IN THE MATTER OF AN ARBITRATION
Under the Ontario Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A

B E T W E E N:

**NORTH BAY REGIONAL HEALTH CENTRE**

(the "Hospital"),

- and -

**CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 139**

(the "Union" or "CUPE"),

AND IN THE MATTER OF THE GRIEVANCES OF "KC" AND "CT" REGARDING HOODIP SICK PAY BENEFIT REINSTATEMENT.

SOLE ARBITRATOR: Gordon F. Luborsky

APPEARANCES

| | |
|---|---|
| For the Union: | Ryan Newell, Counsel<br>Colin MacDougall, National Representative<br>Brett Campbell, Local President<br>Sandra Shank, Local Vice-President |
| For the Hospital: | Carolyn Kay, Counsel<br>Kelly Hanselman, Human Resources<br>Kristen Best, Disability Management<br>Jill Thompson, Occupational Health & Safety Manager |
| HEARD: | September 24, 2020 by Videoconference, Written Submissions Received May 17, 2021 |
| DECISION: | January 17, 2022 |

## A W A R D

[1] The parties have agreed to anonymize the Grievors as "KC" and "CT" in the two grievances before me dated June 11, 2020 alleging that the Hospital violated the collective agreement when it refused to reinstate their full sick-pay entitlement after they returned to work on modified/reduced duties for three continuous weeks following a health related absence.

[2] The Grievors were unable to work in their full-time positions due to an illness or injury recognized as a "disability" under the Ontario *Human Rights Code,* R.S.O. 1990, c. H. 19, as amended ("HRC"). They were entitled to up to 15 weeks of sick pay under terms of the Hospitals of Ontario Disability Insurance Plan (referred to as "HOODIP") incorporated within the collective agreement, eventually returning to modified duties and/or variable shift schedules within that period, which extended beyond 15 weeks before they were capable of resuming their previous full-time duties without limitation.

[3] The narrow issue raised by their grievances is the time required (and basis of its calculation) to entirely replenish their 15 weeks of short-term sick pay entitlement where they returned on modified duties and reduced hours as opposed to their regular full-time responsibilities and schedule.

**Decision**

[4] For the reasons that follow I allow the grievances while remaining seized of the remedy that is referred back to the parties for resolution.

**General Contextual Framework**

[5] HOODIP was established by the Ontario Hospital Association ("OHA") in 1976 to deliver uniform disability income benefits for employees of "Participating Employers" covering most of the public hospitals in Ontario. It provides for two periods of benefits: the "Sick Pay Benefit" (referred to as "Part A") and "Long Term Disability" ("Part B"). A descriptive "brochure" setting out the details of HOODIP for the information of employees was published by the OHA in 1980, and ultimately incorporated by express reference into the "central language" of the collective agreements of the different bargaining units of employees at the OHA member hospitals. The 1980 HOODIP brochure was succeeded by an updated version dated August 1992 also issued by the OHA.

[6] When a full-time employee is unable to attend work due to short-term illness or injury, article 13.01 (a) of the parties' current collective agreement reads in relevant part that: "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". Depending on the employee's length of service, that brochure states the employee may receive a "Sick Pay Benefit" of up to 100 percent of the employee's earnings for the first 15 weeks of disability (depending on the number of years of service).

[7] The 1992 HOODIP brochure then states that the employee must work "for three continuous weeks" in order to reinstate the "benefit period of 15 calendar weeks" for future absences due to "total disability", failing which any recurrence of that or a related disability will only be compensated under the short-term sick leave plan to the end of the initial 15 week period. It also stipulates (in a second paragraph not immediately relevant) that an employee returning to work "on an approved modified work program" is not considered to be "Actively at Work" and that modified work "continues to count towards the expiry of the 15 week benefit period and does not cause it to be reinstated".

[8] The entire provision under the heading, "If your disability recurs", is reproduced below:

> When you return after an absence due to a Total Disability ***and work for three continuous weeks***, ***your benefit period of 15 calendar weeks will be reinstated in full.*** However, if within the three regular work weeks following your return to work you are disabled from the same or a related cause, only the remainder of the 15 calendar week benefit period will apply.
>
> If you become disabled from an unrelated cause of injury or illness within the three regular work weeks following your return to work, your benefit period will be reinstated in full. However, if you remain absent from work and you become further disabled (due to a related or unrelated cause of injury/illness) the 15 calendar week benefit period will not be reinstated. ***If you return to work on an approved modified work program, you are not considered to be Actively at Work. The time spent doing modified work continues to count toward the expiry of the 15 week benefit period and does not cause it to be reinstated.***
>
> [Emphasis added]

[9] In both grievances before me, the Grievors were able to return to work before the end of 15 weeks of total disability while receiving sick pay at 100% of their usual salary during that period. However, instead of immediately resuming their regular full-time responsibilities and schedules they were both accommodated with modified duties and reduced hours for several weeks beyond the three weeks purportedly required by the 1992 HOODIP brochure for reinstatement of their full bank of future sick pay entitlement.

[10] In response to the Union's inquiry on behalf of Grievor KC of whether the Grievor's "sick time has been reinstated to 15 weeks as she has been back for 3 weeks now", the Hospital's representative advised that: "As per the reinstatement language the employee needs to be at work for 3 weeks, continuous full time and full regular duties (modified work does not count)." The Hospital gave the same response to the same question posed by the Union on behalf of Grievor CT; leading the Union to file the two grievances before me now.

[11] The Union takes the position that after the Grievors returned to work and completed three weeks of continuous employment as scheduled by the Hospital, they were entitled to have their "sick banks" completely restored with 15 weeks of future short-term disability coverage regardless of whether they worked on a modified or reduced work schedule. The Union therefore requests a declaration that the Hospital violated the collective agreement with full reinstatement of both Grievors' 15 weeks of sick-pay entitlement effective the end of their third week of work, modified/reduced or not, while remaining seized of potential compensation to make them whole for any consequent monetary loss.

[12] In its responses to both grievances dated July 3, 2020 the Hospital stated that the period after the Grievors' return to work on modified duties and/or variable shift schedules did not count towards the reinstatement of their 15 weeks of future sick-pay entitlement because, consistent with the 1992 HOODIP brochure, "an employee must work three (3) weeks full-time continuous work", which both Grievors had not achieved where they were working modified duties on a reduced schedule during that time.

[13] Later at arbitration, the Hospital argued that an employee assigned to modified duties on a reduced shift schedule would need to work at least 112.5 hours on the assigned duties, which is the equivalent of three weeks of full-time work, in order to recharge the 15 week sick-leave entitlement under HOODIP that the Grievors hadn't satisfied by the time of their grievances. The Hospital consequently maintains that it complied with the collective agreement and that the grievances must be dismissed.

[14] The narrow issue in dispute is thus the basis on which the full 15 calendar weeks of sick leave benefit entitlement will be reinstated to an employee returning from a short-term illness or

injury constituting a disability under the HRC. The parties agree that I was properly appointed as arbitrator under their collective agreement with jurisdiction to determine their dispute.

## Agreed Statement of Facts

[15] The parties argued their conflicting perspectives of the two grievances before me from the following Agreed Statement of Facts ("ASF") with references to a number of ancillary documents also filed on consent:

> **Background**
>
> 1. The North Bay Regional Health Centre (NBRHC) provides acute care services to North Bay and its surrounding communities. It is the district referral centre providing specialist services for smaller communities in the area and is the specialized mental health service provider serving all of northeast Ontario.
>
> 2. NBRHC has 389 beds and numerous outpatient and outreach services in North Bay and throughout the northeast region.
>
> 3. CUPE Local 139 represents a bargaining unit of roughly 1055 at NBRHC.
>
> 4. The Hospital and CUPE's collective agreement consists of a Central Agreement (Tab 1), negotiated through central bargaining with other Participating Hospitals and the OHA, and a Local Appendix negotiated locally (Tab 2).
>
> 5. Article 13.01(a) of the Central Agreement provides as follows:
>
>> 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.
>
> 6. Attached as Tab 3 is a copy of the HOODIP 1992 Booklet. The HOODIP 1992 booklet provides as follows:
>
>> When you return after an absence due to a Total Disability and work for three continuous weeks, your benefit period of 15 calendar weeks will be reinstated in full. However, if within the three regular work weeks following your return to work you are disabled from the same or a related cause, only the remainder of the 15 calendar week benefit period will apply.
>>
>> If you become disabled from an unrelated cause of injury or illness within the three regular workweeks following your return to work, your benefit period will be reinstated in full. However, if you remain absent from work and you become further disabled (due to a related or unrelated cause of injury/illness) the 15 calendar week benefit period will not be reinstated. If you return to work on an approved modified work program, you are not con-

sidered to be Actively at Work. The time spent doing modified work continues to count toward the expiry of the 15 week benefit period and does not cause it to be reinstated.

7. Attached as Tab 4 is a copy of the HOODIP 1980 Booklet.

**Grievor #1 (KC)**

8. KC is a Food Service Worker in the CUPE bargaining unit and has been employed by the Hospital since 1996.

9. As such, KC was covered by the 1992 HOODIP Plan for sick leave and long-term disability coverage.

10. KC normally works 37.5 hours per week on average.

11. KC went off on sick leave as of February 10, 2020 until May 11, 2020 during which time she received sick leave pay pursuant to the HOODIP sick leave plan.

12. During that time, KC exhausted 13 weeks of her 15 week HOODIP entitlement.

13. KC commenced a graduated return to work on modified duties effective May 12, 2020. She had a disability requiring accommodation within the meaning of the *Human Rights Code*. The graduated return to work was part of the accommodation that was necessary based on the available medical information, the sufficiency of which is not in dispute.

14. A return to work plan was developed with the involvement of KC, the Union, her manager and Disability Management, as follows:

| Mon. May 11th | May 12th | May 13th | May 14th | May 15th | May 16th | May 17th |
|---|---|---|---|---|---|---|
| | 4.0 Modified<br>7.5 Sick | | 4.0 Modified<br>7.5 Sick | | 4.0 Modified<br>7.5 Sick | |
| Mon. May 18th | May 19th | May 20th | May 21st | May 22nd | May 23rd | May 24th |
| 6.0 Modified<br>5.25 Sick | | 6.0 Modified<br>5.25 Sick | | 6.0 Modified<br>5.25 Sick | | |
| Mon. May 25th | May 26th | May 27th | May 28th | May 29th | May 30th | May 31st |
| | 8.0 Modified<br>3.25 Sick | 8.0 Modified<br>3.25 Sick | | | 8.0 Modified<br>3.25 Sick | 8.0 Modified<br>3.25 Sick |
| Mon. June 1st | June 2nd | June 3rd | June 4th | June 5th | June 6th | June 7th |
| 11.25 VAC (supplement with VAC as out of sick time) | | | 10.0 Modified<br>1.25 VAC (supplement with VAC as out of sick time) | 10.0 Modified<br>1.25 VAC (supplement with VAC as out of sick time) | | |
| Mon. June 8th | June 9th | June 10th | June 11th | June 12th | June 13th | June 14th |
| | 11.25 Modified | 11.25 STAT | | | 11.25 Modified | 11.25 Modified |

15. While working modified duties, KC received her regular wages and was topped up by sick leave for part of the period during which she worked modified hours.

16. KC was entitled to 75 hours of remaining sick leave before her 15 week entitlement was depleted.

17. As a result, KC ought to have received sick pay top up to her modified duties for the week of May 25th and the week of June 1st. The Hospital will ensure that that occurs and that her vacation bank is restored the 2.50 hours used in the week of June 1st.

18. On June 3, 2020, the parties exchanged emails about the reinstatement of KC's sick bank (Tab 5).

19. The Hospital's position is that KC did not requalify for HOODIP reinstatement until she worked 112.5 hours which is the equivalent of the average 37.5 hours per week times 3 weeks.

20. Applying that calculation, KC would have been entitled to have her HOODIP sick leave restored on or about June 15th, approximately five weeks after she returned to work on modified duties.

21. The Union filed a grievance dated June 11, 2020: Tab 6. Tab 7 is a copy of the Hospital's Response at Step 2 dated July 3, 2020.

22. The Union maintains that KC's sick leave credits should have been reinstated three calendar weeks after May 12, 2020, i.e. June 2, 2020.

**Grievor #2**

23. CT is Paramedic in the CUPE bargaining unit and has been employed by the Hospital since 2004.

24. CT was also covered by the 1992 HOODIP sick leave plan.

25. CT normally works 40 hours per week on average.

26. CT went off on sick leave effective December 6, 2019 and remained off until March 15, 2020. During that period of time, CT received sick leave in accordance with the HOODIP sick leave plan.

27. He commenced a graduated return to work on March 16, 2020. He had a disability requiring accommodation within the meaning of the *Human Rights Code*. The graduated return to work was part of the accommodation that was necessary based on the available medical information, the sufficiency of which is not in dispute.

28. The 15 weeks of sick leave benefits expired on March 19, 2020.

29. With the involvement of CT, his Union, his manager and the Disability Specialist, a graduated return to work plan was developed for him as follows:

| Mon. Mar. 16th | March 17th | March 18th | March 19th | March 20th | March 21st | March 22nd |
|---|---|---|---|---|---|---|
| 12.0 Sick | 8.0 Sick<br>4.0 Modified | 4.0 Modified | 4.0 Modified | 4.0 Modified | | |
| Mon. Mar. 23rd | March 24th | March 25th | March 26th | March 27th | March 28th | March 29th |
| 4.0 Modified | 4.0 Modified | 4.0 Modified | 4.0 Modified | 4.0 Modified | | |
| Mon. Mar. 30th | March 31st | April 1st | April 2nd | April 3rd | April 4th | April 5th |
| 8.0 Modified | 4.0 Modified | 8.0 Modified | 4.0 Modified | 8.0 Modified | | |
| Mon. April 6th | April 7th | April 8th | April 9th | April 10th | April 11th | April 12th |
| 8.0 Modified | 8.0 Modified | 8.0 Modified | 8.0 Modified | 8.0 Modified | | |
| Mon. April 13th | April 14th | April 15th | April 16th | April 17th | April 18th | April 19th |
| 8.0 Modified | 8.0 Modified | 8.0 Modified | 8.0 Modified | 8.0 Modified | | |
| Mon. April 20th | April 21st | April 22nd | April 23rd | April 24th | April 25th | April 26th |
| 8.0 Modified | 8.0 Modified | 8.0 Modified | 8.0 Modified | 8.0 Modified | | |
| Mon. April 27th | April 28th | April 29th | April 30th | May 1st | May 2nd | May 3rd |
| 8.0 Modified | 8.0 Modified | 8.0 Modified | 8.0 Modified | 8.0 Modified | | |
| Mon. May 4th | May 5th | May 6th | May 7th | May 8th | May 9th | May 10th |
| | 12.0 Modified | 12.0 Modified | | | 12.0 Modified | 12.0 Modified |
| Mon. May 11th | May 12th | May 13th | May 14th | May 15th | May 16th | May 17th |
| 12.0 Modified | | | 12.0 Modified | 12.0 Modified | | |
| Mon. May 18th | May 19th | May 20th | May 21st | May 22nd | May 23rd | May 24th |
| 12.0 Modified | 12.0 Modified | | | Sick | Sick | Sick |

30. Due to a coding error, CT should have received 8 hours of sick leave top up for March 18 and March 19, 2020. The Hospital will ensure that this is remedied.

31. On June 3, 2020, the parties exchanged emails about the reinstatement of CT's sick bank (Tab 8).

32. The Hospital's position is that CT did not requalify for HOODIP reinstatement until he worked 112.5 hours which is the equivalent of the average 37.5 hours per week times 3 weeks.

33. Applying that calculation, CT would have been entitled to have his HOODIP sick leave re-stored on or about April 14, 2020.

34. The Union filed a grievance dated June 11, 2020: Tab 9. Tab 10 is a copy of the Hospital's Step 2 Response dated July 3, 2020.

**Past Practice**

35. The Union has grieved that the Employer breached the Collective Agreement and the *Human Rights Code* by failing to reinstate the grievors' sick banks after they had been at work for 3 weeks. The Union also asserted that "the employer is not following Arbitrated award by M. Brian Keller January 8, 2020.

36. Prior to the above-noted grievances, the Hospital had consistently reinstated HOODIP sick leave benefits 3 weeks after an employee returned to full duties and hours of work.

37. The Hospital has never reinstated HOODIP sick leave after 3 calendar weeks from date of employee returning on modified duties.

38. The above-noted grievances are the first time the Union has grieved the issue at NBRHC.

## Other Documents and Contractual/Statutory Provisions

[16] In addition to the 1992 Hospitals of Ontario Disability Income Plan brochure (Part A), the parties filed the following portions of the predecessor 1980 HOODIP brochure in effect at Participating Hospital members of the OHA:

**SICK PAY BENEFIT**

If you are a regular full-time employee with three months' service or more, and are absent from work due to total disability, excluding compensable accidents such as those covered by Workmen's Compensation, you are eligible for sick pay benefits which are fully paid by the hospital as follows:

**DURATION OF BENEFITS**

Benefits are paid for up to 15 weeks or 75 working days based on a normal five day work week.

…

**REINSTATEMENT OF BENEFIT**

When you return from an absence ***and work full-time continuously for three weeks***, your benefit period of 15 weeks is reinstated in full. If you are absent from work again due to total disability for the same or a related cause or before you have completed three weeks of full-time employment, the balance of your original sick pay benefit will apply. However, if your subsequent absence is due to a different illness unrelated to the initial one, the full 15-week benefit period will apply even if the absence due to the second illness occurs within three weeks following your return to work.

[Emphasis added]

[17] The following provisions of the applicable CUPE collective agreement were also referred to in argument or are relevant:

**ARTICLE 3 – RELATIONSHIP**

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. The Hospital and the Union further agree that there will be no intimidation, discrimination, interference, restraint or coercion exercised or practiced by either of them or their representatives or members, because of an employee's membership or non-membership in a Union or because of his activity or lack of activity in the Union.

…

**ARTICLE 13 – SICK LEAVE, INJURY AND DISABILITY**

13.01 – 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 (11) year or more of service shall be deemed to have one (1) year of service.

…

**ARTICLE 14 – HOURS OF WORK**

14.01 (a) DAILY & WEEKLY HOURS OF WORK (Full-Time Employees)

The regular hours of work for all employees covered by this Agreement shall be as follows:

The normal hours per week shall be thirty-seven and one-half (37 ½) hours exclusive of meal times for each employee during biweekly period.

…

[18] As were sections 5, 11 and 17 of the HRC, reproduced below:

5 (1) **Employment** – 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) **Constructive Discrimination** – A right of a person under Part I 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.

17. (1) **Disability** – A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.

    (2) **Accommodation** – No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person reasonable for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

    (3) **Determining if undue hardship** – In determining for the purposes of subsection (2) whether there would be undue hardship, a tribunal or court shall consider any standards prescribed by the regulations.

## Prior and Concurrent Arbitration Decisions

[19] Against the foregoing background facts and documentation, the parties filed two arbitration decisions during their oral representations said to have determined the same issue under the collective agreements between a Participating Hospital member of the OHA and the Ontario Nurses' Association ("ONA") interpreting relevant provisions of the 1980 and/or 1992 HOODIP brochures, written respectively by Arbitrator Brian Keller in *Re Southlake Regional Health Centre and ONA,* 2020 CarswellOnt 2227, 143 C.L.A.S. 64 (Ont. Arb.) (Keller) dated January 8, 2020 and by Arbitrator Janice Johnston in *Re Hamilton Health Sciences and ONA (N.B.),* 2020 CarswellOnt 3773, 143 C.L.A.S. 102 (Ont. Arb.) (Johnston) dated March 5, 2020.

[20] Subsequently, the decision of Arbitrator Christopher White addressing the same issue between a Participating Hospital member of the OHA and ONA was released on April 29, 2021 in *Re Women's College Hospital and Ontario Nurses' Association (Gittens),* 2021 CarswellOnt 10298, 149 C.L.A.S. 43 (Ont. Arb.) (White) on which the parties filed written submissions.

[21] All three arbitration decisions, which repeat many of the same arguments and jurisprudence relied upon by the parties before me, were decided in favour of the ONA. The Union argues that I ought to follow the reasoning of those decisions in determining the two instant grievances; while the Hospital maintains those cases were either wrongly decided or are distinguishable on various grounds.

[22] It is therefore appropriate to review the circumstances and rationale from those three arbitration awards as a precursor to the subsequent consideration of the parties' respective submissions in the two grievances before me.

***(i) Southlake Regional Health Centre***

[23] The issue in the January 8, 2020 decision of Arbitrator Keller in *Southlake, supra,* was "to determine which method is to be used to calculate when short-term disability benefits are reinstated under both the 1980 and 1992 HOODIP plans" (para. 1) in the case of "nurses who return to work on a modified work plan due to disability, that includes either limited days, and/or limited hours in a day"; and whether "the employer [can] pro-rate the hours until the employee has worked the equivalent of three continuous weeks" (para. 2).

[24] ONA (referred to as "the association") took the position that the sick-leave benefit was to be fully reinstated after the employee completed three continuous weeks of work regardless of the modification of duties and/or variable work schedules to accommodate a disability during those initial three weeks. The employer, however, maintained that the employee had to complete at least the equivalent of full-time hours of work during a regular three weeks of 112.5 hours (calculated on an average 37.5 hours per week), which could consist of variable numbers and/or durations of shifts over a period of time exceeding three calendar weeks (per paras. 3 – 7).

[25] In considering these matters, Arbitrator Keller reviewed the relevant HOODIP provisions in both the 1980 and 1992 brochures as well as Minutes of Settlement previously entered into by the parties (the latter not being germane to the instant cases). The 1980 and 1992 brochures were the same documents relied upon by the parties in the two cases before me; notably in connection with the requirement of the 1980 Plan that the employee must "work full-time continuously for

three weeks" and the 1992 brochure which states the sick leave entitlement is not reinstated until the employee returning from an absence works "for three continuous weeks" where "an approved modified work program" is expressly "not considered to be Actively at Work". The jurisprudence reviewed by the arbitrator included a number of the same authorities cited by the instant parties in argument before me, with extensive consideration of the Ontario Court of Appeal's decision in *O.N.A. v. Orillia Soldiers Memorial Hospital,* 1999 CarswellOnt 28, [1999] O.J. No. 44, 117 O.A.C. 146, 169 D.L.R. (4th) 489, 20 C.C.P.B. 195, 36 C.H.R.R. D/202, 40 C.C.E.L. (2d) 263, 42 O.R. (3d) 692, 85 A.C.W.S. (3d) 388, 99 C.L.L.C. 230-007 (Doherty), described in some detail below.

[26] Ultimately the arbitrator determined that the employer's pro-rating for employees requiring modified duties to reasonably accommodate their ongoing disability had the effect of discriminating against those employees contrary to the provisions of the collective agreement and the HRC, by treating that cohort of employees (i.e. requiring modified or a reduced schedule of work) differently than the fully abled for purposes of reinstating the short-term disability benefit. He expressed that conclusion as follows at paras. 66 – 70:

> 66. It is incontrovertible that the employer is treating the two cohorts of employees differently. There is no intention to discriminate, but it is equally incontrovertible that the prorating scheme of the employer results in different treatment. The only reason for the difference in treatment is that one cohort requires accommodation and the other does not. The result is that the cohort not requiring accommodation can requalify within the three weeks as provided by the HOODIP requalification language, whereas the cohort which requires accommodation does not. It is clear that this provides a disadvantage to the cohort requiring accommodation and results in discriminatory treatment to that cohort.
>
> 67. The answer to this question, then, boils down to whether or not the cohort of employees being accommodated is disadvantaged, not by having to work a different number of hours to requalify, but by the fact that the length of time will be longer than the cohort of employees not requiring accommodation. Thus, the question is no longer whether they can ever requalify, as the prorating results in employees being able to requalify. ***The question now is whether it is discriminatory because the prorating of hours will require a greater passage of time before the accommodated group of employees can requalify. In this respect, it is important that the prorating imposed by the employer results in both cohorts of employees being required, ultimately, to work the same number of hours to requalify: it is just the length of time to work the number of hours required to requalify that distinguishes the two cohorts. That distinction, on its face, as expressed above, is discriminatory as, clearly, the two cohorts are treated differently for the reason only that one cohort requires accommodation and the other does not.***

> 68. There is, in my view, another problem with the approach taken by the employer. The employer suggests that by prorating as it does, employees requiring accommodation will always be in a position to requalify. The problem that I identify is that prorating could result, in certain circumstances, because of the length of time before which an employee is able to requalify, in an unreasonable period in which to requalify. An extreme example is where an employee is accommodated and is only able to work one hour per week. In this example, the length of time to requalify would be, in my opinion, unreasonable and would, to all intents and purposes result in a practical inability to requalify as provided by the HOODIP. Another scenario is where an employee is only able to return to work one day per week. In this situation, it would take 15 weeks for the employee to requalify for benefits. This is to be compared with the three weeks to requalify in the case of employees not requiring accommodation.
>
> 69. Thus, while the employer may be correct that, in all situations, employees who require accommodation would be able to requalify, the length of time required to requalify could have the practical effect of a denial of requalification. That, in my opinion, would be a violation of the Code and consistent with earlier jurisprudence in this area. I confess that I do not know at what point it could be argued successfully that there is a practical denial of the ability to requalify. I simply point out to the parties that the intent of the HOODIP is to provide for requalification. ***The employer cannot use prorating if it the effective result is to be an unreasonably long period of time before which an employee, requiring accommodation, is able to requalify. It is not the intent to violate the Code that is at issue: It is whether there has been discriminatory treatment regardless of intent.***
>
> 70. Accordingly, I conclude that the prorating scheme of the employer results in discriminatory treatment to employees requiring accommodation and is not permitted.
>
> [Emphasis added]

[27] And, on the question of whether the employee returning from a disabling illness needed to work full-time hours for an entire or continuous three-week period before requalifying for sick leave benefits under HOODIP, Arbitrator Keller reasoned that the wording of the 1992 HOODIP brochure "removed any issue of what working full-time has to mean" by leaving only the express three-week timeframe as the threshold for requalification regardless of the number of hours scheduled in that period, explaining at paras. 71 – 73 that:

> 71. In my opinion, the answer to the second question lies in the language of the HOODIP brochures. The 1980 brochure talks about full-time work but doesn't define it. However, it contains the phrase *"when you return from an absence and work full-time continuously for three weeks your benefit period of 15 weeks is reinstated in full".* [Emphasis added]. The words "work full-time continuously" in the brochure introduce the notion of hours of work for the nurse who seeks benefits reinstatement. ***That phrase is absent from the 1992 brochure language.*** It states only that *"when you return after an absence due to a Total Disability, and work for three continuous weeks",* removing from consideration any issue of what working full-time has to mean.
>
> 72. ***Therefore, in my view, because of the change in the brochure language, the only consideration for reinstatement is the need for a nurse to work for three continuous weeks,***

> ***regardless of whether a nurse seeking benefit reinstatement is working a variable shift schedule or a "regular" shift schedule. This is reinforced by the language regarding recurrence which refers to "three regular work weeks for a full-time employee", without defining what three regular work weeks means.***
>
> 73. In both cases, it is my opinion that whether it is three regular work weeks or three continuous weeks the language refers to whatever the shift schedule for nurse is on. ***It does not matter what the number of hours worked are so long as the nurse works their regular schedule for three continuous weeks.***
>
> [Emphasis added]

[28] The grievance was accordingly allowed with the arbitrator holding at para. 76 that the language of the operative HOODIP brochure was on its face "unambiguous" requiring only that the employee work for a particular length of time (i.e. three continuous weeks) while making no reference to the specific number of hours that needed to be worked, consequently declaring in conclusion at para. 77 "that to re-qualify, a nurse must work their schedule, regardless of the number of hours in the three-week period."

### *(ii) Hamilton Health Sciences*

[29] Shortly afterwards, a decision by Arbitrator Johnston in *Hamilton Health Sciences, supra,* dated March 5, 2020*,* considered again the meaning of the reinstatement of benefit language in the 1980 HOODIP brochure (Part A). Under that provision, an employee returning after paid sick leave for up to 15 weeks was required to "work full-time continuously for three weeks" in order to fully recharge the 15 weeks of paid sick leave benefit entitlement.

[30] Thus where the grievor in that case returned to work after a lengthy absence due to what was referred to as "Condition A" and was placed on a modified work schedule of reduced hours or shifts for more than three continuous weeks before suffering a different ailment referred to as "Condition B", the question arose as to whether the grievor had recharged her full 15 weeks of sick pay entitlement under Part A of the 1980 HOODIP before going off work as a result of Condition B.

[31] As noted at para. 6 in the award, the employer took the position that to gain reinstatement of the sick pay benefit the employee was required to work "full-time continuously for three

weeks", which based on a regular 37.5 hour workweek meant that the employee would need to work at least 112.5 hours to recharge the benefit. Consequently, even though the grievor had worked for more than three weeks on a modified schedule of limited days and/or hours per day, since she had not completed at least 112.5 hours of such work before leaving due to Condition B, the employer submitted she did not recharge any of her sick pay benefit.

[32] The association disagreed; arguing (at paras. 11 – 12) that the grievor's entitlement to short term sickness benefits was fully reinstated once she completed three continuous weeks of work, whether for 37.5 hours per week or cumulatively 112.5 hours, or not. To hold otherwise would, according to the association, violate the prohibition of discrimination on the basis of disability mandated under the parties' collective agreement and proscribed by the HRC (referred to as "Code") requiring the accommodation of employees with a disability.

[33] In deciding the matter in favour of the association's grievance, the arbitrator followed the then recent decision of Arbitrator Keller in *Southlake, supra,* specifically approving the rationale from paras. 66 – 69 of that award (reproduced above). At para. 19 Arbitrator Johnston consequently wrote:

> 19. ***I agree with the analysis and conclusion reached by Arbitrator Keller. In particular I accept his rejection of the need of an employee to work 112.5 hours to recharge her short term sick benefits and his conclusion that this practice is a violation of the Code. This is the same argument being made before me.*** Although the ASF in the case before me does not indicate exactly how many shirts per week that NB was working, I assume she was working in accordance with her approved graduated return to work program which was intended to accommodate her disability, Condition A. There is no dispute that she worked over a three week period therefore I find that her short term sick benefits were recharged by the time that Condition B occurred. Having concluded this I do not need to decide the meaning to be given to the last sentence under the heading reinstatement of benefit. However, I would observe that it too seems to support the position being taken by the Association. .
>
> [Emphasis added]

### *(iii) Women's College Hospital*

[34] A fresh approach was taken by Arbitrator White in substantially the same factual circumstances in the most recent decision on point in *Women's College Hospital, supra,* released April 29, 2021, with the same outcome.

[35] The grievor in that case was off work due to illness or injury for more than 15 weeks, receiving her full sick pay entitlement (followed by a period without compensation) when she returned to work ("RTW") under a mutually agreed plan of modified duties and reduced hours as an accommodation, there being no dispute that the grievor did not work her "normal" weekly schedule of 37.5 hours during the initial three weeks of her return to work.

[36] As in the two grievances before me, the association argued that the terms of the 1980 HOODIP brochure (which applied in that case) required that when the employee returned from a short-term absence and worked "full-time continuously for three weeks" the entire 15 weeks of benefit entitlement was to be reinstated, notwithstanding that the grievor worked less than the regular full-time hours during that period. Thus as noted at para. 14 of the award, the association submitted that, "the three (3) week period reference in the 1980 HOODIP brochure is a measurement based on a calendar period and not hours actually worked by an employee".

[37] Alternatively, even if the three weeks referred to in the HOODIP brochure did not represent a calendar period, the association submitted that "the determination of what was "full-time continuous work" during that three (3) week period must take into consideration the fact that the grievor's schedule was modified as an accommodation of her disability" supporting the conclusion that "to treat her differently based on that schedule compared to how she would be have been treated had she not required an accommodated schedule (i.e. reduced hours of work as part of her RTW) constituted discriminatory treatment prohibited by the [HRC]." In support of its submissions the association relied upon the same arbitration authorities (itemized at para. 16 of the award) filed in the two grievances before me.

[38] The employer's submissions extensively reviewed at paras. 17 – 35 of Arbitrator White's award were the same arguments on the basis of the same jurisprudence substantially put before Arbitrators Keller and Johnston in the prior arbitration decisions on point, and by the Hospital in the two grievances before me.

[39] In summary, the employer argued that since the HOODIP benefits were only available to full-time employees, which under the collective agreement was defined as a nurse "who is regularly scheduled to work the normal full-time hours" of 37.5 hours per week, "three (3) weeks

of continuous full-time employment (to use the qualifying language from 1980 HOODIP) would require her to work 112.5 hours in order to have sick pay benefits reinstated" (per para. 18). Consequently noting that the applicable 1980 HOODIP brochure language did not expressly define the term "three weeks" as constituting calendar weeks, the employer contended that the association was attempting to read that word in as a qualification the parties never agreed upon. Rather, it was submitted that HOODIP was contemplated by the parties as "a benefit that is earned through work by the employee" (at para. 22) and as such, it was within the expectation of the parties that the 15 weeks of sick leave entitlement would not be reinstated until the employee completed the number of hours reflected by a normal course of three weeks of work for a full-time employee, which amounted to 112.5 hours.

[40] As in its arguments before me, the employer also submitted that Arbitrator Keller's decision in *Southlake, supra,* was wrongly decided which affected the weight that could be given to Arbitrator Johnston's determination in *Hamilton Health Sciences, supra,* that followed *Southlake, supra,* without offering its own independent analysis of the jurisprudence, which Arbitrator White recounted as follows at para. 25:

> …The Employer argued that these cases were wrongly decided and ought to be distinguished or disregarded. Both *Southlake* and *Hamilton Health Sciences* are said to be flawed by the arbitrators' failure to appreciate the difference between prior decisions dealing with the determination of the benefits to which an employee is entitled and the question at issue here that relates to the manner in which the employee might qualify for reinstatement of benefits. The Employer took the position that application by the arbitrators in *Southlake* and *Hamilton Health Sciences* of principles properly limited to questions of entitlement led them to incorrect conclusions on the question of qualification.

[41] And thus in response to Arbitrator Keller's determination that the employer's practice of requiring the employee returning on a reduced schedule to complete 112.5 hours of work before qualifying for the reinstatement of 15 weeks of future sick pay constituted discrimination on the basis of disability prohibited under the HRC because it treated employees requiring an accommodation differently from those who did not, Arbitrator White recounted the employer's arguments at paras. 26 – 28, which being substantially the same submissions made by the Hospital in the two grievances before me, are appropriately reproduced for certainty below:

> 26. In the response to the Union's argument that the Employer's interpretation of the 1980 HOODIP brochure constitutes a breach of the *Code,* it was submitted that it is important to

remember that differential treatment of a class of employees does not necessarily constitute discrimination. In this case, once it is determined that benefits are available to the various classes of employees (i.e. those who are returning to work on modified hours as compared to those who are returning to work with modified duties or those returning to work with no modified hours or duties), basing the reinstatement of sick pay benefits on 112.5 hours worked constitutes differential treatment that is not discriminatory. The Employer submits that it is important to take a purposive approach in assessing the character of the impugned term.

27. ***Expressed another way, the use of comparator groups for analyzing the entitlement to benefits (i.e. those returning to work on modified hours as compared to those returning to work on modified duties or those returning to work without modified hours or duties) in carrying out the analysis of the qualification for the reinstatement of those benefits led to the flawed conclusions in Southlake and Hamilton Health Sciences.***

28. The Employer argued that a proper analysis would be focused on the term "work" in the first sentence of the "Reinstatement of Benefit" language in the 1980 HOODIP brochure that reads:

> *When you return from an absence and work full-time continuously for three weeks, your benefit period of 15 weeks is reinstated in full.*

***It was submitted that the proper analysis is to be found in the Ontario Court of Appeal's decision in Ontario Nurses' Association v. Orillia Soldiers Memorial Hospital, supra, (hereafter "Orillia Soldiers Memorial Hospital"). The Employer took the position that this decision stands for the principle that an employer could not discriminate in the provision of benefits (entitlement) but it was permissible to require that the right to participate in the benefit plan be determined on the basis of work (qualification).*** Applied to this case, it was submitted that the reinstatement of sick pay benefits was tied to a permissible qualification that the returning employee first "work full-time continuously for three weeks". This requirement was neutral on its face and did not constitute adverse or constructive discrimination. Just as it was permissible to require an employee to work for three months in order to initially qualify for the right to participate in HOODIP so, too, was it permissible to require them to work for the period set out in the 1980 HOODIP brochure to have sick pay benefits reinstated. The Employer agreed that there had to be rational mechanism that would allow any employee to qualify for reinstated benefits and submitted that its proposed interpretation does just that.

[Emphasis added]

[42] In the result, however, Arbitrator White rejected the employer's submissions finding instead for the association and allowing the grievance for two primary reasons.

[43] First, in disagreeing with the employer's claim that the phrase, "...work full-time continuously for three weeks" under HOODIP in conjunction with provisions in the collective agreement that described a "full-time nurse" as one who is "regularly scheduled to work for the normal full-time hours…" where the "normal daily tour" was defined as 7.5 hours subject to another provision in the collective agreement that contemplated the averaging of daily tours over

a five day period, supported the proposition that the parties must have intended that an average of 112.5 hours was the proper measure of what a nurse was required to work in order to reinstate the full sick pay entitlement under HOODIP, the arbitrator stated at paras. 40 – 41:

> 40. The difficulty with this proposition is that it is based on an assumption that the language at issue was intended to require that a nurse work the equivalent of three (3) weeks of continuous full-time hours in order to qualify for the reinstatement of benefits. However, it is clear that the intent was that the nurse work those hours during a period of three (3) calendar weeks. In coming to that conclusion, I note that the requirement is that the full-time hours (equaling 112.5) are to be worked "continuously". While other arbitral awards have dealt with the question as to how "continuously" ought to be applied having regard to the *Code,* I am only concerned with how it provides context in the determination of the drafters' intent. ***In that regard it supports the proposition that the three (3) weeks were intended to be a calendar period. Further the requirement is that the nurse work for three (3) weeks. There is nothing on a plain reading of the words to suggest an interpretation other than that it was intended by the drafters that the hours required to qualify for reinstatement of benefits be worked during three (3) calendar weeks.***
>
> 41 I also agree with the Association that the 1980 HOODIP brochure, read in conjunction with the provisions of the Collective Agreement, support this interpretation. As noted by the Association, where the parties have wished to measure time in the sick pay benefit as "hours", such as in Article 12.09, they have clearly done so. In the section of the 1980 HOODIP brochure titled "Duration of Benefits", the basic entitlement is described as follows:
>
> > *Benefits are paid for up to 15 weeks or 75 working days based on a normal five day work week.*
>
> 75 working days based on 7.5 scheduled hours per day equals the 562.5 hours of benefit entitlement referenced in Article 12.09. This is clear demonstration that where the parties wish to express such entitlement in hours, they have done so. It was equally open to the parties to have expressed (or clarified) that the period of qualification for the reinstatement of benefits was a specific number of hours and yet they have elected not to do so. ***This supports the conclusion that the reference to "three weeks" in the language under consideration is intended to be a calendar period.***
>
> [Emphasis added]

[44] Second, in response to the employer's submission based on *Orillia Soldiers Memorial Hospital, supra,* that "questions of qualification for benefits (as opposed to questions of entitlement to benefits) can be legitimately based on a requirement that the employee provide work to earn that benefit (thereby supporting the employer's position on a requirement that the employee on modified or reduced duties complete at least 112.5 hours of work before qualifying for full reinstatement of the sick pay benefit), and after applying a detailed analysis of *Orillia*

*Soldiers Memorial Hospital, supra,* to the facts before him, Arbitrator White concluded the employer's practice was discriminatory under the HRC, stating at paras. 47 – 48:

> 47. The difference in this case arises from the groups of employees to be compared in determining whether there is either direct or constructive discrimination. ***Unlike Orillia Soldiers Memorial Hospital, this case does not involve a comparison between one group of employees that is working and one that tis not.*** Here there are three groups of employees covered by the 1980 HOODIP brochure under consideration, all of whom are working the shifts for which they have been scheduled. They are:
>
> i. employees returning to work with accommodations due to disability that include restrictions on the duties and responsibilities they are able to perform;
>
> ii. employees (such as the Grievor) returning to work with accommodations due to disability that include reductions to the hours of work they are able to perform; and
>
> iii. employees returning to work without the requirement of any accommodation.
>
> Assuming that employees in all three groups work all of the shifts for which they have been scheduled following their return to the workplace, those employees in the first and third groups will have their benefits reinstated after three (3) calendar weeks on the basis of having worked "…full-time continuously for three weeks". Under the Employer's interpretation of the 1980 HOODIP brochure, the Grievor and other members of her group will not have their benefits reinstated at the same time.
>
> 48. It has been agreed that the Grievor has a disability with the meaning of the *Code.* The Grievor is a full-time employee whose hours of work were reduced upon her return to the workplace as part of an accommodation of that disability. ***As a member of the group of employees working reduced hours due to her disability, the Grievor suffered an adverse effect when compared to groups of employees who did not see a reduction of hours either because they did not require any accommodation or because they had a disability that required a different form of accommodation. The rule set out in the 1980 HOODIP brochure is neutral on its face. However, the rule constructively discriminates against individuals such as the Grievor.***
>
> [Emphasis added]

## The Parties' Arguments

[45] The parties' submissions in support of their respective positions on the merits of the grievances before me may be considered in two parts: first, the oral representations made prior to the *Women's College Hospital, supra,* case; and second, their written arguments on the effect, if any, of that latter decision on the outcome of the present cases.

### *(i) Summary of Oral Representations*

[46] It is not necessary to repeat the oral submissions made by the parties as they have already been extensively canvassed in the review of the decisions of Arbitrators Keller, Johnston and White set out above.

[47] In brief, noting that the terms of the 1992 HOODIP brochure applied in the circumstances of the present grievances, Mr. Newell submitted on behalf of the Union that its reference to the requirement that an employee returning from a sick leave "work for three continuous weeks" in order to reinstate the 15 weeks of sick pay entitlement, was met by both Grievors KC and CT when they completed three ***calendar*** weeks of their modified schedules of work, even though they did not work the same number of hours as a full-time employee who did not require the accommodations provided for employees suffering from a disability under the HRC.

[48] On a straightforward reading of the words in the 1992 HOODIP brochure, the Union submitted that once the Grievors completed three continuous weeks of their reduced working schedule, they had earned the right to reinstatement of their full 15 weeks of future sick leave. Consequently, in response to the Hospital's argument at arbitration that the parties' intention could be met by requiring the Grievors to work the equivalent of three full-time weeks, being 112.5 hours, the Union submitted that interpretation was not borne out by the language of the brochure which clearly set the threshold at three continuous weeks without limitation.

[49] Moreover, to the extent the last two sentences of the second paragraph in the applicable 1992 HOODIP brochure stated that an employee on "an approved modified work program" was "not considered to be Actively at Work" and that, "The time spent doing modified work continues to count toward the expiry of the 15 weeks benefit period and does not cause it to be reinstated", the Union contended that, as determined by prior arbitration decisions, such requirements discriminated against the Grievors on the basis of disability contrary to the HRC which could not stand.

[50] And while acknowledging that labour arbitrators were not bound by a strict rule of "*stare decisis"* as are the courts, the Union submitted that the prior arbitration decisions on

substantially the same matters as determined by Arbitrators Keller and Johnston ought to be considered persuasive on an issue affecting all hospital members of the OHA, which included the Hospital in the present case, that in the interests of certainty and consistency of application should not be disregarded unless shown to be clearly wrong; which had not been established in the circumstances of the two grievances before me.

[51] In support of its submissions the Union relied upon the following authorities that were also cited before the earlier Keller and/or Johnston boards of arbitration: *Ottawa Hospital v. O.P.S.E.U., Local 464,* 2008 CarswellOnt 9746, [2008] O.L.A.A. No. 266, 93 C.L.A.S. 148 (Ont. Arb.)(Keller), *The Ottawa Hospital v. Ontario Public Service Employees Union, Local 464,* 2009 CanLII 9389 (ON SCDC), *Re Rouge Valley Health Systems and ONA (Ng),* 2014 CarswellOnt 6431, 129 C.L.A.S. 87 (Ont. Arb.) (Trachuk), *Re Perth and Smiths Falls District Hospital and CUPE, Local 2119 (Short Term Sick Leave Benefits),* 2017 CarswellOnt 3428, 130 C.L.A.S. 239 (Ont. Arb.) (Petryshen), *Re Health Sciences North and CUPE, Local 1623(A),* 2017 CarswellOnt 4145, 130 C.L.A.S. 291, 275 L.A.C. (4th) 241 (Ont. Arb.)(Trachuk), *Re London Health Sciences Centre and ONA (Johnston),* 2018 CarswellOnt 1929, 134 C.L.A.S. 150 (Ont. Arb.)(Hayes), *Re North Bay Regional Health Centre and ONA (L. (C.)),* 2014 CarswellOnt 3604, [2014] O.L.A.A. No. 103, 118 C.L.A.S. 102, 242 L.A.C. (4th) 424 (Ont. Arb.)(Kaplan), Brown, Donald J. M. and David M. Beatty, *Canadian Labour Arbitration,* 5th ed. (Toronto: Thomson Reuters, online), ¶ 2:2215 – "Estoppel and statutory rights" and *Commission scolaire régionale de Chambly v. Bergevin,* [1994] 2 S.C.R. 525 (S.C.C.).

[52] On behalf of the Hospital, Ms. Kay made substantially the same submissions described above in *Southlake, supra,* and *Hamilton Health Sciences, supra* that were also pressed in *Women's College Hospital, supra,* which need not be repeated.

[53] Conceding that the second paragraph of the 1992 HOODIP brochure is not in issue (having regard to prior findings that its restrictions for employees on modified work violated the HRC) but rather focusing on the first paragraph, the Hospital contended it was a reasonable interpretation of the meaning of "three continuous weeks" by the Hospital and not contrary to the HRC that the Grievors complete at least 112.5 hours of work being the equivalent number of

full-time hours in order to establishment an entitlement to the reinstatement of the full sick pay benefit. To the extent that Arbitrator Keller came to the contrary conclusion, the Hospital urged me to find that *Southlake, supra,* was wrongly decided for its failure to appreciate the *ratio* in *Orillia Solders Memorial Hospital, supra,* and that *Hamilton Health Sciences, supra,* was of little assistance because no analysis of the law (other than following *Southlake, supra*) had been offered in that case, according to the Hospital.

[54] In support of its representations the Hospital also referred to same authorities referenced in the earlier arbitration decisions on substantively the same matter: *Re Participating Hospitals and ONA,* 2004 CarswellOnt 10245, 77 C.L.A.S. 192 (Ont. Arb.)(Burkett), *Re Cambridge Memorial Hospital v. O.N.A.,* 2006 CarswellOnt 8689, [2006] O.L.A.A. No. 732, [2007] L.V.I. 3697-2, 88 C.L.A.S. 37 (Ont. Arb.)(E. Newman), *Re Ottawa Hospital v. O.P.S.E.U., Local 464, supra, Re Sunnybrook Health Sciences Centre and ONA,* 2008 CarswellOnt 10207, 82 C.L.A.S. 155 (Ont. Arb.)(Reilly), *Re Ottawa Hospital and CUPE (HOODIP),* 2010 CarswellOnt 11722, [2010] O.L.A.A. No. 647, 104 C.L.A.S. 334 (Keller), *Re Rouge Valley Health System and ONA (Na), supra, Re Perth and Smiths Falls District Hospital and CUP, Local 2119 (Short Term Sick Leave Benefits), supra, Re Health Sciences North and CUPE, Local 1623(A), supra, Re Ottawa Hospital and CUPE, Local 4000 (17-CUG-094)*, 2017 CarswellOnt 17278, 133 C.L.A.S. 141 (Ont. Arb.)(Craven), *Re London Health Sciences Centre and ONA (Johnston), supra, Re The Ottawa Hospital and The Canadian Union of Public Employees and its Local 4000 (Grievance of Bruce Robillard, #18/EB/03/01),* 2014 CanLII 149203 (ON LA) (Craven), May 31, 2018, *Re Southlake Regional Health Centre and ONA, supra, Re Hamilton Health Sciences and ONA (N.B.), supra, O.N.A. v. Orillia Soldiers Memorial Hospital, supra*, *Re Ontario Public Service Employees Union and The Crown in Right of Ontario (Ministry of Community Safety and Correctional Services),* 2007 CanLII 6887 (ON GSB) (Abramsky), *Brosso v. Kinston (City),* 2019 HRTO 654 (CanLII)(Codjoe), *Re City of Toronto and Canadian Union of Public Employees, Local 79,* 2019 ONSC 4045 (CanLII), *Re City of Toronto and Canadian Union of Public Employees, Local 79,* 2018 CanLII 76445 (ON LA) (E. Newman), *Battlefords and District Co-operative Ltd. v. Gibbs,* 1996 CanLII 187 (SCC), [1996] 3 S.C.R. 566 and *Brooks v. Canada Safeway Ltd.,* 1989 CanLII 96 (SCC), [1989] 1 S.C.R. 1219.

***(ii) Written Submissions on Women's College Hospital***

[55] In post-hearing written representations the Union urged me to adopt Arbitrator White's reasoning in *Women's College Hospital*, *supra,* in allowing the present grievances; while the Hospital argued the considerations in that case were distinguishable from those before me, leading to the opposite result.

[56] While acknowledging that *Women's College Hospital, supra,* dealt with the language in the 1980 HOODIP brochure, the Union submitted that its analysis applied to the 1992 HOODIP brochure strengthening the Union's two main arguments that: (a) the terms of the 1992 HOODIP do not require employees to work for three consecutive weeks on a full-time basis in order to reinstate the entire 15 weeks of sick pay entitlement; and (b) that the Hospital's pro-rating scheme (i.e. requiring the equivalent number of 112.5 hours in three weeks of full-time work) effectively discriminated against employees with disabilities who while working through a three week continuum on a graduated return to work program as an accommodation for a disability, could not work 112.5 hours in that time period.

[57] As the third arbitration award finding that the practice of pro-rating hours for employees on a variable work program as an accommodation for a disability was discriminatory, the Union submitted the decision in *Women's College Hospital, supra,* furthered the "growing arbitral consensus which supports the Union's positon in this case", consequently requesting that the Union's grievance be allowed.

[58] The Hospital, on the other hand, pointed to a number of factors said to distinguish the *Women's College Hospital, supra,* case from the factual and contractual provisions at issue in the instant grievances with the result that the *Women's College Hospital, supra,* case did not alter or otherwise undermine the arguments advanced by the Hospital on the merits of the two grievances before me, according to the Hospital.

[59] First, focusing on Arbitrator White's conclusion that under the 1980 HOODIP brochure the reference to "three weeks" (in the sentence, "When you return from an absence and work

full-time continuously for three weeks, your benefit period of 15 weeks is reinstated"), meant "three calendar weeks", the Hospital submitted that the arbitrator read in the word "calendar" on his consideration of other provisions in the ONA collective agreement that are not present in the instant cases (which the arbitrator commented upon extensively at para. 41, reproduced above). Since there was no similar language in the CUPE collective agreement before me, the Hospital argued there was no basis to conclude that the requirement to work "three continuous weeks" in order to requalify for sick leave benefits under the 1992 HOODIP brochure language must mean "calendar" weeks. Rather, the deliberate use of the word "continuous" in the phrase "three continuous weeks" that are required to reinstate the full sick leave benefit, instead of using the word "calendar" as the Union would have me read as the meaning of that phrase, must lead to the conclusion that the parties did not intend to limit the amount of time that the employee would be required to work to a fixed temporal period as opposed to the equivalent number of full-time hours for work over three continuous weeks (amounting to 112.5 hours) as proposed by the Hospital in the present cases.

[60] Second, as noted in para. 41 of his decision, in arriving at his interpretation of "three continuous weeks" as three "calendar" weeks, it was submitted that Arbitrator White relied upon the fact that the 1980 HOODIP brochure itself sets up an equivalency when it allows for benefits to be "paid for up to 15 weeks or 75 working days based on a normal five day work week", which based on wording in the ONA collective agreement he then equates to 562.5 hours of work, which according to the Hospital the arbitrator "simply created"…by multiplying the '75 days' by the normal hours of work." It was submitted there was no reason why a similar calculation could not be done in the instant cases "where the reference is simply to three continuous weeks" (as it is under the 1992 HOODIP brochure), particular where I was urged to find that the word "continuous" must mean something different than "calendar", otherwise the parties would have used the word "calendar" in the first place.

[61] Finally, the Hospital challenged as inappropriate the way that Arbitrator White distinguished the arbitral authorities said to support the position of the employer in *Women's College Hospital, supra,* which it submitted should have led him to the opposite conclusion, referring specifically to *Re Health Sciences North and CUPE,* the 2017 decision in *Re The*

*Ottawa Hospital and CUPE, supra, Re OPSEU and Ontario (Ministry of Community Safety and Correctional Services), Brosso v. Kinston (City), supra,* and the Ontario Divisional Court decision in *Re City of Toronto and Canadian Union of Public Employees, Local 79, supra.*

**Reasons for Decision**

[62] For ease of immediate discussion the key first paragraph of the 1992 HOODIP brochure under the heading, "If your disability recurs", incorporated by express reference of article 13.01 within the "central language" of the collective agreement, is reproduced below:

> When you return after an absence due to a Total Disability and work for three continuous weeks, your benefit period of 15 calendar weeks will be reinstated in full. However, if within the three regular work weeks following your return to work you are disabled from the same or a related cause, only the remainder of the 15 calendar week benefit period will apply.
> …

[63] As part of the central language in the parties' collective agreement, the same requirements under HOODIP for full reinstatement of the sick pay entitlement following an absence due to "Total Disability", applies to all employer members of the OHA and their bargaining agents covered by the same proviso, impacting many thousands of healthcare workers working out of different locations throughout Ontario. In determining the meaning of this important limitation in the context of the factual circumstances of the two grievances before me, I must be attentive to the reality that three seasoned arbitrators have already opined on substantially the same matter that requires certainty for the stability of the future relations between the broadly recognized employer – union parties.

[64] While the doctrine of *stare decisis* does not apply in labour arbitration, arbitrators have consistently held that prior arbitrations determining the same or substantially same issues have persuasive force that should be followed unless the previous decisions are clearly wrong. Arbitrator Sudykowski explained the labour-relations rational underlying this important principle in *Re Sunnybrook Health Sciences Centre and ONA (Jarrett),* 2021 CarswellOnt 12966, 149 C.L.A.S. 245 (Ont. Arb.) as follows at Footnote #1:

> In this jurisdiction there is no grievance arbitration doctrine of ***Stare decisis*** as such. That is, a grievance arbitration decision is not strictly speaking binding on another arbitrator. However, arbitrators do recognize the concept of *jurisprudence constant;* namely, that notwithstanding that

> every arbitrator is independent and none is "superior" to any other, it is generally accepted that as a group arbitrators should adjudicate in a predictable and non-chaotic manner because certainty has a significant labour relations value. ***Accordingly, an arbitrator will follow a prior decision determining the same collective agreement issue between the same parties even if she/they disagrees with it unless s/he/they concludes the prior decision is manifestly (i.e. clearly) wrong.*** Similarly, more general lines of arbitral "authority" have developed, and an arbitrator will typically not depart from an applicable established line of arbitration decisions particularly concerning substantially the same issue and collective agreement language unless s/he/they is convinced the line of authority has gone off track or that changes in the legislative framework or in society require an alteration in course.
>
> [Emphasis added]

[65] Even though the three previous arbitration decisions of Arbitrators Keller, Johnston and White on point were, strictly speaking, between different employer and union parties, when dealing with the same central language negotiated collectively between the member hospitals of the OHA and their unionized healthcare groups (including ONA and CUPE), it is my opinion that they constitute as a practical matter the "same parties" for purposes of considering the persuasive value of prior arbitration awards dealing with substantially the same issues at different hospitals throughout the province.

[66] On an issue as important to the broader stakeholders of the terms and conditions of sick pay entitlements for healthcare workers that has been at the "central" bargaining table for more than four decades, the need for certainty and consistency is manifest. And while as urged by the Hospital, one may regard as "debatable" at least, some of the rationale of prior boards of arbitration considering substantially the same matters in *Southlake, supra, Hamilton Health Sciences, supra,* and *Women's College Hospital, supra,* which I considered when assessing the various arguments pressed in the two grievances before me, I cannot say that the line of authority represented by those prior decisions is "manifestly" or "clearly" wrong to justify a contrary finding at this stage in the evolution of the parties' appreciation of the matter. Rather, the matter should be considered sufficiently settled to form the basis of future collective bargaining between the "broader parties", should there be a mutual desire to change what is effectively the recognized status quo.

[67] That is not to say that having considered the representations of both parties on the facts before me that I haven't arrived at my own conclusions on the controversy, which converge in substantial part with those of Arbitrator White in *Women's College Hospital, supra.*

[68] Like Arbitrator White, I primarily view the resolution of the instant dispute as an exercise in contract interpretation.

[69] In focusing on the narrow question of the meaning of the phrase, "for three continuous weeks" in the 1992 HOODIP brochure in context, I recognize that in considering the words of a "brochure" prepared by the OHA that was obviously intended for an audience of workers with the utilization of more "conversational" language than the precision that might be expected of the sophisticated employer and union parties composing contractual language behind the scenes, a plain straightforward interpretation is called for.

[70] Here, as a standalone document that employees would be expected to understand without reference to their collective agreement, a "week" in common parlance refers to a period of seven consecutive days; and thus the notion of "three continuous weeks" is a simple reference to three weeks on the calendar. Most readers would recognize there is no requirement for an employee to work all seven days of a week or any minimum number of hours per week(s) to qualify for reinstatement of the benefit, which is not mentioned anywhere in the brochure.

[71] As Arbitrator Keller determined with express reference to the 1992 HOODIP brochure (at paras. 71 – 73), which Arbitrator White also found (at paras. 40 – 41) under the 1980 HOODIP brochure, it is my opinion that a straightforward reading of the phrase, "for three consecutive weeks" in the applicable paragraph of the 1992 HOODIP brochure in proper context, refers to a calendar period without limitation. Provided the employee returning from a leave of absence due to illness or injury qualifying for sick pay under HOODIP works whatever schedule is agreed upon or determined appropriate throughout that interval of time, the employee qualifies for reinstatement of the full future sick-pay (or "Part A") entitlement of 15 weeks.

[72] Consequently on the agreed facts of the present cases, where KC completed at least four weeks under a modified work assignment that included graduated shift durations and CT worked

through at least 10 weeks of a schedule of reduced shifts during an apparent "work hardening" or graduated return-to-work ("GRTW") program that the parties considered appropriate given their mutual obligation to act reasonably in accommodating the employees' disabilities, and where the evidence indicates the Grievors did not experience a relapse of their prior ailments during the first three continuous weeks of their return to work, I conclude that KC and CT were entitled to full reinstatement of their 15 weeks of future sick pay entitlement under HOODIP.

[73] In arriving at the foregoing conclusion, I have reexamined the line of arbitral authority relied upon by the Hospital in its written submissions (referenced above) to the effect that Arbitrator White (and inferentially Arbitrator Keller) improperly distinguished those cases from the circumstances immediately at issue leading to an erroneous interpretation of the language in the applicable HOODIP brochures, with which on critical review I must respectfully disagree.

[74] For example, in *Re Health Sciences North and CUPE, supra,* which considered the circumstances of three disabled employees working a combination of modified duties and/or reduced hours of a GRTW program under the same provisions of the 1992 HOODIP brochure and language of articles 3.01 and 13.01(a) of the CUPE collective agreement at issue in the grievances before me, Arbitrator Trachuk noted (consistent with other arbitral authority) that the second paragraph of the HOODIP reinstatement language under the heading "If your disability recurs" which provides that: "If you return to work on an approved modified work program, you are not considered to be Actively at Work [and the] time spent doing modified work continues to count toward the expiry of the 15 weeks benefit period and does not cause it to be reinstated", contravened the proscription on discrimination due to disability encompassed by sections 5, 11 and 17 of the HRC (para. 48). At para. 56 the arbitrator thus held the employer's practice of treating employees retuning on a modified and/or GRTW programs as not being "Actively at Work" constituted discrimination leading to her conclusion at para. 60 that the employer, "violated the [HRC] and Article 3.01 of the collective agreement by requiring the grievors [one being on a GRTW program] to use their short term sick benefit when they were at work on modified duties ***and by failing to count those hours toward the reinstatement of entitlement to short term sick leave benefits***" (emphasis added). In arriving at that conclusion the arbitrator did not specifically consider the argument in the present case that the "hours toward the

reinstatement of entitlement to short term sick leave" refers to 112.5 hours as the equivalent of three weeks continuous work. Consequently, I like Arbitrator White, do not regard the foregoing comments as an interpretation of the reference to "three continuous weeks" in the first sentence in the 1992 HOODIP brochure supporting the ability of the Hospital to require an employee to work 112.5 hours before reinstating the full sick pay entitlement.

[75] Also, in the 2017 decision of Arbitrator Craven in *Re The Ottawa Hospital and CUPE, supra,* the parties had already agreed to equate three continuous weeks of work with 112.5 hours to be (which they affirmed in the settlement of an earlier policy grievance) for use in determining whether an employee returning from sick leave had crossed the threshold of "three continuous weeks" under the 1992 HOODIP brochure to reinstate the full 15 weeks of sick pay entitlement. Based on the facts of that case the arbitrator found that the grievor had provided sufficient work to satisfy the 112.5 hour requirement (even though it apparently extended beyond a three week calendar period). That case has little relevance to the matters before Arbitrator White (and to me in the present grievances) where the question is whether one can equate the term "three continuous weeks" with 112.5 hours of work, without express or implied acceptance of that formula in the 1992 HOODIP brochure or collective agreement.

[76] Having thus determined the grievances before me narrowly on the 1992 HOODIP brochure language itself in proper context, it is not necessary to reconsider the parties' other arguments concerning the Hospital's requirement that the Grievors work at least 112.5 hours after returning from sick leave, being the equivalent of three continuous weeks, for compliance with the HRC which have been thoroughly digested in *Southlake, supra,* at paras. 66 – 70 and *Women's College Hospital, supra,* at paras. 47 – 48, as recounted above.

[77] Even if I agreed with the Hospital's written submissions on the matter in *Women's College Hospital, supra,* challenging Arbitrator White's (and inferentially Arbitrator Keller's) appreciation of the principles described in *Orillia Soldiers Memorial Hospital, supra,* as comparatively applied in *Re OPSEU and Ontario (Ministry of Community Safety and Correctional Services), supra, Brosso v. Kinston (City), supra,* and *Re City of Toronto and Canadian Union of Public Employees, Local 79, supra,* given my determination of the meaning

of the operative language in the incorporated 1992 HOODIP brochure, it is not necessary to revisit the debate on whether the Hospital's pro-rating formula violated the HRC, notwithstanding my view that the Hospital has raised legitimate questions over the identification of the proper "cohort" requiring accommodation for purposes of the analysis contemplated by *Orillia Soldiers Memorial Hospital, supra,* in that and prior arbitration decisions.

[78] Instead, on narrow contractual grounds alone, since both Grievors surpassed the necessary threshold of working "three continuous weeks" after returning from their respective sick leave absences, which is an unqualified interval, I conclude they were entitled to the reinstatement of their full complement of sick pay regardless of the number of hours they actually worked during that timeframe. To the extent the Hospital believed it could compel employees on a graduated return-to-work program to work the equivalent of three continuous weeks measured as 112.5 hours over a longer temporal period before restoring the full bank of 15 weeks of sick pay under HOODIP, it simply hasn't negotiated an appropriate requirement (through the OHA or otherwise) into the parties' collective agreement conferring that right.

**Disposition**

[79] Consequently, the Union's grievances on behalf of KC and CT must be allowed.

[80] For the reasons set out above I declare the Hospital violated the collective agreement when it failed to reinstate the Grievors' full sick pay bank of 15 weeks once they completed "three continuous weeks" as defined herein on their modified/reduced work schedules.

[81] As requested by the parties at the outset of the hearing, the appropriate remedy to make each Grievor whole is remitted back to the parties to resolve, failing which I remain seized to determine the matter.

DATED THIS 17TH DAY OF JANUARY, 2022

"G. F. Luborsky"
Gordon F. Luborsky,
Sole Arbitrator