

IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1999

-AND-

MARKHAM STOUFFVILLE HOSPITAL (UXBRIDGE SITE)

AWARD

Board of Arbitration:

Laura Trachuk
Joe Herbert
R. Greg Shaw

For Canadian Union of Public Employees,
Local 1999:

Mark Wright
Lori Bolle
Lee Douitsis
Lorrie Boake
Louis Rodrigues
Pam Parks

For Markham Stouffville Hospital
(Uxbridge Site):

Sarah A. Eves
Gail Schneider
Adrian Di Lullo

The hearing took place in Richmond Hill on May 1, 2017 and July 16, 2018.

AWARD

The Canadian Union of Public Employees, Local 1999 (the "Union") has filed a grievance alleging that Markham Stouffville Hospital (Uxbridge Site) (the "Hospital") has violated the collective agreement by failing to continue long term disability (LTD) benefit coverage for employees who work past their 65th birthdays. A preliminary award was issued on June 6, 2017.

The parties referred to three kinds of documents in their submissions: the collective agreements; the Long Term Disability Plan B booklets; and the plan texts/policies.

COLLECTIVE AGREEMENT

The collective agreement under which the grievance was filed provides as follows:

ARTICLE 13 – SICK LEAVE, INJURY AND DISABILITY13.01 – HOODIP

(The following clause is applicable to full-time employees only)

- (a) The Hospital 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.

The Hospital will pay 75% of the billed premium towards coverage of eligible employees under the long-term disability portion of the Plan (HOODIP or an equivalent plan as described in the August, 1992 booklet (Part B)), the employee paying the balance of the billed premium through payroll deduction. For the purpose of transfer to the short-term portion of the disability program, employees on the payroll as of the effective date of the transfer with three (3) months or more of service shall be deemed to have three (3) months of service. For the purpose of transfer to the long-term portion of the disability program, employees on the active payroll as of the effective date of the transfer with one (1) year or more of service shall be deemed to have one (1) year of service.

The relevant part of the above provision is the reference to long-term disability:

The Hospital will pay 75% of the billed premium towards coverage of eligible employees under the long-term disability portion of the Plan (HOODIP or an equivalent plan as described in the August, 1992 booklet (Part B)), the employee paying the balance of the billed premium through payroll deduction.

Article 13.01 also contains the following:

- (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 under the provisions of the collective agreement.

The Union agrees that it will encourage an employee to utilize the Medical Appeals Process provided under the plan, if any, to resolve disputes.

(g) A copy of the current HOODIP plan text or, where applicable, the master policy of the current HOODIP equivalent, shall be provided to the Union.

ARTICLE 18 – HEALTH AND WELFARE

18.01 INSURED BENEFITS

(The following clause is applicable to full-time employees only)

The Hospital agrees, during the term of the Collective Agreement, to contribute towards the premium coverage of participating eligible employees in the active employ of the Hospital under the insurance plans set out below subject to their respective terms and conditions including any enrolment requirements: ...

HOODIP is not one of the plans listed in Article 18.01.

AUGUST 1992 HOODIP BOOKLET

The 1992 HOODIP Part B Long Term Disability Benefit booklet from the Mutual Group for August 1992 provided as follows:

INTRODUCTION

The Ontario Hospital Association (OHA) established the Hospitals of Ontario Disability Income Plan (HOODIP) in 1968 to provide uniform disability income benefits for employees of Participating Employers. The Plan provides two periods of benefits: Sick Pay and Long Term Disability. These cover the periods before and after the disability benefits paid by the Canadian Employment and Immigration Commission.

This pamphlet describes the Long Term Disability (LTD) benefit. Be sure to read the pamphlet on the Sick Pay benefit too.

PLAN HIGHLIGHTS

Comprehensive Coverage

- During the first 15 weeks of disability, the employer pays up to 100 per cent of earnings.
- Sick pay benefits from the 16th to 30th week of disability are provided by the Canada Employment and Immigration Commission.
- Long Term Disability benefits of up to 75% of earnings are provided by the Plan until the employee reaches age 65, or life in some cases.

No limits on Pre-existing Conditions

Employees who have completed six months of service are *eligible for coverage* regardless of any pre-existing medical conditions. [emphasis added]

...

JOINING THE PLAN

All new employees must join the plan after completing the waiting period, which is the period of time from your first day of Active Work until the day you complete six months of service.

The effective date of coverage will be the latest of:

- The day after you complete your waiting period, if you are Actively at Work on that day
- If, due to injury or illness, you are not Actively at Work on that day, the day you have completed 7 consecutively scheduled days of Active Work following your return to work
- The day that Mutual specifies as your effective date following proof of your insurability if required.

...

WHEN BENEFIT PAYMENTS BEGIN

If you become disabled, you may receive LTD benefits following a qualifying period of 30 weeks of Total Disability.

LTD benefits are paid monthly, and begin one month after you become eligible to receive them. These benefits are taxable.

AMOUNT OF LONG TERM (LTD) BENEFIT

The amount of LTD benefit you receive will be determined by the length of your Continuous Service (from your first day of employment), as of the day before your first day of absence, according to the following schedule:

- At least 6 months 65% of regular earnings
- At least 20 years 70% of regular earnings
- At least 30 years 75% of regular earnings

...

The minimum payment is \$50 per month to age 65.

WHEN BENEFITS STOP

Benefits are payable from the end of the qualifying period until the earliest of the following dates:

...

- Your 65th birthday, if you become disabled after age 64 and you have completed fewer than 10 years of Continuous Service, when you become disabled
- The day 12 months after the Date of Disability, if you become disabled after age 64 but before age 65 (minus the qualifying period) and you have

completed fewer than 10 years of Continuous Service when you become disabled.

- The date of death if you have completed 10 years of Continuous Service when you become disabled. In this case, at age 65 your benefit will be further reduced by any additional payments from government plans and your employer's pension plan that begin at that age (see Amount of Long Term Disability Benefit).

...

PORTABILITY OF COVERAGE

If you terminate employment and go to work for another Participating Employer within six months, you will be immediately *eligible for coverage* under your new employer's plan, providing you are Actively at Work on your first day of work. If due to injury or illness you are not Actively at Work on that day, then coverage will be effective after seven days as described under Joining the Plan. Your level of coverage will be that offered under your new employer's plan, and may differ from previous coverage. [emphasis added]

You may ask your new employer to arrange this transfer of coverage within one month of your first day of employment and inform your new employer of all service counted toward coverage. If you fail to do so, you will have to provide medical evidence of your insurability, at your own expense, to complete the transfer of coverage.

WHEN YOUR COVERAGE TERMINATES

Your membership in this Plan terminates on the earliest of the date:

- You are not *eligible*
- You are not employed by the Participating Employer
- You do not belong to a Participating Group
- You do not live in Canada
- Your disability benefit terminates and you do not return to work
- The group benefit plan terminates

If you are Totally Disabled on the date your membership terminates you will remain entitled to a benefit subject to the terms and conditions of the Plan. [emphasis added]

PLANS AND POLICIES

At the time this grievance was filed the Hospital's Group Insurance Plan carrier was Desjardins. Sunlife replaced Desjardins as the carrier effective April 1, 2017. No copy of the Sunlife plan was available on the date of the hearing.

The Markham Stouffville Hospital Corporation Policy No. 541217 for Uxbridge CUPE Service and Clerical Active and Retired Employees (the Desjardins plan) provided:

MEMBER LONG TERM DISABILITY BENEFIT (CUSTOM HOODIP 1992)

Underwritten by Desjardins Financial Security Life Assurance Company

Class 001 Uxbridge CUPE Service and Clerical Active

Percentage of Benefit based on the length of continuous service up to the first day of absence:

At least	But less than	
6 months	20 years	65% of monthly Earnings, rounded to the next \$1, if not already a multiple.
20 years	30 years	70% of monthly Earnings, rounded to the next \$1, if not already a multiple.
30 years		75% of monthly Earnings, rounded to the next \$1, if not already a multiple.

Qualifying Period: 30 Weeks

Minimum Benefit Payment: In any event, the amount of the monthly disability benefit before age 65, after reductions, will not be less than \$50 per month.

Maximum Benefit Period: For Members with less than 10 years of service:
If the Qualifying Period ends on or before Members 64th birthday, and Member continues to be Totally Disabled, the Members 65th birthday.
For Members with less than 10 years of service:
If the Qualifying Period ends after the Members 64th birthday but before Members 65th birthday, and Member continues to be Totally Disabled, 12 months after the Qualifying Period ends.

If the Member becomes Totally Disabled after completing 10 years of continuous service and continues to be Totally Disabled, up to the Member's death

Taxability of Benefits: Taxable

Benefit Termination: Age 65 of the Member or retirement, whichever occurs first.

...

MEMBER LONG TERM DISABILITY BENEFIT (CUSTOM HOODIP 1992)
CLASS 001 UXBRIDGE CUPE SERVICE AND CLERICAL ACTIVE

DEFINITIONS

As used in this Benefit

Qualifying Period means the period, as specified in the Benefit Schedule, of continuous Total Disability that must be completed before Long Term Disability Benefit commence under this Benefit.

Maximum Benefit Period means the maximum period during which monthly benefits are payable, as specified in the Benefit Schedule.

...

PAYMENT OF BENEFIT

Upon receipt of Proof of Claim satisfactory to the Insurer that

- 1) a Member became Totally Disabled while insured under this Benefit and remained Totally Disabled during the Qualifying Period; and
- 2) the Member is under Continuing Medical Care of a Physician, as described under the DEFINITIONS provision of the policy

the Insurer will pay monthly Long Term Disability Benefit for as long as the Member is Totally Disabled, in accordance with applicable policy provisions, up to the Maximum Benefit Period.

...

TERMINATION OF BENEFITS

Long Term Disability Benefits will cease on the earliest of

...

- 7) the date on which the Member attains the Age Limit specified in the Benefit Schedule.

The Plan Text for the Administrative Services Agreement for Group Policy Number 2100 effective January 1, 1992 includes an "eligibility" section. It provides:

ELIGIBILITY

...

Eligibility of Members

A person under the age of 65 is *eligible* to be a Member if she meets all of the following conditions. She continues to be *eligible* to be a Member while she meets all of the following conditions:...[emphasis added]

Participation is compulsory for Member Life Insurance and Long Term Disability Insurance as defined on the applicable Appendix for persons who meet all of the above conditions and begin Active Work after the Participating Employer's Effective Date...

ADDITIONAL FACTS

The HOODIP 1980 booklet provided that benefits were payable until the member's 65th birthday. The HOODIP 1984 booklet provided that LTD coverage terminated at age 65 but that benefits would continue past age 65 in certain circumstances reduced by pension and other benefits. Employees on LTD benefits are no longer required to take their pensions, Canada Pension Plan or Employment Insurance benefits at age 65.

In 1992, an employer was permitted to require an employee to retire at age 65 and that was not a breach of the Ontario *Human Rights Code* (the “Code”). In 2005 the Code was amended and no longer included an exception for mandatory retirement at age 65. However, it provided at section 25 (2.1), that a group insurance plan or fund that complies with the *Employment Standards Act, 2000* (ESA) and regulations did not violate the right to equal treatment with respect to employment without discrimination. The ESA and regulations permit certain age and gender based differences in benefit, pension and insurance plans. The legislature delayed the coming into force of the Code amendments for a year to permit employers, unions and employees an opportunity to make any adjustments required.

In *Wayne (Steve) Talos and Grand Erie District School Board and Ontario Human Rights Commission et al*, 2018HRTO 680 (CanLII) (Grant), a recent award of the Human Rights Tribunal of Ontario, the Chair found that the Code’s exceptions, except for LTD, pension plans and superannuation funds, violate the *Charter of Rights and Freedoms*. The Tribunal did not consider whether the exception violates the *Charter* if applied to LTD, pension plans and superannuation fund coverage.

SUBMISSIONS

The Union submits that the effect of Article 13.01(a) is to incorporate the HOODIP 1992 Plan Part B booklet into the collective agreement. It argues that the agreement requires that any LTD plan the Hospital purchases must provide coverage equivalent to what is described in the HOODIP 1992 Part B booklet.

The Union contends that the booklet for HOODIP 1992 Part B did not state that benefit coverage ended at age 65. It only provided that benefits would be reduced at age 65 by pension and other benefits. The Union also argues that Article 13.01 of the collective agreement does not say that LTD coverage ends at 65 years. It asserts that enrollment provisions are found at Article 18.01 and they also do not say that LTD coverage ends at age 65. The Union maintains that it is irrelevant that some of the booklets refer to the master policies because they are always more detailed than the booklets. However, according to the Union, the collective agreement and the 1992 booklet together set out the coverage the parties negotiated and the master agreements cannot be inconsistent with that.

The Union submits that an earlier plan, HOODIP 1980, clearly provided that the duration of the LTD benefit ended at age 65 so coverage had to end then as well. The HOODIP 1984 booklet stated that benefits would continue after age 65 reduced by pension and government benefits and the plan text was amended accordingly. In 1985, a fund was created to fund HOODIP and Mutual Life was appointed to administer the plan. The HOODIP 1984 booklet did say that coverage would terminate at age 65. That section remained until 1991. However that language was not included in the HOODIP 1992 Plan B Booklet and that, according to the Union, demonstrates that plan coverage can continue past age 65. It insists that that is the level of benefit to which the parties agreed and any plan inconsistent with that violated the collective agreement.

The Union submits that the Hospital’s 2014 insurance plan with Desjardins for this bargaining unit was inconsistent with the collective agreement because it provided that LTD benefits terminate at age 65 or retirement whichever occurs first. Under

“Termination of Member Insurance” it says that it terminates on the date specified in the Benefit Schedule and that is age 65. The Desjardins plan revised in 2015 is the most recent available plan and it contains the same language so, according to the Union, it is also inconsistent with the collective agreement.

The Union argues that members of the bargaining unit who work after the age of 65 are entitled to all of the benefits included in the collective agreement unless a restriction is set out in clear and unambiguous language. It asserts that, in this case, neither the collective agreement, nor the booklet states that LTD coverage ends at age 65. The Union contends that the Hospital wants to read into the collective agreement that LTD coverage stops at age 65 but that language was removed from the booklet in 1992.

The Union refers to the following awards: *The Scarborough Hospital and Canadian Union of Public Employees, Local 1487*, 2014 CanLII 66059 (ON LA) (Goodfellow); *Strathroy-Caradoc Police Assn. v. Strathroy-Caradoc Police Services Board* (Goldrick Grievance), [2012] O.L.A.A. No 390 (Cummings); *London (City) v. Canadian Union of Public Employees, London Civic Employees, Local 107 (Collective Agreement Grievance)*, [2010] O.L.A.A. No 347 (Etherington); *London (City) v. Canadian Union of Public Employees, Local 101 (Arnold Grievance)*, [2008] O.L.A.A. No. 351 (Brandt); *Brockville Mental Health Centre v. Ontario Public Service Employees Union (Renaud Grievance)*, [2016] O.L.A.A. No. 73 (Knopf); *Ottawa Hospital and CUPE (HOODIP), Re*, 2010 CarswellOnt 11722 (Keller); *Grey Bruce Health Services v. O.P.S.E.U., Local 260*, 2003 CarswellOnt 1861 (Samuels).

The Hospital submits that LTD coverage stops at age 65. It says that a review of the collective agreement, the 1992 HOODIP Plan B booklet, the 1992 plan itself and the history of the brochures between 1980 and 1992 must lead to that conclusion.

The Hospital acknowledges that the 1992 HOODIP Plan B booklet is incorporated into the collective agreement. However, it says that the plan text is incorporated into the booklet and, therefore, the collective agreement as well. The Hospital asserts that all of the terms of the plan text are part of the content of the booklet and the collective agreement.

The Hospital argues that Article 13.01(a) states that it “will pay 75% of the billed premium towards coverage of *eligible* employees”. It says that the word “eligible” is used to limit the employees who may be entitled to LTD. The Hospital notes that the word “eligible” is not used in relation to short term disability coverage. It contends that the word “eligible” is not defined anywhere in the collective agreement so it is necessary to make reference to other documents, specifically the booklet and the plan, to determine what it means. The Hospital argues that Article 13.01(a) refers to “HOODIP or an equivalent plan as described in the August 1992 booklet (Part B)” so the booklet itself is not the Plan. The Plan is, therefore, incorporated into the collective agreement.

The Hospital submits, further, that the language of Article 13.01(f) is a clear statement that HOODIP and equivalents are incorporated into the collective agreement. It points out that there is no reference to the 1992 booklet in that section. It also contends that if the Plan and the booklet were not integrated into the collective agreement it would not have been necessary to include Article 13.01 (g) which requires that the HOODIP plan text or master policy be provided to the Union.

The Hospital submits that its position is consistent with the history of HOODIP and that the Union's position is inconsistent with that evolution. It says that prior to 1992, the collective agreement incorporated the booklet into the collective agreement and the booklet referred to HOODIP. The booklet said that coverage ended at age 65 but the collective agreement did not. It did however include the same Articles 13.01 (f) and (g) that are included in the current agreement. The Hospital says that in 1992, the Ontario Hospital Association (OHA) got out of the trust business and contracted with The Mutual Life Assurance Company to provide the plan. The language referring to the booklet was then added to Article 13.01(a). The Hospital asserts that the booklet also incorporated the plan on the very first page where it says "Group Policy No. 2100". The plan text for Group Policy No. 2100 says that LTD coverage ends at age 65. Furthermore, the Hospital argues, the booklet describes what the LTD benefit is but does not purport to describe the whole plan. Thus, when Article 13.01(a) refers to "eligible" employees and the booklet does not say what "eligible" is, it must be found in the plan text.

The Hospital submits that its interpretation that LTD coverage ends at age 65 is more consistent with the provisions of the 1992 booklet and its terms. It asserts that the booklet makes numerous references to the plan. The Hospital also contends that there are many places in the booklet that lead to the conclusion that LTD coverage ends at age 65. The first page says that Long Term Disability benefits are provided "until the employee reaches age 65, or for life in some cases". The Hospital argues that that is inconsistent with the Union's position because it would require that someone's benefits would end at age 65 but that they would qualify again if they continued to work afterwards. A person would, therefore, be in and out of the plan. The Hospital maintains, further, that the section "When Benefits Stop" also says that benefits end at age 65 if an employee has worked fewer than 10 years or that they will only receive 12 months of benefits if they become disabled between age 64 and 65. In order for an employee to qualify for the lifetime benefit they must become disabled before age 65 or the other bullets in that section make no sense. The Hospital contends that the language suggests that the employee is already receiving benefits before hooking into the lifetime benefit.

The Hospital submits, further, that an employee needs to be "eligible" to qualify or continue to qualify for benefits. It says that the plan text is where "eligibility" is defined. It includes a section on eligibility that is not found in the collective agreement or the booklet. The Hospital argues that the "eligibility" section of the plan text clearly says, "A person under the age of 65 is eligible to be a Member". It maintains that that statement and what follows define what "eligible" means in the collective agreement and the booklet. The Hospital contends that the requirement that an employee be under the age of 65 to be eligible is consistent throughout the plan text. It asserts that the most recent version of the plan text for this bargaining unit is consistent with the 1992 policy as well as the 1984 and 1980 policies. They all include an age limit of 65 for coverage for LTD benefits. The Hospital says that nothing suggests that the Union bargained a change to extend HOODIP coverage after age 65. It maintains that that makes sense because the retirement age in 1992 was 65. According to the Hospital, all that the parties did was change the language from a reference to the 1984 booklet to the 1992 booklet. The references to the plan remained and so did the right to grieve a denial of benefits. The Hospital argues that since the terms of the 1992 plan are incorporated into the collective agreement, there is no violation because the 1992 and subsequent plans have ended LTD coverage for employees at age 65.

The Hospital submits, in the alternative, that if the plan is not incorporated into the collective agreement, the booklet is ambiguous because it does not define “eligible”. It asserts that the booklet also contains an ambiguity because it does not say that coverage continues but has other restrictions at age 65. The Hospital contends that it is necessary to consider the policy to resolve the ambiguities.

The Hospital argues that there is a heavy onus on the Union because it is asserting a new benefit. It says that all of the policies and booklets were clear that LTD coverage terminated at age 65. The Hospital asserts that the Union needs to demonstrate that it negotiated something clearly different and that it has failed to do so. It says that in 1992 the parties were operating in a mandatory retirement environment and where, for at least 12 years prior, coverage terminated at age 65. The Hospital contends that, in that context, clear language would be required to find that the parties had negotiated a change to extend coverage beyond the age of 65. It notes that there has been no arbitration on this issue since the language was changed in 1992 and there can be no assumption that it has never come up before. The Hospital argues that the Union has failed to meet its burden of proof because it is unable to point to any language that specifically provides the benefit it seeks. It insists that the benefit cannot be granted by implication.

The Hospital submits that it did not need to change its LTD policy after 2006 because there was nothing in the change to the legislation that made that necessary.

The Hospital also submits that it is not asserting that the policy overrides the collective agreement if it contains any terms that conflict with it. However, it contends that the LTD plan text does not conflict with the collective agreement. The Hospital says that there is nothing in the collective agreement that requires LTD coverage past the age of 65. It maintains that the collective agreement says that the benefit is for “eligible” employees not *all* employees so “eligible” needs to be given some meaning and the only place it is defined is in the plan. The Hospital argues that contracts are not made in a vacuum and therefore the whole factual matrix is relevant.

The Hospital refers to the following awards: *Peterborough Utilities Commission v. I.B.E.W., Local 1964*, 1973 CarswellOnt 1466 (Palmer); *Keller Foundations Ltd. and IUOE, Local 870*, Re, 2014 CarswellSask 827 (Wallace); *North York General Hospital and SEIU, Local 1 (Bisram)*, Re, 2014 CarswellOnt 16154 (Surdykowski); *District School Board Ontario Northeast and COPE, Local 249 (Morin)*, Re, 2017 CarswellOnt 14407; *A.E. Mackenzie Co. v. U.F.C.W., Local 832*, 1993 CarswellMan 568 (Hamilton); *Fleet Industries Ltd. v. I.A.M. & A.W., Lodge 171*, 2000 CarswellOnt 5922 (Rayner); *Brockville Mental Health Centre and OPSEU, Local 439 (Renaud)*, Re, 2016 CarswellOnt 2751 (Knopf); *Saskatoon (City) and IBEW, Local 319 (Marks) Re*, 2017 CarswellSask 669 (Ish).

The Union replies that Article 13.01(a) refers to the HOODIP 1992 plan booklet because the hospitals use different insurance companies which are all supposed to be providing the same negotiated benefit. That benefit is described in the booklet.

The Union submits that Articles 13.01(f) and (g) do not lead to the conclusion that the policies are incorporated into the collective agreement. It says that 13.01(f) is contingent on the benefits described in 13.01. The Union also notes that the language in 13.01(g) is also found in 18.01(f) but they are separate benefits. It says that one of the purposes of

13.01(g) is to ensure that the Union is still getting the benefit of its bargain. The Union contends that that is why it negotiates access to the policy but the members only get the booklet.

The Union disagrees that there is nothing in the collective agreement or booklet that defines “eligible” employees. It says that Article 13.01 of the collective agreement refers to full-time employees only, so part-time employees are not “eligible”. Furthermore, according to the Union, the eligibility requirements are exhaustively set out in the booklet section that describes joining the plan, i.e. all new employees after the waiting period. The Union insists that those are the eligibility requirements as described in the collective agreement and the booklet. It says that everyone knows that eligibility means the conditions of membership and the conditions of membership are set out in the booklet.

The Union asserts that the Hospital is referring to the January 1992 policy but it was signed and executed on May 11, 1992 and the reference in the collective agreement is to a booklet dated August 1992 subject to a memorandum of agreement from 1995. The Union contends that the agreement between the OHA and Mutual Life suggests that they wanted to change the manner in which they were providing benefits. It insists that the collective agreement is the primary document and that the policy does not trump the booklet if they are in disagreement.

The Union submits that there is a presumption that benefits will not be circumscribed by age unless there is clear language to that effect. It says that affects the onus. The Union claims that it is not required to bargain to have members over 65 included in the collective agreement, it is up to the Hospital to bargain within the changed legal environment.

The Union denies that the collective agreement and the booklet are ambiguous. It asserts that the 1984 booklet ended coverage at age 65 and that the 1992 booklet did not. However, it says that even if they are ambiguous, there is a presumption against an age limitation and the Hospital would have had to negotiate clear language to that effect.

DECISION

There is nothing in the collective agreement itself that says that LTD coverage ends at age 65. However, it provides at Article 13.01(a):

The Hospital will pay 75% of the billed premium towards coverage of *eligible* employees under the long-term disability portion of the Plan (HOODIP or an equivalent plan as described in the August, 1992 booklet (Part B)), the employee paying the balance of the billed premium through payroll deduction...[emphasis added]

At issue is whether an “eligible” employee includes someone who works past the age of 65. The above section provides that coverage is for “eligible employees under the long-term disability portion of the Plan (HOODIP or an equivalent plan as described in the August, 1992 booklet (Part B))”. Thus, it is eligibility under the long-term portion of HOODIP but as it is described in the August 1992 booklet that is relevant. Both parties agree that the “booklet” is incorporated into the collective agreement by Article 13.01(a).

The August 1992 booklet does not say that LTD coverage terminates at age 65. The booklet from 1984 to 1991 had included such a limit but the parties chose to include a version in their collective agreement that did not. They probably expected in 1992 that LTD coverage would end at age 65 because that was when people retired. However, that does not mean that they intended that age 65, rather than retirement, would be the triggering event. In fact, the removal of the reference to coverage terminating at age 65 suggests the latter.

The Employer argues that recourse must be had to the plan itself because that is the only place in which eligibility is defined. However, the booklet does specifically refer to eligibility. It says, "Employees who have completed six months of service are eligible for coverage regardless of any pre-existing medical conditions". So "eligibility" is defined in the booklet. That is clarified with more detail on the next page under "Joining the Plan" which also deals with the situation in which an employee is not actively at work on what would otherwise be their effective date of coverage. That section of the booklet provides that "Mutual" will specify the effective date in certain circumstances where evidence of insurability was required but that is clearly not applicable to the eligibility of everyone. That language demonstrates that when the parties wanted to refer to the insurer they did so. The "Portability of Coverage" section also talks about being "eligible for coverage" if an employee goes to work for another HOODIP employer. It provides further details about eligibility for coverage if one is not Actively at Work on one's first day of work. The collective agreement itself provides that Article 13.01 only applies to full-time employees so full-time employment is another requirement of eligibility.

The Employer argues that the plan is incorporated into the booklet because there is a reference to it on the first page and elsewhere. It says that since it is incorporated into the booklet and the booklet is incorporated into the collective agreement the plan is also incorporated into the collective agreement and eligibility is defined by the plan. However, if the parties had intended for the terms of the plan document itself to determine eligibility they would not have referred to the booklet. In Article 18 they refer to certain plans, not booklets, and those plans have, therefore, been used to determine eligibility. (see *Scarborough Hospital*) It must be presumed that they said something different in Article 13.01(a) because they meant something different. Furthermore, the fact that the plan is mentioned in some places in the booklet and not others only demonstrates that it may be relevant to understanding those sections but does not mean that the whole booklet is to be read in the context of the plan. The plan is not incorporated into the collective agreement through the booklet and cannot be relied upon to reduce the benefit provided in the collective agreement. That benefit is the payment of 75% of the premium for long term disability coverage.

The Employer also argues that the Union is seeking a new benefit and that clear and unambiguous language is required for such an interpretation. However, in a number of prior awards, arbitrators have found that benefits, including extended health, dental, life insurance, and accidental death and dismemberment, continue beyond age 65 even though the parties did not change the language of their collective agreement after the change to the legislation with respect to mandatory retirement. Arbitrators have rejected the argument that the parties must have intended that the age 65 limit would continue unless they negotiated otherwise, in favour of the assumption that the parties must be presumed not to have intended discriminatory provisions even if they were legal. Clear and unambiguous language has, therefore, been required to support a determination

that benefits end at age 65. There is nothing about that analysis that would not apply to LTD benefits. In *Scarborough Hospital* the arbitrator explained as follows:

In our view, the Hospital's retirement policy or practice, or the normal retirement age at the Hospital, in 1993 does not have the effect of making age a factor. The fact that in 1993 employees were required to retire at age 65, that persons who are retired are deemed terminated, and that benefits coverage ceases upon retirement or termination, does not address the question of the rights of active employees when mandatory retirement no longer exists. It does not create or reveal a limitation that is nowhere present on the face of the collective agreement.

We agree with the comments of Arbitrator Kaplan in *Central West Specialized Development Services, supra*, at page 7, that while a similarly unrestricted obligation on the employer to contribute to the relevant benefits coverage under the collective agreement in that case:

“ ... may not have seemed like a live issue when mandatory retirement was permitted under law. Once the law was changed, the issue did become a live one ...”.

Finding the question of the alleged failure to provide the relevant benefits coverage to be “clearly arbitrable”, Arbitrator Kaplan went further, noting that, “on its own submissions, the employer is in violation of this collective agreement requirement”.

The Hospital's primary argument in this case is also not dissimilar to that which was considered and rejected by Arbitrator Etherington in *City of London, supra*. There, the employer had argued, amongst other things, that the fact that mandatory retirement was still in place when the collective agreement obligations were negotiated supported a finding that it could not have been the parties' intention that persons working past the age of 65 were entitled to the relevant benefits: para. 23. Arbitrator Etherington addressed this argument as follows:

38. However, the problem for the employer is that acceptance of that premise cannot change the plain ordinary meaning of the language used in various parts of Article 14 to expressly indicate those workers who are to be provided with the benefits in question. That language indicates that the benefits are to be provided to all employees or all “permanent employees”. While it is true that this group of employees did not include employees who were 65 or older due to article 14.7 prior to December 12, 2006, the really significant impact of the amendments brought about by Bill 211 was to render article 14.7 of no force or effect, so that after December 12, 2006 the group of all permanent employees contemplated by the benefit provisions of Article 14 would now include employees who are 65 or older who continue to work. It would be inappropriate to attempt to read an implied limitation into the various benefit provisions that remain in force on the basis of a clause that has been rendered null and void because it is in violation of anti-discrimination legislation found in

the *Human Rights Code*, particularly where the implied limitation is contrary to the plain ordinary meaning of the language used to express entitlement that remains. To the extent that the amendments in Bill 211 appear to allow for continuation of benefits plans that discriminate on the basis of age, the finding of an intention to differentiate on such grounds should require clear and unambiguous language to indicate such an intention. In short, the amendments to the *Human Rights Code* may enable employers and unions to make distinctions that disadvantage senior workers in their entitlement to benefits, but it does not mandate it or require us to read such a limitation into existing general contract language concerning benefits simply on the basis that workers who are 65 or older were not allowed to work past age 64 to December 12, 2006. This conclusion is also supported by the union argument that the status quo with respect to benefits (both immediately before and after December 12, 2006) was that all permanent employees are entitled to the benefits provided, subject to certain express limitations such as that which excludes workers who are 65 or older from LTD coverage.

This collective agreement does not include the express limitation on LTD coverage continuing past age 65 that the collective agreements in *City of London* and other awards contained and the parties did not argue that the interpretive approach should be different just because this case relates to LTD benefits. However, the Employer insists that the result should be different than most of those cases. It argues that Articles 13.01 (f) and (g) refer to HOODIP not the booklet. However 13.01(a) defines HOODIP as the 1992 booklet for the purposes of the LTD provisions. Furthermore, arbitrators have found in earlier awards that the fact that the agreement says that a copy of the plan must be provided to the Union does not mean that it is incorporated into the collective agreement or that the Union is presumed to have agreed to the terms of the plan or even that the collective agreement will be interpreted in accordance with the plan. The plan is provided to the Union so it can see the coverage for which the Employer has contracted. (see *Strathroy, Scarborough Hospital and City of London*)

If the parties intended to incorporate the whole plan text into the collective agreement they would simply have eliminated the bracketed portion of Article 13.01(a) or left out the reference to the booklet. There would be no need to refer to the booklet at all. By referring to the booklet they incorporated its terms but not the whole plan into the collective agreement. Phrased slightly differently, they incorporated the plan but only to the extent that it was described in the booklet. The parties certainly knew how to make the benefit set out in the collective agreement subject to the terms of an insurance plan as they did that in Article 18 with the following words:

The Hospital agrees, during the term of the Collective Agreement, to contribute towards the premium coverage of participating eligible employees in the active employ of the Hospital under the insurance plans set out below subject to their respective terms and conditions including any enrolment requirements: ...

The parties were, therefore, doing something very specific by including the reference to the booklet in Article 13.01(a) rather than stating that the LTD benefit was subject to the

plan's terms, conditions and enrollment requirements. In *Strathroy-Caradoc Police Assn* the collective agreement contained an appendix setting out "Hospital, Medical and Extended Healthcare benefits". The appendix did not contain any limitations or qualifications. However, it did provide that employees should refer to the named insurance policy for specifics and limitations. The appendix also required that each member be provided with a copy of the benefits outlined in the plan. That document made it clear that benefits ended at age 65. The arbitrator found, however, that the plan was not part of the collective agreement although the benefits set out in the appendix were. She stated at paragraph 18:

I am left with the interpretive exercise. Have the parties to the collective agreement before me negotiated a legally permitted discriminatory benefit plan? As set out above, I adopt the view of Arbitrator Etherington that only clear and unambiguous language should lead me to conclude that differential benefits have been negotiated. In my view, it is also important to remember that these parties took no active steps to change their bargain after the *Human Rights Code* was amended. So, I am not looking at a situation where the parties took steps to respond to the legislative change and now disagree about the impact of those steps. Instead, I am interpreting the parties' unchanged agreement against the altered legislative landscape.

Those comments apply to this matter as well. I note that this collective agreement does not even require that all members be provided with a document that says that coverage ends at age 65.

The booklet states that coverage ends when "you are not eligible". It does not go on to say "in accordance with the plan" or something similar. The Employer asserts, nevertheless, that determining eligibility requires a referral to the plan text. However, it is not necessary to refer to the plan text because there are eligibility requirements in the collective agreement and in the booklet themselves. For example, eligibility would be lost if an employee changed from full-time to part-time. It could also be lost if an employee transferred employers and did not inform the new employer within one month of the first day of employment or if someone had a hiatus of more than six months between participating employers. The words "you are not eligible" in the booklet thus refer to what constitutes eligibility in the booklet. It does not make sense that the parties would include the words "you are not eligible" in the booklet to direct readers to the plan to learn that their coverage ends at age 65 when they could just have included that limitation in the booklet under "When Your Coverage Terminates" if that had been their intention. They had done that in the 1984 to 1991 booklet.

The parties could have agreed to include the age 65 limit for LTD coverage in the collective agreement anytime since 1992 if that was their intention. Many collective agreements do include such a limit. The parties have had the opportunity during every negotiation since 2006 to ensure that the language in the collective agreement reflected their bargain in light of changes to the *Code*. They continued to include Article 13.01(a) without adding that the Employer's obligation to pay LTD premiums ends at age 65. Furthermore, the parties must be presumed to have known the jurisprudence related to benefit continuation after age 65 when they negotiated the collective agreement under which this grievance was filed but they did not specify that LTD coverage would end at that age. Coverage will, therefore, continue until such time as they agree to such a change.

In conclusion, the collective agreement and the booklet provide that full-time employees are eligible for LTD coverage after six months of service or if they transfer from another HOODIP employer within six months. There is nothing in the collective agreement or the booklet that provides that coverage ends at age 65 if an employee keeps working. Clear and unambiguous language would be needed for such a limitation even if it is permitted under the *Code* and the *Employment Standards Act*. We find, therefore, that LTD coverage continues for employees who work beyond the age of 65.

The parties were clear throughout this arbitration that the issue before us was whether LTD coverage ends at age 65 and that we are not dealing with entitlement to benefits. We have not, therefore, made any determinations about benefit entitlement.

The grievance is allowed. We declare that the Employer is required to continue to “pay 75% of the billed premium towards coverage of eligible employees” who work past their 65th birthdays. We remain seized with respect to any other remedial issues and any issues that arise with respect to the interpretation or implementation of this award.

November 19, 2018



Laura Trachuk, Chair

“I concur”
“Joe Herbert”

Joe Herbert, Union Nominee

“I dissent”
“R. Greg Shaw”

R. Greg Shaw, Employer Nominee

Dissent of the Employer Nominee

I must dissent from the award of the majority this matter. I believe this award is erroneous and patently unreasonable from many perspectives.

This is a relatively straightforward matter. Is the Plan Text incorporated into the Collective Agreement or at a minimum to be relied on for purposes of coverage under the HOODIP Plan? The majority says no. I strongly disagree for the following reasons.

Article 13.01 of the Collective Agreement provides at the second paragraph that;

“The Hospital will pay 75% of the billed premium towards coverage of eligible employees under the long term disability portion of the Plan (HOODIP or an equivalent plan as described in

the August, 1992 booklet (Part B)...”

[emphasis added]

This provision therefore incorporates the August, 1992 booklet and the Plan into the Collective Agreement. Nowhere in the booklet or the Collective Agreement does it define what an eligible employee is, but the booklet does state that coverage terminates when “you are not eligible”. That term “eligible” is used in both the Collective Agreement and the booklet and therefore must have meaning. The brochure only outlines coverage not the myriad of continuing eligibility matters covered by the Plan document.

The August 1992 HOODIP booklet also states on its cover that;

“The statements contained in this booklet are only a summary of some of the provisions of the master policy. If you need further details of the provisions which apply to your group benefits you must refer to the master policy.”

The cover of the brochure also includes that it is;

“Information for Full-Time Employees Group Policy No. 2100”

This clearly incorporates the Master Policy into the Collective Agreement. The Plan is also referred to in the Collective Agreement at 13.01 (f) and (g)

Further, article 13.01 specifically states that coverage is for “... eligible employees ... as described in the August, 1992 booklet...”. The August, 1992 booklet is not the Plan, is simply describes the Plan. The current Plan for Markham Stouffville Hospital is administered by Desjardins, but it contains the same eligibility requirements of the HOODIP plan under Group Policy No. 2100 that was held by Manulife, and specifically referenced in the August, 1992 booklet.

The Master Policy (Plan), at page E-1 ,defines eligible as;

“A person under the age of 65 is eligible to be a Member if she meets all of the following conditions. She continues to be eligible to be a Member while she meets all of the following conditions:”

**The Master Policy further provides at Page F-2 that “
....Insurance of a member terminates on the date she no longer meets all of the conditions for Eligibility to be a Member.”**

This must be interpreted to mean coverage terminates at age 65. This eligibility requirement also does not conflict with any provision of the Collective Agreement or the August, 1992 booklet.

The majority of this Board relies on a number of cases put forward by the Union that stand for the proposition that arbitrators in other cases have rejected the argument "... that the parties must have intended that the age 65 limit would continue unless they negotiated otherwise, in favour of the assumption that the parties must be presumed not to have intended discriminatory provisions even if they were legal."

Those cases are based entirely on a false premise. The termination of LTD coverage at age 65 never was "discriminatory" because the government of the day enacted legislation in the Human Rights Code and the Employment Standards Act to permit such distinctions to continue, notwithstanding the elimination of the age 65 exemption under the Code. It is also inconsistent to suggest that something that continued to be "legal" under the Code was in any way "discriminatory" for the purposes of the Code.

The effect of the award creates absurd results due to the following provisions listed in the August, 1992 booklet:

WHEN BENEFITS STOP

Benefits are payable from the end of the qualifying period until the earliest of the following dates: ... • Your 65th birthday, if you become disabled after age 64 and you have completed fewer than 10 years of Continuous Service, when you become disabled

• The day 12 months after the Date of Disability, if you become disabled after age 64 but before age 65 (minus the qualifying period) and you have completed fewer than 10 years of Continuous Service when you become disabled. • The date of death if you have completed 10 years of Continuous Service when you become disabled. In this case, at age 65 your benefit will be further reduced by any additional payments from

government plans and your employer's pension plan that begin at that age (see Amount of Long Term Disability Benefit).

In the circumstances under the first bullet in the section above, an employee would normally see their benefits terminate at age 65 even if they continued working past age 65. The effect of the majority Award, however, would permit coverage (and benefits) to continue past age 65. Under the second bullet, an employee who becomes disabled between age 64 and age 65 would normally receive only 12 months of benefits. The majority Award, however, would continue the right to coverage and benefits beyond that 12 month period if the employee continued working.

These absurd results would render these provisions in the August, 1992 booklet meaningless and that could never have been the intention by the parties. The parties clearly intended that coverage and benefits would only continue past age 65, if an employee had 10 years of continuous service and became disabled prior to age 65.

Finally, article 13.01 g of the Collective Agreement provides that ;

"A copy of the current HOODIP plan text , or where applicable, the master policy of the HOODIP equivalent, shall be provided to the Union."

If the entire HOODIP Plan was contained within the brochure, what possible reason could the Union have for wanting the Plan text?

This is a terrible decision for the entire Hospital industry. The expense of providing LTD coverage to employees post 65 will likely be enormous. It will be interesting to see if any insurance

company will even underwrite it.

For the above reasons I would have dismissed the grievance.

Greg Shaw Employer Nominee