

IN THE MATTER OF AN ARBITRATION

BETWEEN:

Perth and Smith Falls District Hospital

(The Employer)

-and-

Canadian Union of Public Employees, Local 2119

(The Union)

AND IN THE MATTER OF A POLICY GRIEVANCE RELATING TO THE
REINSTATEMENT OF SHORT TERM SICK LEAVE BENEFITS.

Board of Arbitration: Ken Petryshen - Chair
Joe Herbert - Union Nominee
Matthew Sutcliffe - Employer Nominee

APPEARANCES:

For the Union:

P. Engelmann - Counsel
C. Bauman - Counsel
L. Rodriques - Vice-President O.C.H.U.
J. Jackson - Local Union President

For the Employer:

L. Harnden - Counsel
P. Lawrence
A. McLean – Human Resource Specialist

The hearing was held at Ottawa, Ontario, on October 13, 2015, May 3 and June 2, 2016. The panel held an executive session by conference call on July 14, 2016.

AWARD

[1] This decision concerns a policy grievance dated January 14, 2015, filed by Mr. J. Jackson, the Local Union President. In essence, the Union takes the position that the terms of the 1992 Hospitals of Ontario Disability Income Plan (“HOODIP”) which deal with the reinstatement of short term sick pay benefits for employees returning to work on a modified work plan (“MWP”) are discriminatory and therefore contrary to article 3.01 of the central Collective Agreement and sections 5(1) and 11(1) of the *Ontario Human Rights Code* (the *Code*). The parties presented us with an Agreed Statement of Facts with attached exhibits (“Agreed Facts”) which constitutes the only evidence before us. Counsel also provided us with written submissions and supplemented them with oral submissions at the hearing on June 2, 2016. Employer counsel filed two decisions for our consideration on August 25, 2016.

[2] The relevant aspects of article 3.01 of the Collective Agreement read as follows:

3.01 No Discrimination

The parties agree that there shall be no discrimination within the meaning of the Ontario Human Rights Code against any employee by the Union or the Hospital by reason of race, creed, colour, age, sex, marital status, nationality, ancestry or place of origin, family status, handicap, sexual orientation, political affiliation or activity, or place of residence...

[3] Sections 5(1) and 11(1) of the *Code* provide as follows:

5(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

11(1) A right of a person under Part 1 is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

(a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; or

(b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

(2) The Tribunal or a court shall not find that a requirement, qualification or a factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

[4] The Agreed Facts, absent the exhibits, reads as follows:

1. The Employer and the Union are parties to a collective agreement containing both central and local provisions. The combined central and local agreement between the parties is set out in **Tab 1** of the **Union's Book of Documents ("Exhibit 1")**.
2. In December 2014, the Union provided a letter to the Employer regarding the subject matter of this grievance. Attached to the letter was the decision in the *Ontario Nurses' Association v. Rouge Valley Health System* case. The letter and case are set out in **Tab 2, Exhibit 1**.
3. On January 14, 2015, having not received a response, the Union filed a policy grievance, which is set out in **Tab 3, Exhibit 1**.
4. On January 28, 2015, the Employer denied the grievance. The letter denying the grievance is set out in **Tab 4, Exhibit 1**.
5. Article 13 of the central collective agreement between the Employer and the Union addresses sick leave, injury and disability.
6. Pursuant to Article 13.01(a), the Employer "will assume total responsibility for providing and funding a short-term sick leave plan equivalent to that described in the August, 1992 booklet (Part A) Hospitals of Ontario Disability Income Plan Brochure" ("HOODIP 1992"). The HOODIP 1992 brochure is set out in **Tab 5, Exhibit 1**. The HOODIP Sick Pay Document is attached as **Exhibit 3**.
7. Pursuant to Article 13.01(f), any dispute which may arise concerning an employee's entitlement to any benefits referred to in Article 13.01, including HOODIP and equivalents, may be subject to the grievance and arbitration procedure under the provisions of the collective agreement.
8. Under HOODIP 1992, employees who become "totally disabled" may be compensated up to 100% of their earnings by the Hospital for up to the first 15 weeks from the date of the disability.
9. "Totally disabled" is defined under the HOODIP 1992 Brochure as follows:

"Unable, due to injury or illness, to perform the regular duties pertaining to the occupation in which you participated immediately before becoming disabled."
10. "Total Disability and Totally Disabled" is defined under the HOODIP Sick Pay

Document as follows:

“the member has a medically determinable physical or mental impairment due to injury or illness which prevents her from performing the regular duties of the occupation in which she participated immediately preceding the start of the disability”

11. If employees remain “totally disabled” beyond the first 15 weeks, they become eligible to apply for Employment Insurance. Employment Insurance benefits are available from the 16th to 30th weeks of disability.
12. Employees who remain “totally disabled” beyond the 30th week of disability are eligible to apply for long term disability benefits under the Disability Income Plan (1992), which is Part B of HOODIP.
13. HOODIP 1992 provides that if “you return after an absence due to a Total Disability and work for three continuous weeks, your [short-term sick leave] benefit period of 15 calendar weeks will be reinstated in full.”
14. Employees who return to work after an absence due to a total disability on an approved modified work program are not considered to be “actively at work” under HOODIP 1992. “Actively at work” is defined under the HOODIP 1992 Brochure as follows:

“At work and able to perform all the regular duties of your occupation for one full working day or shift”

15. “Actively Working and Actively at Work” is defined under the HOODIP Sick Pay Document as follows:

“the performance for a Participating Employer of the regular duties of the person’s own occupation for one full working day or shift. This includes vacation days, personal days and/or holidays as well as occasional days used for educational purposes or union business, as granted by the Participating Employer. An Employee on an extended leave, such as an approved leave of absence, is not considered to be Actively at Work.”

16. Furthermore, the HOODIP 1992 Brochure expressly states:

“The time spent doing modified work continues to count towards the expiry of the 15 week benefit period and does not cause it to be reinstated.”

17. This is also reflected in the HOODIP Sick Pay Document:

“If a Member returns to work on an approved modified work program she is not considered to be Actively at Work. In such a case she will continue to expend the 15-week benefit period. In the event that the modified work program exceeds three weeks this will not cause reinstatement of the 15-week benefit period.” (p. G-1)

18. The Employer has a "Modified Work/Early and Safe Return to Work" Policy. The purpose of this policy is to "provide a return to work guideline for employees who are disabled due to illness or injury and who are temporarily or permanently unable to perform the regular or essential duties of their job." Pursuant to this policy the Employer may enter into a Return to Work/Modified Work Plan with an employee. A copy of the Employer's policy is set out in **Exhibit 2**.
19. Modified work plans are individualized, depending on the nature and extent of the medical condition in question, and can include modified duties, modified hours, graduated hours, or some combination of the above.
20. An employee on a modified work plan may be working full-time hours with modified duties. Like full-time employees working regular duties, employees who work full-time with modified duties receive their full salary as well as other full-time benefits including but not limited to holiday pay, vacation pay, seniority, pensions, and insured benefits. Examples of modified work plans/memoranda (full-time hours, modified duties) of six of the Union's members are set out in **Exhibit 4**.
21. Another type of modified work plan is an employee working modified hours with regular duties or with modified duties. Employees working modified hours may be eligible to draw short-term sick leave benefits for the hours when they are not at work, and draw their regular salaries for the proportion of time that they are at work. Examples of modified work plans/memoranda (modified hours, modified duties) of two of the Union's members are set out in **Exhibit 5**.
22. The HOODIP 1992 provisions as incorporated into Article 13 of the collective agreement provide that if an employee returns to work full-time on regular duties following an illness or injury, she re-qualifies for short-term sick leave benefits to be reinstated in full after three continuous "regular work weeks". If an employee returns to work on some form of approved modified work program following illness or injury, "she is not considered to be Actively at Work." Rather, she will continue to expend the 15-week benefit period and "in the event that the modified work program exceeds three weeks this will not cause reinstatement of the 15-week benefit period." The Employer's modified work plans all include a reference that "participation in the modified work program does not constitute a return to work for the purposes of the activation period for short-term sick leave benefits." A modified work plan template is attached as **Exhibit 6**.
23. This statement of agreed facts is without prejudice to the parties' respective positions in any other matters. The facts contained herein are agreed to by the parties for the sole purpose of adjudicating (and expediting the hearing of) the within grievance.

[5] Without restating all of the facts, we note that the Agreed Facts references the short term sick pay benefit and the specific terms of the HOODIP that govern the reinstatement of this benefit. One of these terms, which can be described as the 3 week rule, is the requirement that the employee has returned to work regular duties for three continuous weeks before the benefit is

reinstated. Another significant term provides that a return to work to perform modified duties does not cause the reinstatement of short term sick pay benefits. The Agreed Facts also refers to the Employer's Modified Work/Early and Safe Return to Work policy ("the Modified Work policy") and the provision in the MWP template (Appendix D in the Modified Work Policy) which provides that "Participation in the modified work program does not constitute a return to work for the purposes of the activation period for short-term sick leave benefits (see HOODIP)." An employee on a MWP may be working full-time hours with modified duties or may be working modified hours with regular or modified duties. Examples of employees working on such MWPs are set out in exhibits 4 and 5.

[6] Exhibit 4 includes MWPs for six employees working full-time hours on modified duties. For example, Mr. S. McIvor, Maintenance, was on a temporary MWP following an accident that affected his right foot and ankle. His initial temporary MWP was in effect from September 23, 2013, and lasted for longer than three weeks. The following functional abilities were initially recommended: "Avoid prolonged weight bearing and walking with right foot/ankle; no lifting, carrying, pushing or pulling; rest, elevate and ice as needed; and, light duties, desk/computer work only." Subsequent reassessments altered the functional abilities that were recommended. Each of his four MWPs, the last one being a reassessment dated December 13, 2013, included the following sentence: "Participation in the modified work program does not constitute a return to work for the purposes of the activation period for short-tem sick leave benefits."

[7] Exhibit 5 includes MWPs for two employees working modified hours and modified duties. For example, Ms. A. Nichols, RPN, was on a temporary MWP in effect from September 24, 2014, which had an expected duration of 4-6 weeks. The following modified work duties were recommended: "Limit lifting, carrying, pushing and pulling to under 10 lbs; limit bending and lifting, limit bending and twisting of left leg; no climbing, crouching or kneeling; limit prolonged sitting and standing to under 30 minutes; limit prolonged walking to under 15 minutes; and, start at 4 hours per day and increase hours as tolerated." Her MWP also included

the following sentence: "Participation in the modified work program does not constitute a return to work for the purposes of the activation period for short-term sick leave benefits."

[8] The key circumstances based on the relevant HOODIP provisions that gave rise to the Union's policy grievance can be described as follows. An employee who had been off work on sick leave and returned to work full-time hours performing regular duties will have the 15 weeks of sick leave benefit reinstated after working three continuous weeks. An employee with a disability who returned to work on a MWP is treated differently. An employee who had been off work on sick leave and returned to work on an MWP (on modified hours, modified duties or some combination of both) because of a disability will not have the 15 weeks of sick benefit reinstated until he or she is no longer on modified work and has worked regular duties for three consecutive weeks. A disabled employee who is permanently on modified duties will never have the short term sick leave benefit reinstated.

[9] The Agreed Facts do not disclose that any disabled employee on a MWP went on sick leave again and experienced a financial loss because the short term sick leave benefit had not been reinstated. As part of its remedial request, the Union asks that we remain seized of the issue of compensation if it is successful on the policy grievance.

[10] The Union's position quite simply is that disabled employees are treated differently under the HOODIP when compared to employees returning to work on regular duties insofar as the reinstatement of short term sick leave benefits is concerned. It asserts that the only reason for the differential treatment that denies disabled employees a benefit available to other employees is the fact that they are disabled and that such a distinction based on a prohibited ground of disability constitutes *prima facie* discrimination within the meaning of the *Code*. The Union also submits that there is no evidence of undue hardship that justifies this discriminatory treatment.

[11] In support of its position in this matter, the Union relied on the following decisions:

British Columbia (Public Service Employees Relations Commission) v. BCGSEU, [1999] 3 S.C.R. 3; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; *Corporation of the City of Kingston v. CUPE, Local 109*, 2016 CanLII 26000 (ON LA) (Surdykowski); *McGill University Health Centre (Montreal General Hospital) v. Syndicat des Employées de l'Hôpital général de Montréal*, [2007] 1 S.C.R. 161; *Moore v. British Columbia (Education)*, [2012] 3 S.C.R. 360; *North Bay Regional Health Centre v. ONA (CL)*, 2014 CanLII 13512 (ON LA) (Kaplan); *Ontario Human Rights Commission v. Etobicoke*, [1982] 1 S.C.R. 202; *Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536; *OPSEU, Local 464 v. Ottawa Hospital*, 2015 CanLII 24420 (ON LA) (Cummings); *Ottawa Hospital v. OPSEU, Local 464*, [2008] O.L.A.A. No 266 (Keller); *Ottawa Hospital v. OPSEU, Local 464*, 2009 CanLII 9389 (ON Div. Ct.); *McCormick Home (Parkwood Hospital) and London and District Service Workers Union, Local 220*, [1996] O.L.L.A. No. 933 (Surdykowski); *Re Rouge Valley Health System v. ONA (Ng)*, 2014 CarswellOnt 6431 (Trachuk); *City of Toronto and C.U.P.E., Local 79* (1999), 81 L.A.C. (4th) 315 (Davie); and, *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396.

[12] The Employer does not claim that the discriminatory treatment alleged by the Union would be justified on the basis of undue hardship. However, it does take the position that the Union has not made out a *prima facie* case of discrimination. As set out in its written material, the Employer submitted that the Union's policy grievance should be dismissed for the following reasons:

- (i) The Union has not established that the Hospital's application of the relevant provisions of HOODIP leads to an adverse impact on the ground of disability in respect of all employees to whom these provisions are applied;
- (ii) The reasoning of Arbitrator Trachuk in *Rouge Valley* should not be followed, as the Arbitrator in that matter failed to properly apply all the required steps in the discrimination analysis;
- (iii) Even if this Board finds Arbitrator Trachuk's analysis to be persuasive, the award in *Rouge Valley* wrongly concludes that all situations where an employee returns to work on modified duties or modified hours engage the protections of the *Code* or represent an occasion where the application of the rules relating to entitlement to HOODIP benefits results in a violation of the *Code*.

Whereas the focus of the Union was primarily on the relevant terms of the HOODIP, the Employer's focus is on the how the HOODIP terms are applied in particular circumstances. Employer counsel emphasized that the duty to accommodate is an individualized duty and that an assessment of alleged discriminatory treatment must be made on a case-by-case basis by examining the specific facts and the individual's circumstances. Counsel submitted that it would be wrong to assume, as he contended the arbitrator in *Rouge Valley* did, that all employees on MWP were being treated contrary to the *Code*. Counsel noted that an employee on a MWP may not have a disability under the *Code*, may have been returned to the workplace in circumstances where the Employer has no work of value to be performed or in circumstances where the principle in *Orillia Solders* may have application. Counsel also submitted that the facts before us fail to establish that an employee on an MWP suffered any adverse impact. The Employer maintains that the two fundamental problems with the Union's policy grievance are that, "(i) it is based on the assumption that, in all cases, the application of the provisions of HOODIP dealing with return to work will necessarily involve employees who have a disability within the meaning of the Code; and, (ii) it is based on a further assumption that the application of HOODIP will lead to adverse impacts that cannot be accommodated for in some way by the Hospital." The Hospital argued that if we were to find a *prima facie* case of discrimination that any remedy should not include striking down any terms of the HOODIP.

[13] The Employer also relied on the following decisions: *Rouge Valley Health System v. ONA (Ng)*, *supra*; *Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd.*, *supra*; *Moore v. British Columbia (Education)*, *supra*; *McGill University Health Centre (Montreal General Hospital) v. Syndicat des Employees de l'Hopital general de Montreal*, *supra*; and, *North Bay Regional Health Centre v. ONA*, *supra*. In addition, at the hearing or subsequent to the hearing, the Employer provided us with the following decisions: *Re Hamilton Health Sciences and ONA (RJM)*, 2016 CarswellOnt 7789 (Steinberg); *O.N.A. v. Orillia Soldiers Memorial Hospital*, 1999 CarswellOnt 28 (Ont. C.A.); *Re Toronto (City) and CUPE, Local 79 (Manini)*, 2016 CarswellOnt 6613 (Goodfellow); *Re Saanich School District No. 63 and BCTF (Macri)*, 2012 CARSWELLBC 4089 (Gordon); and, *Re Renfrew Victoria Hospital and ONA (Bowes)*, unreported decision dated July 12, 2016 (Stephens). The Employer also provided us at the hearing with a supplementary written submission relating to the definition of disability which

referenced the following decisions: *OPSEU, Local 464 v. Ottawa Hospital, (Cummings), supra*; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City)*; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 S.C.R. 665; *Burgess v. College of Massage Therapists of Ontario*, 2013 HRTO 1960 (CanLII); *Pelletier v. Veolia Transportation/York BRT Services LP*, 2015 HRTO 323 (CanLII); *Moulton v. Leisureworld Caregiving Centre*, 2009 HRTO 1575 (CanLII); and, *Anderson v. Envirotech Office Systems*, 2009 HRTO 1199 (CanLII).

[14] The Supreme Court of Canada in *O'Malley v. Simpsons-Sears, supra*, and *Moore v. British Columbia (Education), supra*, referred to the three elements of the test for establishing a case of *prima facie* discrimination. To succeed with its allegation that the relevant terms of the HOODIP constitute adverse effect discrimination against bargaining unit employees, the Union must establish that there is a protected characteristic of disability within the meaning of the *Code*, that there has been an adverse impact and that the protected characteristic of disability was a factor in the adverse impact. After considering the submissions of counsel in light of the Agreed Facts, it is our conclusion that the Union has made out a *prima facie* case of discrimination under the *Code* based on the relevant terms of HOODIP that govern the reinstatement of short term sick leave benefits. In allowing the policy grievance however, we are not prepared to strike down the impugned terms of the HOODIP. We will begin our reasons by referring to some of the decisions that were referred to us.

[15] We agree with the Union's submission that the *North Bay Regional Health Centre v. ONA, supra*, the *OPSEU, Local 464 v. Ottawa Hospital, supra*, and the *Corporation of the City of Kingston v. CUPE, Local 109, supra*, decisions are favourable to the position that the Union has taken in this matter. These are decisions by arbitrators who found that the failure to provide sick leave benefits to a disabled employee amounted to discriminatory treatment. The first two of these decisions also concerned the terms of HOODIP, but not with the general issue of the reinstatement of sick leave benefits. We find it unnecessary to review these decisions in this Award. There are three arbitration decisions and a Divisional Court decision however, that warrant a detailed review. These decisions address the same issue that is before us in the instant

case in that they deal with the terms of the HOODIP that affect the reinstatement of short term sick leave benefits.

[16] In *McCormick Home (Parkwood Hospital) and London and District Service Workers Union, Local 220, supra*, a 1996 decision, the grievor had been off work due to an injury and in receipt of the HOODIP short term sick leave benefits. Upon her return to work, the grievor was initially accommodated with modified hours and duties. She increased her hours over time to full-time hours, but continued on modified duties. The grievor became ill for reasons unrelated to her injury and was off work for about a month. It was necessary for her to take a number of unpaid sick days even though she had worked full-time hours for at least three weeks before she went off work due to illness. She had received her full-time wages and all other full-time employee benefits while she performed the modified duties that benefited her employer. What she did not receive was the reinstatement of her short term sick leave benefit given her employer's application of the relevant terms of the HOODIP. Arbitrator Surdykowski agreed that the relevant terms of the HOODIP that precluded the reinstatement of her short term sickness benefit were discriminatory. In the following paragraphs near the end of the decision, the arbitrator comment as follows:

33. ...Further, if she continued to work on a modified work programme for a year or ten years, she would never requalify for part A sick pay benefits, to cover her if she was absent from work because of illness (even the flu) for even a day. All this because the grievor suffered a compensable work injury. This cannot be.

34. Further, what reason is there to draw a distinction for sick pay benefits purposes between someone, like the grievor, who returns from a compensable injury to work her regular hours of work as a modified work programme, and an employee who returns to work from an injury or illness (whether compensable or not) to her regular job and hours? I can discern no legitimate one...

35. The HOODIP "Recurrence of Disability" requalification for benefits provisions draw a distinction between employees who return to work to their regular full-time job and hours of work, and employees who return to work from a WCB compensable injury to their regular full-time hours of work on an approved modified work program. Applied to this case, those provisions resulted in the grievor, who was on a full-time modified work program because she had suffered a WCB compensable injury, not requalifying for Part A sick pay benefits. In that respect, she was treated differently from other employees working full-time (which is the appropriate comparator group if there must be one) because she has suffered a WCB compensable injury. But for this, she would have

requalified for a further fifteen weeks of Part A sick pay benefits. The *Human Rights Code*, and specifically sections 5(1) and 10(1)(e) thereof require that no such distinction be made between employees on this basis.

38. In the result, I find that the “Recurrence of Disability” provisions of the HOODIP discriminate against employees on an approved modified work program... As part of the collective agreement between the parties, the HOODIP must comply with the requirement of the *Human Rights Code*...

39. Accordingly, to the extent that the Employer failed to pay Part A sick pay benefits under the HOODIP to the grievor with respect to the illness which began on October 18, 1995, the Employer has breached the collective agreement between the parties.

[17] *Ottawa Hospital v. OPSEU, Local 464, supra, (Ottawa Hospital (Keller))* is a 2008 decision decided by arbitrator Keller. The Union had filed a policy grievance on behalf of part-time employees alleging discriminatory treatment with respect two features of the HOODIP short term disability plan. The aspect of the case that is relevant for our purposes is the Union’s claim that a disabled employee who returns to work on a part-time basis will not be eligible to re-qualify for the short term sickness benefit. Arbitrator Keller found that the relevant terms of the HOODIP that dealt with the reinstatement of sick leave benefits were discriminatory when applied to part-time disabled employees and therefore allowed this aspect of the grievance. The Union’s grievance was addressed on the basis of an examination of the terms of the HOODIP without any consideration of individual facts.

[18] The employer applied for judicial review of the *Ottawa Hospital (Keller)* award. The Divisional Court (“*Ottawa Hospital I*”) described the issue before the Court at paragraph 5 as the finding by the arbitrator that the HOODIP “provision that allowed workers to re-qualify for short-term benefits after three continuous “regular work weeks” was discriminatory because it is possible that workers whose disabilities allow them to work or return to work part-time may never re-qualify for short-term disability benefits.” The Court dismissed the employer’s review application. In response to an argument that there had been no discriminatory treatment because “the plan in this case treats short term and long term disabilities and partial and full disabilities differently, and specific accommodation is made for partial disabilities, because the capacity and needs of the groups are different”, the Court commented as follows:

[13] ...this distinction does not hold, at least in the case of a person who is being accommodated and working with a partial disability and who suffers from another illness and requires sick leave and who cannot access the short term disability benefits, no matter how long he or she has been working with the partial disability.

[14] For example, a full-time worker who experiences a disability (such as chronic fatigue) that reduces capacity to 90% of regular hours but does not preclude all work cannot meet the requirement of "three regular weeks". Workers in this position will run out of benefits after 15 weeks, and no matter how many hours they work or how long, they will never re-qualify for short term benefits even if they subsequently suffer from an unrelated short term disability (such as a broken leg) and cannot work for several weeks. In contrast, employees whose disability allows them to work full-time can, after only 3 weeks, re-qualify for short term disability benefits. This results in a sub-set of employees with ongoing disabilities being treated adversely when compared to other employees with respect to access to an important aspect of the disability scheme. The reason for the distinction is their disability, which prevents them from meeting the criterion of three weeks full-time work.

[15] The purpose of the re-qualification provision is [to] allow a worker who has accessed the short term disability benefits previously, and returned to work, to take advantage of the short term disability benefits in the event of a new short term disability. The denial of any opportunity to re-qualify for those who return part-time and who experience another illness such as the one described above is inconsistent with the purpose of the plan.

[16] We are therefore satisfied that the arbitrator's decision that the re-qualification provision discriminates against those who are suffering partial disabilities is reasonable... This provision discriminates against a worker with a partial disability, at least to the following extent: a worker who has returned to work part-time after using the short term disability provision and who works continuously but at a reduced level is unable to access a further period of short term disability, if he or she subsequently suffers from another short term disability.

[17] The appropriate remedy has yet to be determined and the parties will no doubt have further opportunity to review the extent of the discrimination and to adopt such remedial measures as may be appropriate.

[19] The final decision that addresses the HOODIP terms that govern the reinstatement of short term sick leave benefits is *Rouge Valley Health System v. ONA (Ng)*, *supra*, a 2014 decision by arbitrator Trachuk. This is the decision that the Union brought to the Employer's attention when it enquired about the Employer's intentions on the issue of the reinstatement of benefits for employees returning to work on modified duties. *Rouge Valley* involved two individual grievances and a policy grievance. The two individual grievances were filed by nurse

Ng and by nurse Damodaran. Essentially nurse Ng was placed on sick leave for approximately 7 weeks and then returned to full-time work on modified duties while the employer waited for the results of TB testing. Nurse Damodaran, who was on sick leave due to pregnancy, returned to full-time work on modified duties for approximately 19 weeks. The arbitrator allowed all of the grievances. The arbitrator ordered that nurse Damodaran be paid for the one day she was off sick and not paid because her sick leave benefits had not been reinstated. Nurse Ng did not experience a financial loss. The arbitrator remained seized of the policy grievance in the event the parties were unable to fashion a remedy. In finding that the Union had made out a *prima facie* case of discrimination, arbitrator Trachuk made the following comments:

40. The Hospital is required to accommodate disabled nurses by returning them to work modified duties unless that would cause undue hardship. The Association is not alleging that the Hospital has not accommodated nurses by providing them with modified work. However, it contends that the Hospital has violated the *Code* because it treats the nurses being accommodated differently with respect to the reinstatement of sick pay benefits than other nurses who return to full-time duties.

41. Under 1992 HOODIP, a nurse who returns to work full-time on modified duties is not entitled to have her short term sick pay benefits reinstated as long as she remains on modified duties. More than that, a nurse who returns to work on modified duties loses days from her sick pay benefit bank. That is the case if the nurse was absent for a month, for one day, or apparently missed no time at all but requires some kind of modification to her duties in order to work. However, a nurse who returns from sick leave without requiring modified duties will have her sick pay benefits reinstated after three weeks. Nurses only require modified duties because they are disabled. Therefore, HOODIP imposes adverse treatment on disabled nurses with respect to the reinstatement of sick pay benefits. That adverse treatment is a violation of the *Code*...

...

44. The *Code* prohibits discrimination on the basis of disability. Disabled employees, therefore, are a protected group under the *Code*. The nurses in issue in these grievances require modified duties because they are disabled. Disabled nurses on modified duties are subject to adverse treatment under 1992 HOODIP because their sick pay benefits are not reinstated. The adverse treatment is directly related to the nurses' disabilities and those disabilities are, therefore, a factor in the adverse treatment. The nurses' disabilities require them to be accommodated and, since they are being accommodated, they are not entitled to the same right to sick pay benefits that other full-time employees have. The plan itself is clear about that because it defines nurses on modified duties as being not "actively at work". Any nurse not "actively at work" is subject to the adverse treatment with respect to the reinstatement of sick pay benefits. The Association has, therefore, made out a *prima facie* case of a violation of Section 5 of the *Code*.

The employer had argued that the terms of the HOODIP were not discriminatory since sick benefits are a type of compensation and that it was not obliged to compensate employees on modified duties in the same way it compensated employees working full-time on regular duties. The employer relied on the *O.N.A. v. Orillia Soldiers Memorial Hospital* decision, *supra*, which found that employees on unpaid leave were not entitled to all of the same benefits that employees working full-time are entitled to. Arbitrator Trachuk rejected this employer argument and in doing so commented as follows:

45. ...Those cases are distinguishable from this one because the nurses at issue in this case are working full-time. 1992 HOODIP treats some nurses who are working full-time differently than other nurses working full-time because they have a disability that requires an accommodation through modified work. That distinction is inconsistent with the purpose and other terms of the plan. Under 1992 HOODIP, the entitlement to sick pay benefits is related to the number of full-time weeks worked not to the kind of work a nurse performs. Sick pay benefits are not contingent on some threshold analysis of the value of the work performed by a nurse. The value of work is tied to wage rates not to the entitlement to sick pay benefits. However, the Hospital is, essentially, arguing that any modified work performed by a nurse is less valuable than her regular duties and that it is not discriminatory to compensate her less for that work by using and then not reinstating her sick leave account... It cannot be assumed that modified duties are less valuable than unmodified ones. Employers are not required to provide modified work to employees if it has no value. The Hospital is not required to accommodate nurses by making work for them that it does not actively require. Furthermore, nurses are not provided with the choice of whether to stay home and use their sick pay benefits or to return to modified duties. If the Hospital offers them suitable modified work they are required to take it. They must cooperate in their accommodation.

[20] Employer counsel spent some time critically analysing the *Rouge Valley* decision and submitted that we should not follow it based on its reasoning. He argued that the arbitrator did not properly apply the discrimination analysis as set out by the Supreme Court of Canada and did not take into account the impact of the Court of Appeal's reasoning in the *Orillia Soldiers* decision. We find it unnecessary to detail the well thought out submissions of Employer counsel and we simply note that even if the arbitrator's reasoning in *Rouge Valley* was flawed in some respect, we agree with her result. She relied on the *McCormick Home (Parkwood Hospital)* decision, the *Ottawa Hospital (Keller)* decision and the Divisional Court decision and the result she reached is consistent with these decisions. We further note that arbitrator Surdykowski in the *City of Kingston* case was asked to find that the *Rouge Valley* decision was wrongly decided, but

he refused to do so and relied on the decision to support his conclusion the 6-month re-qualification rule before him contravened the Code “because of its discriminatory adverse effect on employees who have a disability.”

[21] We have then before us the above three arbitral decisions and a Divisional Court decision that deal with the issue of whether the relevant terms of the HOODIP before us, including the three week rule, are discriminatory against disabled employees on a MWP insofar as the reinstatement of short term sick leave benefits is concerned. Two of the awards address grievances by individual employees. The *Rouge Valley* decision includes a policy grievance. The *Ottawa Hospital (Keller)* award involves only a policy grievance and the absence of the individual employee circumstances. Two of the awards deal with a disabled employee returning to work full-time on modified duties. The *Ottawa Hospital (Keller)* award and the reviewing Divisional Court decision deal with disabled employees returning to work modified hours. In these varying circumstances, the arbitration decisions all find that the HOODIP terms that preclude disabled employees returning to work on a MWP from having their short term sick leave benefits reinstated constitute discriminatory treatment within the meaning of the *Code*. We were not provided with a decision on the relevant HOODIP terms that determine the reinstatement of sick leave benefits that reaches a different conclusion. Counsel for the Union took the position that we are bound by the Divisional Court decision that reviewed the *Ottawa Hospital (Keller)* award. Although we have some doubt about whether we are bound by the Court’s conclusion that the result in *Ottawa Hospital (Keller)* award was reasonable, we are persuaded that it is appropriate to follow the decision, as well as the decisions of arbitrators Surdykowski, Keller and Trachuk. We are satisfied that these decisions are far from being clearly wrong or patently unreasonable.

[22] As noted in the Agreed Facts, we were provided with examples of employees who are or had been on MWPs. We were not asked to find that these employees had been treated in a discriminatory fashion based on the protected characteristic of disability. These examples were provided as part of the context for the Union’s policy grievance. In our view, the Union is entitled to file its policy grievance to advance a claim that the terms of the HOODIP, apart from

how these terms may be applied in a particular case, are discriminatory against employees on MWP who are disabled within the meaning of the *Code*. This conclusion is supported by the *Ottawa Hospital (Keller)* award and the Divisional Court decision reviewing that award.

[23] We agree with some aspects of the submissions made on behalf of the Employer. For example, we agree that an assessment of alleged discriminatory treatment must consider the specific facts of a given case and the entire circumstances in which the Employer's decision was made. We agree that, in what is likely a limited set of circumstances, an employee could be returned to work on a MWP, but not have a disability as defined by the *Code*. Employer counsel referred us to a number of decisions that support the proposition that not all medical conditions amount to a disability as defined by the *Code*. We therefore do not assume that an employee on modified duties is protected under the ground of disability. We also do not assume that any HOODIP impacts cannot be accommodated for in some way by the Employer. And if we were asked to reconvene to deal with the alleged discriminatory treatment of an individual disabled employee who did not have his or her short term sick leave benefit reinstated, the Union would have to establish that the employee has a *Code* disability and the other elements of the test as set out in *O'Malley v. Simpsons-Sears, supra*, to prove a case of *prima facie* discrimination. However, these considerations do not disentitle the Union from pursuing its claim based on the relevant HOODIP terms that are part of the Collective Agreement.

[24] The three elements of the test for establishing a *prima facie* case of discrimination have been established in the instant case by the Union on the basis of the relevant terms of the HOODIP. We are only dealing with employees who are disabled as defined by the *Code* who return to work on MWPs. These employees may be working full-time hours with modified duties or modified hours with regular or modified duties. Disabled employees experience an adverse impact when their short term sick leave benefit is not reinstated after being on a MWP for longer than three weeks in contrast to employees who return to regular duties for more than three weeks. Whether or not an employee experiences a financial loss, disabled employees are adversely impacted by the mere failure of the HOODIP to provide for the reinstatement of the

benefit. The third element of the test is also satisfied because the only reason for the adverse treatment has to do with the employee's disabled status.

[25] As noted previously, we do not find it appropriate to provide the Union with a remedy that includes the striking down the impugned terms of the HOODIP. We agree with the Employer's position that the remedy should take into account the individual circumstances of any case without assuming that any employee on a MWP is being subjected to discriminatory treatment contrary to the *Code*. There is also an absence of authority to support the striking down of the relevant HOODIP provisions that effect the reinstatement of short term sick leave benefits.

[26] For the foregoing reasons, the Union's policy grievance dated January 14, 2015, is allowed. We find and declare that the terms of the HOODIP that preclude the reinstatement of short term sick leave benefits for disabled employees who are on a MWP for more than three weeks are discriminatory within the meaning of the *Code*. We direct the Employer to consider and comply with its *Code* obligations when dealing with employees on modified duties who are disabled as defined by the *Code*. One thing the Employer should consider doing is taking an individualized approach and not consistently advising disabled employees starting on a MWP that sick leave benefits will not be reinstated if the MWP exceeds three weeks. We will remain seized of the Union's policy grievance.

Dated at Toronto, this 6th day of February 2017.



Ken Petryshen – Chair

“I concur”

Joe Herbert - Union Nominee

“I concur – see Addendum”

Matthew Sutcliffe – Hospital Nominee

Addendum of the Employer Nominee, W. Matthew Sutcliffe

This addendum is intended to briefly comment upon outcome of this matter. I appreciate the Chair's nuanced approach to the established case law that has grown (and continues to grow) in this specific intersection between the HOODIP, the *Human Rights Code*, and modified work/return to work plans.

While this Board has found that the grievance of the Union must be allowed, the conclusion that an individualized, or "case-by-case," approach should be adopted by the Hospital is well in line with most decisions on related matters, and aligns with the approach taken by arbitrator Kaplan in the referenced awards, with which I largely concur. The Chair, in this matter, in concluding that striking the impugned provisions from HOODIP is unnecessary, provides the following direction at paragraph 26, which I believe is non-controversial:

We direct the Employer to consider and comply with its *Code* obligations when dealing with employees on modified duties **who are disabled as defined by the Code.** [Emphasis added]

This, I believe, reinforces the case-by-case analysis approach, and the importance of individualized examination that has to occur in each set of circumstances. Clearly, there are reasons to be ill or injured and away from work that, while they fall under concepts of "ill" or "injured," do not meet the definition of disability under the *Code*, and are therefore not subject to *Code* protection.

I believe that the end result in the matter before this Board is reasonable, and declining to strike down the impugned provisions of HOODIP as requested by the Union was the correct result. This result, I believe, reinforces a practical approach in workplaces in such cases, and stands apart from the result in the *Rouge Valley* decision of arbitrator Trachuk.

Dated at Toronto, this 5th of February, 2017.