IN THE MATTER OF A GRIEVANCE under the *Labour Relations Act, 1995* and pursuant to a collective agreement

BETWEEN:

ST. JOSEPH'S HEALTHCARE HAMILTON
(the "Employer")

-AND-

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 786
(the "Union")

Lydia Tucker Paid Sick Days Grievance #19-E-0095

Before: Gail Misra, Greg Shaw and Joe Herbert

Appearing for the Employer:
Sarah A. Eves, Counsel
Kellie Gamble, Director, Employee & Labour Relations
Alison Adamowicz, Manager, Employee & Labour Relations

Appearing for the Union:
Mark Wright, Counsel
Ella Bedard, Counsel
Kevin Cook, Local 786 President
Louis Rodrigues, OCHU Representative
Diana Zawadzki

Videoconference Hearing held on November 23, 2020

Decision issued: December 7, 2020

DECISION

Decision of Board Member Gail Misra:

1. We have been appointed pursuant to the collective agreement between the parties to hear a grievance dated August 14, 2019, filed by the Union on behalf of its member, Lydia Tucker. The grievance claims that the Employer (or the "Hospital") violated various provisions of the collective agreement when it denied the Grievor sick pay for June 10, 11 and 12, 2019. The Union is seeking sick pay for the three days, as well as a declaration of breach of the collective agreement. There is no issue respecting our jurisdiction to hear this matter.

THE FACTS AND ISSUE

2. The parties relied on an Agreed Statement of Facts and Documents (the "ASF") as the basis for their respective arguments. The ASF states as follows:

1. The Hospital and the Union are parties to a collective agreement ("the collective agreement") (Tab 1). The collective agreement between the parties consists of a Central portion and a Local Appendix.

2. This Agreed Statement of Facts and Documents pertains to the arbitration of a grievance filed on August 14, 2019 (See Grievance and Response at Tab 2). The grievance alleges, on behalf of Lydia Tucker ("the Grievor" or "Ms. Tucker") and the Union, that the Grievor was denied sick pay for June 10, 11, 12, 2019 in violation of the Collective Agreement.

3. The Hospital denies that there has been a breach of the collective agreement.

Factual Overview

4. The Grievor works as a full-time RPN in the Hospital's Forensic Department and has been employed by the Hospital since September 4, 1995.

5. The Grievor was off on paid sick leave for approximately 16 weeks, from February 25, 2019 until June 14, 2019 (Tab 3). During this period of time, there were three statutory holidays: April 19, 2019 (Good Friday), April 22, 2019 (Easter Monday) and May 20, 2019 (Victoria Day).

6. On the Grievor's paystubs, these statutory holidays were "coded" as statutory holidays (Tab 4), not sick time, and Ms. Tucker was paid for

these days at her regular straight time rate, in accordance with the attached Minutes of Settlement at Tab 5 . The Grievor did not also receive sick pay for the three statutory holidays.

7. The Hospital deemed the Grievor to have used her full entitlement to sick pay under the 1992 HOODIP brochure (Tab 6) by Friday, June 7, 2019.

8. It is the Union's position that the Grievor should have been entitled to three additional paid sick days on June 10, 11 and 12, 2019.

9. The Employer draws down short term sick pay based on 562.5 hours (7.5 hours x 5 days x 15 weeks).

10. When an employee returns to work on part-time modified hours, the employee can use sick time from the 562.5 hours as sick pay, if they have any time left, to top up their earnings while they are on modified work. The combined sick leave and top-up period may extend beyond 15 weeks until the 562.5 hours are depleted.

11. When a statutory holiday occurs during short term sick leave, the Hospital deducts 7.5 hours from the 562.5 hours.

3. The Minutes of Settlement ("MOS") referred to in para. 6 of the ASF relate to the settlement of a Policy grievance filed by the Union on November 11, 2014 (the "November 2014 Grievance"). That grievance claimed a breach of the collective agreement because when an employee was off work sick on a statutory holiday, the Employer was marking the person as having received a sick day, rather than a statutory holiday.

4. On July 11, 2017 the parties settled the November 2014 Grievance on the understanding that henceforth when an employee was off work sick; was in receipt of short term disability benefits (which are paid through HOODIP); and, when a statutory holiday occurred during the period the employee was off sick, the Employer would mark and code the day off as a statutory holiday. The parties also agreed that an employee would be paid in accordance with the collective agreement. (At para. 2 of the MOS). As has become clear through the present grievance, there may have been a lack of clarity about what the reference to payment meant.

5. The issue arises here because although the Grievor was off work on an approved sick leave between February 25 and June 14, 2019, she was only paid sick benefits until June 7, 2019, which was the end of a 15 calendar week period from the commencement of her leave. The Employer maintains that Ms. Tucker was entitled to 15 calendar weeks of sick benefits. The Union claims that as a consequence of the three statutory holidays that fell during the period of Ms. Tucker's illness, and since

those days are considered statutory holidays in accordance with the collective agreement and the MOS, that the Grievor should have received sick pay for three more days during the period of her total disability, namely June 10, 11 and 12, 2019.

THE COLLECTIVE AGREEMENT

6. Article 13 is the Sick Leave, Injury and Disability provision of the collective agreement. Art. 13.01(a), which is applicable to full time employees like the Grievor, states that the Employer will assume total responsibility for providing and funding a short-term sick leave plan equivalent to that described in the August, 1992 booklet (Part A) Hospitals of Ontario Disability Income Plan Brochure (the "HOODIP 1992 brochure").

7. Article 16 is the Holidays provision in the collective agreement. Art. 16.01 is applicable to full time employees, like the Grievor. It indicates that there shall be 12 holidays, which are described in the Local Provisions Appendix to the agreement.

8. Article 16.02, also only applicable to full time employees, defines holiday pay and outlines the qualifiers to receive holiday pay. The relevant portions of Art. 16.02 state as follows:

> Holiday pay will be computed on the basis of the employee's regular straight time hourly rate of pay times the employee's normal daily hours of work.
>
> In order to qualify for holiday pay for any holiday, as set out in the Local Provisions Appendix, or to qualify for a lieu day an employee must complete her scheduled shift on each of the working days immediately prior to and following the holiday except where absence on one or both of the said qualifying days is due to a satisfactory reason.
> …
> An employee who qualifies to receive pay for any holiday or a lieu day will not be entitled, in the event of illness, to receive sick pay in addition to holiday pay or a lieu day in respect of the same day.

9. Appendix "N" is the Local Provisions Appendix that describes the 12 recognized holidays. They include Good Friday, Easter Monday and Victoria Day, which are the three holidays in dispute here.

10. Appendix N(b) indicates that pay for the recognized holidays will be in accordance with Art. 16.02 or the employee shall be given a lieu day off with pay at some other mutually convenient time.

11. Article 17.03 addresses Illness During Vacation, and is applicable to full time employees. It states as follows:

> Where an employee's scheduled vacation is interrupted due to serious illness, which either commenced prior to or during the scheduled vacation period, the period of such illness shall be considered sick leave.
> …
> The portion of the employee's vacation which is deemed to be sick leave under the above provisions will not be counted against the employee's vacation credits.

HOODIP 1992 BROCHURE FOR FULL TIME EMPLOYEES

12. It is instructive to note at the outset the history of the HOODIP. According to the Introduction in the HOODIP 1992 brochure, "the Ontario Hospital Association (OHA) established the Disability Income Plan in 1976 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 Canada Employment Insurance Commission".

13. The brochure describes a full time employee's entitlement to Sick Pay benefits. In the Plan Highlights, an employee is advised that if she becomes "Totally Disabled" and is unable to work, she may receive a Sick Pay benefit from her employer up to 100 percent of her earnings for up to the first 15 weeks of her disability. As already noted, the Plan also provides for Long Term Disability benefits, but they are dealt with in a different part of the brochure and are irrelevant to the issue in this case.

14. There is no dispute that the Grievor was a full time employee, who by virtue of the length of her service, was eligible to receive 100% of her pre-illness earnings for up to 15 weeks of total disability.

15. The Plan Highlights indicate that if an employee continues to be "Totally Disabled" after 15 weeks, she becomes eligible for Sick Pay benefits through the Canada Employment Insurance Commission ("EI") from the 16th to the 30th weeks of disability. Thereafter, the employee, if still "Totally Disabled" after a total of 30 weeks, may be eligible for HOODIP Long Term Disability benefits.

16. "Total Disability and Totally Disabled" are defined in the brochure as "Unable, due to injury or illness, to perform the regular duties pertaining to the occupation in which you participated immediately before becoming disabled".

17. "Actively at Work and Active Work" are defined as "At work and able to perform all the regular duties of your occupation for one full working day or shift".

THE ARGUMENTS

18. According to the Union, the problem in this grievance arises because although the Employer has implemented the terms of the 2017 MOS, and has been coding

statutory holidays that fall during an employee's period of sick leave as statutory holidays, it has been deducting the hours paid for that statutory holiday from the employee's 562.5 hour sick bank. As such, the Union claims that the Employer has been "double dipping" in that it is not paying the holiday pay that the employee has earned; the employee is not getting the paid holiday as a lieu day at some later date; and the Employer is essentially taking the holiday pay equivalent out of the employee's sick bank so that the employee bears the cost of the statutory holiday.

19. The Union maintains that in this case the Employer should have coded the three statutory holidays as being paid through statutory holiday pay, which would have meant that the Grievor would still have had the equivalent of three sick days left in her sick bank to draw down on the three days in question in this grievance, as she continued to be totally disabled for a week after the Employer claims she had exhausted her sick leave.

20. The Union does not dispute that pursuant to Art. 16.02 the Grievor could not have been paid both holiday pay and sick pay for the same days, i.e. Good Friday, Easter Monday, and Victoria Day. That is not what this grievance is about. The issue here is that the Grievor was entitled to holiday pay for those three days, and as a result, would not have had the Employer use her Sick Pay credits to fund those days. Therefore, she should still have had the equivalent of three sick days' pay available to her for use when she needed them, on June 10, 11, and 12, 2019.

21. The Union relies on the following jurisprudence in support of its argument: *Ottawa Hospital and CUPE,* (2010) CarswellOnt 11722(Keller); *Participating Hospitals and ONA,* (2002) CarswellOnt 5079(Burkett); *Participating Hospitals and ONA,* (2004) CarswellOnt 10245(Burkett) (referred to as the "*Participating Hospitals* 2004 decision"); *Cambridge Memorial Hospital and ONA,* (2006) CarswellOnt 8689(Newman); *CUPE 1623 and Health Sciences North,* (2017) CarswellOnt 4145(Trachuk); *London Health Sciences Centre and ONA,* (2018) CarswellOnt 1929(Hayes).

22. The Employer argues that it has applied the provisions of the collective agreement and the HOODIP 1992 brochure correctly, and that what the Union is seeking in this grievance is double income for the Grievor for the three statutory holidays which fell during the time she was off work due to total disability.

23. It states that since the Grievor was off work and totally disabled for a period of 16 weeks, and her HOODIP Sick Pay benefits were payable for a 15 week period of disability, they expired on June 7, 2019, and she was not entitled to any further sick days beyond that date.

24. Relying on the arbitral jurisprudence regarding the principles of collective agreement interpretation, the Hospital argues that the board of arbitration must engage in a strict interpretation of the HOODIP 1992 brochure and the collective agreement. It must also find clear language in the collective agreement to confer a

monetary benefit, and the Employer argues that the Union bears the onus of showing that the monetary benefit it is seeking is part of the compensation package the parties have negotiated.

25. The Hospital relies on the language of Art. 16.02, but has a different interpretation than does the Union. It asserts that the Union is seeking to have the Grievor paid twice in respect of the same three statutory holidays. In the Employer's view, since the Grievor was totally disabled from working from February to June 2019, on the statutory holidays in question she was totally disabled from work. As such, in its view, she had to be and was paid sick pay. While the Employer coded the holidays as statutory holidays, in accordance with the 2017 MOS, it paid her sick pay for that reason.

26. According to the Employer, but for the statutory holidays, the Grievor would get sick pay because she was totally disabled and could not perform her regular work. Therefore, it asserts, if she was to be paid holiday pay for Good Friday, Easter Monday and Victoria Day, she would then be getting sick pay on June 10, 11, and 12, 2019 in respect of the same statutory holidays, which it argues would be contrary to Art. 16.02.

27. Since the Grievor was still totally disabled from working on the holidays, they fall within the 15 weeks of total disability covered by HOODIP Sick Pay. Since the Grievor was entitled to sick pay at the rate of 100% of her regular earnings by virtue of her length of service, the Employer deducted the full 100% of her pay for the holidays from her Sick Pay bank. If an employee had been receiving 70% of their regular earnings as their Sick Pay rate, the Employer would have deducted 70% of their regular earnings from such an employee's Sick Pay bank for the statutory holiday, notwithstanding that in the normal course, had they been at work, they should be paid 100% of their regular pay for that day.

28. By way of example of what the parties could have negotiated, but did not regarding sick pay, or sick days, the Employer points to Art. 17.03. In the Illness During Vacation provision the parties agreed that under certain circumstances, where an employee's scheduled vacation is interrupted due to serious illness, the period of such illness will be considered as sick leave, and will not be counted against the employee's vacation credits.

29. The Hospital relied on the following jurisprudence in support of its arguments: *Petro Canada Lubricants Inc. and Unifor, Local 593 (Thornton)*, 2019 CarswellOnt 10685 (Surdykowski); *Vancouver Hospital v. H.E.U., Local 180*, 1996 CarswellBC 3188 (Morrison); *Cardinal Transportation B.C. Inc. v. C.U.P.E., Local 561*, 1997 CarswellBC 3206 (Devine); *Canadian General-Tower Ltd. v. U.S.W.A., Local 862*, 2011 CarswellOnt 9711 (Surdykowski); *Building Service Workers' Union, Local 220 v. Sarnia General Hospital*, 1972 CarswellOnt 1456 (Shime); *St. Vincent Hospital and Ontario Nurses' Assn.*, 1986 CarswellOnt 5434 (Shime); *Rainy River Valley Health Care Facilities Inc. and CUPE*, 1989 CarswellOnt 4499 (Hearn); *Unimin Canada Ltd. v.*

Teamsters Union, Local 938, 1993 CarswellOnt 1288 (Burkett); *Kingston Regional Ambulance Service and OPSEU, Local 462*, 1995 CarswellOnt 6820 (Verity); *Sisters of Charity Ottawa Health Services and OPSEU, Local 413*, 1996 CarswellOnt 6213 (Simmons); *Peel (Regional Municipality) and CUPE, Local 966 (10-04)*, 2014 CarswellOnt 14134 (Albertyn).

DECISION

30. The question raised by the grievance is how should the Hospital have treated the three statutory holidays, Good Friday, Easter Monday and Victoria Day, which fell during the period of the Grievor's paid sick leave. Sick leave is governed by the HOODIP 1992 brochure, which is incorporated by reference into the collective agreement, and the holiday issue is addressed in Article 16 and Appendix "N" of the collective agreement.

31. Based on the ASF (reproduced above), there is no dispute in this case that the Hospital draws down an employee's short term sick pay based on a bank of 562.5 hours, which represents 7.5 hours/day x 5 days per week x 15 weeks. As well, if an employee returns to work from sick leave on modified hours, they are allowed to top up their earnings using any sick pay hours that remain unused. It is also clear from the ASF that the Employer does not limit the use of short term sick leave to the first 15 weeks of total disability, and agrees that the combined sick leave and top-up period may extend beyond 15 weeks until the 562.5 hours are depleted.

32. This is consistent with the finding in the *Ottawa Hospital* decision, cited above, which recognized that the 15 week HOODIP Sick Pay program is not simply a straight 15 continuous weeks entitlement, no matter how many days in any given week may in fact be taken as sick days, but rather is for a period of days or hours up to a total of 15 weeks, which may be accounted for as 75 days, or 562.5 hours.

33. The Hospital's manner of administering the sick pay allocation is also consistent with Arbitrator Burkett's finding in the *Participating Hospitals* 2004 decision, cited above. In that case the arbitrator rejected the employer argument that whether an employee used sick benefits for time off work sick, or as top up during the period when they may be on modified work/hours only working part of a day, that the total time that an employee could be eligible for sick pay was 15 calendar weeks.

34. Rather, the Hospital has agreed in the ASF (at para. 10) that "when an employee returns to work on part-time modified hours, the employee can use sick time from the 562.5 hours as sick pay, if they have any time left, to top up their earnings while they are on modified work. The combined sick leave and top-up period may extend beyond 15 weeks until the 562.5 hours are depleted."

35. In light of these agreed facts, we cannot accept as a given the Hospital's argument that since the Grievor was on sick leave for a total period of 16 calendar weeks, that she had exhausted her Sick Pay entitlement under HOODIP at the end of

the 15 calendar weeks from the commencement of her sick leave. That issue has already been decided and it is settled law that the HOODIP Sick Pay program is not a strict 15 calendar weeks entitlement.

36. Rather, one must still consider whether an employee had any other entitlement during that period. The cases have addressed where an employee may work for part of a day as part of a modified return to work program, in which case the hours worked must be paid as earnings, and only the portion of a day that the employee is unable to work due to the disability is considered as covered by the Sick Pay program. This case presents another scenario, that of the mode of payment for statutory holidays that may fall during the period an employee is off work and in receipt of Sick Pay.

37. Arbitrators have found that the HOODIP Sick Pay program is an income protection plan for employees that is not time-driven but is benefit-driven. As Arbitrator E. Newman noted in the *Cambridge Memorial Hospital* decision, cited above, at para. 36:

> 36. I do not read the 1980 plan brochure as fundamentally time-driven. Rather, I read it as benefit-driven. The brochure, in my view, exists to describe a benefit that exists for the income protection of the Hospital's employees. It exists to explain to the employee what protections the employer has agreed to provide in the event of her inability to earn income. It is, in my view, unreasonable to interpret the 1980 plan brochure in a manner that causes the employee to exhaust her sick pay without even using it. That is essentially where the *Ongwanada* reasoning leads, and essentially the reasoning that the Burkett boards have rejected.

38. While the collective agreement before us refers to the HOODIP 1992 brochure, the essential purpose of the Sick Pay plan has not changed, and indeed, the brochure itself declares that it is a "Disability Income Plan". There is little doubt at this juncture that the HOODIP Sick Pay program's purpose is to indemnify employees covered by the plan for lost wages when they are totally disabled from being able to perform their work. In *Health Sciences North*, cited above, Arbitrator Trachuk noted at para. 57 that "the purpose of the sick leave benefits is to provide income replacement when employees are off due to illness or disability". In that case, as in the case before us here, the collective agreement incorporated the HOODIP 1992 brochure.

39. As noted earlier, the Union argues that on each of the three statutory holidays during the Grievor's period of total disability, she was not off work due to disability, but rather because those days were statutory holidays, for which she is entitled to be paid statutory holiday pay by virtue of Art. 16.02. Holiday pay is computed based on the employee's regular straight time hourly rate of pay times the employee's normal daily hours of work. Since the HOODIP Sick Pay program is an income replacement plan, and since the Grievor was entitled to have her income replaced on the three statutory holidays with statutory holiday pay, she did not need to have her

income replaced through her Sick Pay program. As such, the Union argues that she should still have had three sick days available to her to use on June 10, 11, and 12, 2019.

40. There is no dispute that pursuant to the MOS reached in 2017, the parties agreed that when an employee is off work sick, is in receipt of short-term sick pay benefits, and when a statutory holiday occurs when the employee is off sick, that the Hospital will mark and code the day as a statutory holiday. Hence, it would appear that once the parties had agreed that a person in that situation qualifies for a statutory holiday even though they are on sick leave, it is to be coded as if the employee had the benefit of a statutory holiday on that day.

41. The Employer asserts it coded the three statutory holidays as such in this instance. One must then ask, what would be the point of coding the holidays as statutory holidays if nothing flowed from that? In this regard it is noteworthy that the parties further agreed in the MOS that the statutory holiday would be "paid in accordance with the collective agreement" (at para. 2 of the MOS). The parties did not spell out what that meant, but that is essentially the question before this panel, and therefore requires us to interpret the language of the collective agreement.

42. In the *Petro Canada Lubricants* decision, cited above, the arbitrator outlined the principles of collective agreement interpretation as follows:

> 21. Although much has been written about the interpretation significance of collective agreement purpose, fairness, internal anomalies, cost or administrative difficulty, or the effect on the parties or bargaining unit employees, such considerations only come into play when a grievance arbitrator must choose between equally plausible interpretations of the collective agreement language in issue. The grievance arbitrator is tasked with determining what the collective agreement provides or requires, regardless of the effect on either party or on bargaining unit employees. Subject to considerations of ambiguity or estoppel (or perhaps waiver) the employer, the union, and bargaining unit employees are entitled to no more or less than the benefit of the bargain made in the collective agreement as described by the words used. It is no part of a grievance arbitrator's job to save the parties or either of them from the consequences of the agreement they have written. It is up to a party that is dissatisfied with the consequences of the collective agreement bargain as determined by a grievance arbitrator to seek a collective bargaining solution.
>
> 22. The fundamental collective agreement interpretation presumption is that the parties to a collective agreement purposely chose the language they have used to express their shared intention. That is, it must be presumed that the parties wrote what they meant and meant what they wrote.
>
> 23. Therefore, the fundamental (rebuttable) presumptive rules of collective agreement interpretation are:

> • The words used must be given their plain and ordinary meaning unless it is clear from the structure of the provision read in context that a different or special meaning is intended, or the plain and ordinary meaning result would be illegal or absurd.
>
> • All words must be given meaning, with the same word having the same meaning wherever it is used, and different words having different meanings.
>
> • Specific provisions prevail over general provisions.
>
> • Words or phrases cannot be either inferred or ignored unless it is essential to the purposive operation of the collective agreement.
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> 24. Collective agreements are not negotiated or written by linguistic experts, and the Supreme Court of Canada's decision in *Creston Moly Corp. v. Sattva Capital Corp.*, [2014] 2 S.C.R. 633, 2014 SCC 53 (S.C.C.) (CanLII) makes it clear that an arbitrator tasked with interpreting a collective agreement must not act as a mere linguistic technician. On the contrary, the arbitrator's job is to take a practical approach to interpretation in order to determine the objective contextual labour relations meaning of the collective agreement provision(s) in dispute.

43. In *Cardinal Transportation B.C.*, cited above, the arbitrator described the collective agreement interpretive exercise as follows:

> 24. I accept as a general proposition that I am bound to attempt to determine the intention of the parties when interpreting the parties' Collective Agreement. Where the language of a collective agreement is clear, however, its express terms may be found to apply even if the literal interpretation is unfair or oppressive: see Brown and Beatty, *Canadian Labour Arbitration*, 3rd ed., looseleaf (Aurora, Ont.: Canada Law Book), para. 4:2100, page 4-31.
>
> 25. Where a monetary benefit is asserted, it normally falls to the Union to show in clear, specific and unequivocal terms that the monetary benefit is part of the employee's compensation package. Such an intent is not normally imposed by inference or implication: see *Noranda Mines* (April 27, 1981), Unreported (Hope).

44. Pursuant to the first paragraph of Art 16.02, "holiday pay will be computed on the basis of the employee's regular straight time hourly rate of pay times the employee's normal daily hours of work". That is the only manner of computing holiday pay in the Holiday Pay provision. As such, it would appear that, *if Ms. Tucker qualified to receive it*, she should have been paid *holiday pay* on the three statutory holidays in question in this grievance based on her regular straight time hourly rate of pay times her normal daily hours of work.

45. In the 2017 MOS the parties have agreed that when an employee is off sick and in receipt of Sick Pay under HOODIP, and when a statutory holiday occurs during that period of sickness, the Hospital will code and mark that day as a statutory holiday. As such, the parties have agreed that a person in the Grievor's

circumstances is qualified to receive a statutory holiday on each of the three days in question in this grievance. In fact, the Employer coded her in its systems as having been on statutory holidays on those dates.

46. Other than the descriptions of qualification for a paid holiday, and the manner in which payment for the holiday is to be calculated, there is a caveat in Art. 16.02 which must also be considered. The Employer argues that based on the following language of Art. 16.02 the Grievor is not entitled to receive both sick pay and holiday pay in respect of the same statutory holidays:

> An employee who qualifies to receive pay for any holiday or a lieu day will not be entitled, in the event of illness, to receive sick pay in addition to holiday pay or a lieu day in respect of the same day.

47. We are required to read Article 16 in its entirety and to give meaning to the words used. As already outlined above, the Grievor is an employee who qualifies to receive paid holidays for the three holidays in question. That means that she is entitled to receive holiday pay for those three days.

48. The parties have agreed that such an employee, although entitled to the holiday pay despite illness, is not entitled *to receive sick pay in addition to holiday pay in respect of the same day*.

49. On the facts of this case, the Employer did not pay the Grievor holiday pay for the three days in question, despite her entitlement to that earned benefit. Instead, it paid her sick pay out of the Grievor's sick bank to fund those holidays. In our view, in doing so, the Employer breached the terms of Article 16.02 in that it was required to pay her holiday pay, but did not do so.

50. Had the Employer abided by the holiday pay requirement, there would be no issue here, as this is not a case of an employee seeking to be paid both holiday pay and sick pay for the same day. That appears to have been the fact situation in the case law provided to us by the Hospital. Employees who had been paid holiday pay on a day they were off sick also claimed an entitlement to sick pay on top of the holiday pay for the same day. Arbitrators have consistently, absent collective agreement language permitting such pyramiding, dismissed such claims. The following are examples of such grievances.

51. In *St. Vincent Hospital*, cited above, two grievors were scheduled to work on Good Friday; both did not work due to a *bona fide* illness; both received holiday pay, but they claimed they should also have received sick pay for that day. That collective agreement, like the one before us, contained a provision that a nurse entitled to holiday pay under what was Art. 15.02 in that agreement, could not receive sick leave pay to which she may otherwise have been entitled. Based on that express collective agreement exclusion, the arbitration board denied the grievances.

52. In *Rainy River Valley Health Care Facilities*, cited above, the grievance was about an employee's claim to both holiday pay and sick pay for the Victoria Day holiday. The grievor had been scheduled to work on May 23, 1988, which was Victoria Day. Assuming that she would have worked on Victoria Day, the grievor had booked May 29th as her lieu day for that holiday. On May 22nd the grievor became ill, and did not work on Victoria Day. The grievor was paid holiday pay for Victoria Day, despite having been ill on that day. It was accepted that holiday pay was an earned benefit. The hospital did not pay the employee for May 29th as it contended that she had not earned a lieu day because she had not worked on May 23rd.

53. The union claimed that the grievor should have been paid both holiday pay and sick pay for May 23rd. The collective agreement, much like the one before us, stated that an employee who qualified to receive pay for any holiday was not entitled, in the event of illness, to receive sick pay in addition to holiday pay in respect of the same day. Relying on the decision in *St. Vincent Hospital*, cited above, the grievance was dismissed as there was an express provision in the collective agreement denying payment of both holiday pay and sick pay for the same day.

54. In *Kingston Regional Ambulance Service*, cited above, an employee was off sick on Thanksgiving day, was paid holiday pay for the day, but then claimed that he should also have been paid sick pay for the same day. The grievance was denied for the same reasons as in the other decisions already reviewed. The arbitrator noted at para. 12 of the decision that "pay on a designated holiday as specified in the collective agreement is an earned benefit which must be considered as part of the total compensation package". At paras. 14 and 18 the arbitrator noted that, as opposed to an earned benefit, the purpose of the HOODIP sick pay program is to indemnify employees for loss of regular earnings. Since in that case the employee had not worked on the holiday but had been paid holiday pay for the day, he had no loss of regular earnings for that day, so he had no entitlement to receive sick pay for the same day.

55. In *Unimin* Canada Ltd., cited above, an employee was off work sick for a period of time. During that time, there were five holidays, for which he was paid holiday pay. For the remainder of the time the grievor was paid weekly indemnity benefits as a result of being off sick. The grievor claimed that he should also be paid weekly indemnity benefits for the holidays that fell within the period he had been off sick. The grievance was dismissed on the following basis:

> 10. Weekly indemnity benefits are designed to indemnify an employee who suffers a loss of earnings by reason of illness or injury. Indemnity insurance is defined in *Black's Law Dictionary* 6th (1990) as "insurance which provides indemnity against loss" and its dictionary meaning is "protection or security against damage or loss". These parties have chosen to protect the earnings capacity of bargaining unit employees by means of weekly indemnity benefits. The implied precondition to the payment of such a benefit, therefore, is a loss of earnings. On a paid holiday a bargaining unit employee receives the day off work with pay. Mr. Lalonde, who was

> already off work, received full pay for each of the days in question. Accordingly, I have not been satisfied that Mr. Lalonde suffered a loss on these days for which he was entitled to be indemnified under the weekly indemnity plan. He received 100% of his daily rate for these days and, therefore, must fail in his claim to supplement his daily rate by means of a concurrent weekly indemnity payment.

56. *Unimin* is an indemnification case in that the weekly indemnity scheme was, like the HOODIP Sick Pay program, designed to protect employees against the loss of earnings while they were off work due to illness. However, the opposite occurred in the case before us: the Hospital did not pay Ms. Tucker holiday pay, but instead took monies for the three holidays out of the Grievor's 562.5 HOODIP Sick Pay hours. Had the Employer paid the Grievor holiday pay as required by Art. 16.02, Ms. Tucker would not have needed disability income benefits through the HOODIP Sick Pay program on those dates.

57. Nothing in the HOODIP 1992 brochure gives an employer the right to use an employee's Sick Pay to offset some other benefit that the Employer may owe to a sick employee under a collective agreement. The only caveat in respect of holiday pay arises out of the terms of the collective agreement, at Art. 16.02, where it states that an employee receiving holiday pay cannot also *receive sick pay in respect of the same day*.

58. The decision in the *Sarnia General Hospital* case, cited above, is instructive. In that case a grievor was off sick for a period of time that included the Good Friday holiday; the hospital paid her statutory holiday pay for that day because it had accepted that she was off work through illness for reasons satisfactory to the employer, but the grievor also claimed that she should have been paid sick pay for that day. The majority of the board of arbitration noted that holiday pay is "a fringe benefit entitling employees to be absent from work and to enjoy the holiday without loss of pay" (para. 7). They viewed sick pay as "a fringe benefit which in part is designed to indemnify an employee against loss of income", and as "protective" in nature (para. 8).

59. At paras. 10 and 18, Arbitrator Shime, writing for the majority, stated:

> 10. While statutory holidays and sick pay are generally intended to deal with different situations, there is a common element in both which is to prevent loss of income. Accordingly, if an employee is compensated by receiving one of the benefits it may be that in certain circumstances there would be no basis for receiving the alternate benefit which may cover the same contingency. In our view the grievor has received payment for the statutory holiday which has, in part, covered any loss of income for that day and accordingly, she should not be entitled to any additional benefit from the employer to cover the same contingency. We think that some distinction should be made between having the employer compensate the employee for a loss and paying her an additional benefit.
>
> …

> 18. In the result, *the grievance is dismissed, but we do note, however, that the grievor is entitled to retain her sick leave credit for the Good Friday in her sick leave bank.*
> (Emphasis added)

60. We cannot agree with the Employer's position that the Grievor is seeking payment of holiday pay and sick pay in respect of the same day. She is not. She wants to be paid holiday pay for the three statutory holidays, and she wants to use her HOODIP Sick Pay entitlement for June 10, 11, and 12, 2019, which are different days. That is what Arbitrator Shime recognized in the *Sarnia General Hospital* decision: while the grievor there was not entitled to sick pay for a day on which she had been paid holiday pay, she nonetheless still had a sick leave credit to her benefit as a result of not being paid sick pay for that day.

61. It is noteworthy that in that case there was no explicit provision against an employee receiving both holiday pay and sick pay for the same day, but the principle that has been applied in all of the decisions reviewed above is the same: that if an employee has received holiday pay for a holiday that occurs while they are off sick, they cannot also claim sick pay for that day if the purpose of their sick pay plan is to indemnify them against a loss of earnings, because they have had no loss of earnings.

62. These parties have negotiated what should occur when a statutory holiday occurs during a leave of absence, and it is noteworthy that sick leave is not listed in the collective agreement as a leave of absence. Pursuant to Appendix N(e), "an employee who has been granted a leave of absence shall not be entitled to payment or additional time off for any recognized holiday that occurs during such leave". There is no such limitation in the sick leave provisions of the collective agreement. The only limitation in Art. 16.2 is that an employee who qualifies to receive pay for any holiday will not be entitled, in the event of illness, to receive sick pay in addition to holiday pay in respect of the same day.

63. The Hospital relied on Art. 17.03 as an example of how the parties could have addressed the situation before us, but did not. In that provision, the parties have negotiated what is to happen if an employee becomes seriously ill during their scheduled vacation. In that circumstance, pursuant to Art. 17.03, the period of serious illness is to be considered as sick leave, and those days are not to be counted against the employee's vacation credits. In other words, the employee does not lose vacation credits for the days they are seriously ill during a scheduled vacation.

64. We have not found this example helpful in our consideration of the matter since the parties to this agreement have in fact negotiated what should occur if an employee is off sick on a paid holiday (at Art. 16.02). In some instances an employee may be found to be qualified to receive holiday pay despite their being off sick (as in this case, having regard to the 2017 MOS), and in others they may not. However, if an employee is found to be qualified to receive holiday pay, they cannot also receive Sick Pay for the same day.

65. To summarize then, pursuant to Art. 16, the Hospital has agreed to provide its employees with twelve paid holidays. In Appendix "N" the parties have delineated which 12 days will be recognized as paid holidays. Once the Employer coded Good Friday, Easter Monday and Victoria Day as statutory holidays, it was required to pay Ms. Tucker holiday pay "in accordance with the collective agreement", as it had bound itself to do in the 2017 MOS.

66. It was only because the Hospital funded the Grievor's holiday pay through her own sick pay bank that there was nothing left in that bank for her to draw on for the three days in question. In essence, Ms. Tucker received nothing from the Hospital as a result of the Employer accepting in the 2017 MOS that a worker like her, who was off work sick and in receipt of HOODIP Sick Pay, had met the qualification for paid holidays under Art. 16.02. She did not get three paid holidays, despite being coded as having received them.

67. Just as arbitrators do not grant a monetary benefit to employees unless there is clear language in a collective agreement to support such a benefit, so too, arbitrators should not grant an employer a monetary benefit without clear language to that effect in a collective agreement. In this instance, Art. 16.02 is unambiguous as to how holiday pay is to be computed, and it is payable by the employer to qualified employees. Nothing in the entire provision suggests that an employee who is off work sick but has been deemed qualified for the statutory holiday has to pay for the holiday themselves out of their sick pay benefits. It would take the clearest of language to make such a finding, and none exists in the provisions of this collective agreement.

68. This is not a case of a union seeking a monetary benefit for which there is no support in the language of the collective agreement. We are satisfied, for the reasons outlined above, that Art. 16.02 entitles the Grievor to holiday pay for the three days in question. Furthermore, we are satisfied that had the Grievor been paid holiday pay on those days, she would not also have been paid sick pay, again by virtue of Art. 16.02. Thus, she would have had three days of sick pay remaining in her HOODIP Sick Pay allocation, and could have drawn on them on June 10, 11, and 12, 2019.

69. We find the Hospital violated Art. 16.02 when it failed to pay the Grievor holiday pay for Good Friday, Easter Monday and Victoria Day in 2019. We further find that but for the Employer's breach, the Grievor would have been entitled to receive sick pay on June 10, 11 and 12, 2009. The Employer is therefore directed to compensate the Grievor for her losses on June 10, 11 and 12, 2009.

70. We will remain seized to address any issues that may arise out of the implementation of this award.

Dated this 7th day of December, 2020.

"Gail Misra"
Gail Misra, Arbitrator

Joe Herbert:

I concur.

Greg Shaw:

With respect to the majority in this matter, I must dissent in that I believe they simply got it wrong.

At several points in the award, Paragraph 25 and 44 specifically, the award states that the Grievor was paid sick pay for April 19 Good Friday, April 22 Easter Monday, and May 2 Victoria Day. This is simply not the case. She was paid Holiday Pay for the 3 days in question.

There is also an erroneous belief that the HOODIP Plans is a sick bank. This is not accurate; it is sick pay for **up to 15 weeks** of total disability not to exceed 562.5 hours or 75 days.

HOODIP is a disability income plan designed to cover "short term" illnesses for "up to a 15 week period". In my view Ms. Tucker's entitlement to sick pay ended after the 15 week period, referred to in the HOODIP brochure, ended. This should be the case regardless of the number of sick days or hours that she was paid during her period of illness.

The words of the HOODIP Plan are clear and must be given meaning. The Brochure states:

"When your Sick pay benefits end.
Benefits are payable for up to 15 calendar weeks on a normal 5 day work week."

Surely this has to be given literal meaning. Otherwise, it renders the provisions of the HOODIP plan meaningless. The Plan does not provide for a carry over to the 16th week in the circumstances of Ms. Tucker.

The Grievance should have been dismissed.