches between FT and casual EMS employees.

c) Article 15.011 does not help SCHR. Counsel for SCHR argues that Baht having a start-time of 6:00 a.m. on October 4, 2014, illustrates that this was a standby assignment and not a scheduled shift. I cannot agree. We are simply seeing the operation of a CBA that creates different approaches between FT and casual EMS employees.

[84] Counsel for SCHR has suggested I should consider the Saskatchewan Healthcare Employees' Pension Plan[44] as an instructive interpretive aid. He also suggests I consider SHEPP's earning policy.[45] He submits the plan categorizes standby pay as additional remuneration and argues that the parties would have known the terms of the pension plan when entering into the CBA and would not have circumvented pension plan exclusions by allowing employees to convert unpensionable earnings (standby pay) into pensionable earnings (sick leave pay).

[85] Counsel for HSAS does not disagree that the plan categorizes standby pay as additional remuneration. However, he argues the plan and policy address accrual, not access and use of sick leave. Counsel argues there is no argument in the case at hand regarding accrual. There is a difference. I agree. For this reason, I do not find the plan and policy persuade me to vary my assessment of what I believe to be clear language.

[86] It remains to be noted that I do not find the *Prairie North Health Region* decision helpful to SCHR. This is particularly so because there the Arbitration Board found ambiguity.

[87] I find Baht is entitled to sick leave for the standby shifts–on October 3, 4 and 5, 2014–she

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[44] Exhibit E-3

[45] Exhibit E-2

was unavailable due to illness. I must now address SCHR's estoppel argument.

C. SHOULD HSAS BE ESTOPPED FROM CLAIMING ACCESS TO SICK LEAVE ON BEHALF OF BAHT AND OTHER SCHR EMPLOYEES ON STANDBY?

[88] Counsel for SCHR acknowledges the Supreme Court's endorsement of arbitral flexibility in invoking estoppel in order to craft peaceful resolutions that consider the ongoing relationships between parties to a collective agreement which is to function until its expiry.

[89] In terms of longstanding past practice, Counsel for SCHR submits employees on standby have never been allowed access to sick leave credits. However, I cannot agree. The evidence clearly established that SCHR paid sick leave on a previous occasion to Baht. The evidence also established a practice of paying sick leave after two (2) weeks of illness. The practice was confusing, however, because SCHR could not point to any provision in the CBA for the two (2) week exclusion. Counsel for SCHR just said "that is the way it is."

[90] Counsel argues that HSAS's grievance letter was drafted after the parties had exchanged proposals–in other words, after the point at which the parties could bargain in relation to the basis for the grievance, being whether employees on standby have access to sick leave credits. While there was evidence the grievance letter was drafted after the parties had exchanged proposals, I have nothing further in evidence that would suggest the parties could not bargain. I am not prepared to speculate that is the case.

[91] Counsel for SCHR submits that if the CBA is interpreted to allow employees access to sick leave credits on standby, the effect should be postponed during the life of the current CBA. Counsel cites authority to support its position that filing of a grievance does not relieve the party from raising that issue during bargaining.[46]

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[46] *Collingwood General and Marine Hospital* v. *O.N.A.* (2011), 216 L.A. C. (4th) 313; 2012 CLB 4817, 110 C.L.A.S. 40

[92] Counsel for HSAS raised the issue of whether estoppel can be raised if only one region is raising it, and questioned how estoppel would be implemented in such a situation. I am not prepared to agree with this proposition. Though a provincial agreement is negotiated between SAHO and HSAS that applies to the various health regions, there is nothing that precludes agreements being negotiated between HSAS and SCHR with respect to local issues. If that can be done, I can see no reason why an estoppel could not also apply to just the region.

[93] Counsel cited Brown & Beatty, which (at 2:2221) confirms the ability to consider evidence of past practice without ambiguity in the context of estoppel. But, he argues arbitrators have been very cautious in invoking estoppel and have chosen not to apply it where the evidence did not clearly establish a past practice, or where the past practice conduct was not intended to induce reliance, or where the past practice conduct was not relied upon to the detriment of the party asserting the estoppel.

[94] Counsel for HSAS also cited Durham (Regional Municipality) and CUPE, Local 1764,[47] which found that estoppel was applicable. There, the employer's past practice was described as conspicuous and had occurred over the course of three (3) predecessor CBAs, but it did not advise the union that its practice was coming to an end. It was held the employer had an obligation to do so, and that the union suffered detrimental reliance because it lost the opportunity to bargain in relation to the issue during negotiations.

[95] I find there is no basis upon which HSAS should be estopped from claiming access to sick leave on behalf of Baht and other SCHR employees it represents. There is no evidence:

a) of a past practice, long standing or otherwise, not to allow casual EMS employees on standby access to sick leave credits;

b) HSAS knew of such a practice and by its acts or omissions lead, or ought reasonably to have known it would lead, SCHR to understand and believe it either agreed to or did not

[47] 2012 CarswellOnt 12416

object to same;

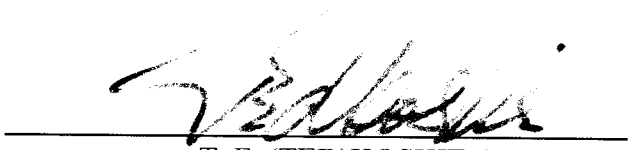
c) there was any conduct on the part of HSAS that was intended to lead induce reliance by SCHR;

d) there was detrimental reliance by SCHR.

[96] I allow the Grievance and direct SCHR to pay Baht sick leave for her shifts on October 3 (partial), 4 and 5, 2014.

[97] I wish to extend my appreciation to both counsel for the courteous and capable manner in which they put forward the evidence and arguments in this matter.

Dated at Saskatoon, Saskatchewan, on February 22, 2016.



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