IN THE MATTER OF AN ARBITRATION

B E T W E E N:

CUPE Local 5666

("the Union")

- and -

Brockville General Hospital

("the Hospital")

AWARD

Before: **Lindsay Lawrence, Arbitrator**

Re: Grievances of Tessier 2022-004 & Larock 2023-003
Accrual of Paid Vacation on Pregnancy and/or Parental Leave

Appearances

For the Employer:
Colin Youngman, Counsel
Shauna Bartlett, Counsel
Casie Kenney, Director, People Services

For the Union:
Jessica Greenwood, Counsel
Adam Gregory, Counsel
Martha Peters, Local President
Curtis Coats, Acting Chief Steward
Julie Jones, Vice President
Dana Larock, Grievor

Hearing Date: November 12, 2024

1. The above grievances, duly referred to me for arbitration, allege that the Hospital has violated the Collective Agreement by failing to credit the grievors, Rebecca Tessier and Dana Larock, with paid vacation time accumulated during pregnancy and/or parental leave. There is no dispute that during such leave vacation time accumulates; the dispute here is whether or not this vacation time is paid time after the first 30 days of such leave.

2. Both parties make claims of estoppel. They each reserved the right to call evidence in support of and to make such argument but agreed that this Award should issue first, following which they could each decide whether to pursue their respective estoppel arguments.

3. The parties entered into an Agreed Statement of Facts, upon which they each based their arguments for purposes of this Award, and which is reproduced in full below:

AGREED STATEMENT OF FACTS

Background

1. Brockville General Hospital (the "Hospital") is a community hospital located in Brockville, Ontario.

2. Its service and clerical workers are represented by the Canadian Union of Public Employees, Local 5666 (the "Union").

3. The Union and the Hospital are parties to a Collective Agreement with Central (**Exhibit A**) and Local terms (**Exhibit B)**.

Collective Agreement Provisions on Vacation and Pregnancy/Parental Leave

4. Article 9.04 of the agreement provides the following:

   Unless otherwise provided in the Collective Agreement:

   (a) It is understood that during an approved unpaid absence not exceeding thirty (30) continuous days or any approved absence paid by the Hospital, both seniority and service will accrue.

(b) During an unpaid absence exceeding thirty (30) continuous calendar days, credit for service for purposes of salary increment, vacation, sick leave or any other benefits under any provisions of the Collective Agreement or elsewhere, shall be suspended for the period of the absence in excess of thirty (30) continuous calendar days, the benefits concerned appropriately reduced on a pro rata basis and the employee's anniversary date adjusted accordingly. In addition, the employee will become responsible for full payment of any subsidized employee benefits in which he/she is participating for the period of absence, except that the Hospital will continue to pay its share of the premiums up to thirty (30) months while an employee is in receipt of WSIB benefits. Such payment shall also continue while an employee is on sick leave (including the Employment Insurance Period) to a maximum of thirty (30) months from the time the absence commenced.

5. Vacation for the Hospital's service and clerical workers is administered under Article 17 of the Central Terms which provides the following entitlements for full-time and part-time employees:

ARTICLE 17 – VACATIONS

17.01(A) – FULL-TIME VACATION ENTITLEMENT, QUALIFIERS AND CALCULATION OF PAYMENT
(The following clause is applicable to Full-Time employees only)
Subject to any superior conditions:

An employee who has completed the following number of continuous years of service:	But less than the following number of continuous years of service:	Is entitled to the following number of weeks of annual vacation with pay:
1	2	2
2	5	3
5	12	4
12	20	5
20	28	6
28		7

Vacation pay shall be calculated on the basis of the employee's regular straight time rate of pay times their normal weekly hours of work, subject to the application of Article 9.04, Effect of Absence.

17.01(B) – PART-TIME VACATION ENTITLEMENT, QUALIFIERS AND CALCULATION OF PAYMENT

(The following clause is applicable to part-time employees only)
Subject to any superior conditions:

An employee who has completed the following number of continuous hours of service:	But less than the following number of continuous hours of service:	Is entitled to the following percentage of vacation pay, plus the equivalent time off:
Less than 3,450		4%
3,450	8,625	6%
8,625	20,700	8%
20,700	34,500	10%
34,500	48,300	12%
48,300		14%

Progression on Vacation Schedule (Part-Time)
Part-time employees, including casual employees, shall accumulate service for the purpose of progression on the vacation scale, on the basis of one year for each 1725 hours worked.

6. Articles 12.06(A)(e) and 12.07(A)(f) provide that credits of service and seniority shall continue to accumulate for full-time employees during such leaves:

> (e) Credits for service and seniority shall accumulate for a period of up to seventeen (17) weeks while an employee is on pregnancy leave.
>
> (f) Credits for service and seniority shall accumulate for a period of up to sixty-one (61) weeks after the parental leave began, if the employee also took pregnancy leave, and sixty-three (63) weeks after the parental leave began otherwise, while the employee is on a parental leave.

7. Similar language exists for part time employees under Articles 12.06(B)(e) and 12.07(b)(f):

> (e) Credits for service and seniority shall accumulate for a period of up to seventeen (17) weeks while an employee is on pregnancy leave on the basis of what the employee's normal regular hours of work would have been.
>
> (f) Credits for service and seniority shall accumulate for a period of up to sixty-one (61) weeks after the parental leave began, if the employee also took pregnancy leave, and sixty-three (63) weeks after the parental leave began otherwise, while the employee is on a parental leave on the basis of what the employee's normal regular hours of work would have been.

8. Prior to the current grievance, the Hospital administered vacation accrual for employees on pregnancy and parental leave in line with the rate they achieved on the grid under Article 17 for the duration of the pregnancy and/or parental leave. The parties agree that before this change in practice, employees were credited with vacation time and vacation pay for the duration of their leave(s) taken. The Employer's evidence would be that the paid vacation was provided, during pregnancy and parental leave, in error and that it was appropriately corrected in approximately 2019.

9. It is the Employer's current position, relying on Article 9.04 (b) that this vacation was credited in error, and that **paid** vacation time only accrues for the first 30 days of any pregnancy and/or parental leave.

10. There is no dispute that employees accumulate vacation time for the duration of the pregnancy and/or parental leave. The dispute is with respect to whether this time is paid time after the first 30 days of that leave.

Tessier and Larock Grievances

11. On March 15, 2021, Rebecca Tessier went on pregnancy leave. She returned on March 19, 2022.

12. Throughout the entirety of her pregnancy leave, she was credited with only 12.99 hours of vacation from March 15, 2021 to April 16, 2021 (See **Exhibits C, D, and E**). After that period, Ms. Tessier's vacation bank remained capped until her return (see **Exhibit F**).

13. On March 23, 2021, Dana Larock went on sick leave, after which, in the pay period starting May 1, 2021, she began her pregnancy leave. She returned in October of 2022.

14. Ms. Larock took a pregnancy leave previously in 2015 and 2016. During this leave, in line with the Hospital's previous practice, she accumulated vacation for the entirety of her leave.

15. However, during her 2021-2023 maternity leave, she only accumulated 11.54 hours of vacation from May 1, 2024 to May 28, 2024 (See **Exhibits G, H and I**). After that period, Ms. Larock's vacation bank remained capped until her return (**Exhibit J**).

16. On May 11, 2022, the Union filed a grievance on behalf of Ms. Tessier (**Exhibit K**).

17. On March 15, 2023, the Union filed a grievance on behalf of Ms. Larock (**Exhibit L**).

18. The Employer denied the Tessier Grievance on June 13, 2022 (**Exhibit M**) and July 5, 2022 (**Exhibit N**), and denied the Larock Grievance on May 8, 2023 (**Exhibit O**) and June 15, 2023 (**Exhibit P**).

The Union's Submissions

4. Briefly summarized, the Union argued that the Collective Agreement requires the accrual of vacation leave with pay for the entire period of pregnancy and/or parental leave. From the Union's perspective, the continued accrual of service and seniority while on such leave results in paid vacation accrual. Articles 9.04 and 12.06/12.07 must be read harmoniously and in line with the *Employment Standards Act, 2000* (the "ESA"), and doing so can only result in the accrual of paid vacation time. Put another way, if Article 9.04 were to apply to pregnancy and parental leaves, it would contradict both Articles 12.06/12.07 and the ESA. Rather, Articles 12.06/12.07 should be read as the "full protocol" for pregnancy/parental leaves, to which Article 9.04 does not apply, following the interpretive principle that specific provisions should be taken to override more general provisions.

5. The Union relied upon the following cases: *Federated Co-operatives Ltd. and Miscellaneous Employees Teamsters, Loc. 987 (Re),* 2004 CanLII 94697 (AB GAA)*; Cornwall Community Hospital v Ontario Public Service Employees' Union, Local 402,* 2016 CanLII 51102 (ON LA); *Fredericton Police Union, UBCJA, Local 911 and Fredericton (City) (Wilson), Re,* 2022 CarswellNB 170; 4. *Windsor Regional Hospital and OPSEU, Local 143, Re,* 2006 CarswellOnt 10766; *Resolve Counselling Services Canada v Ontario Public Service Employees' Union*, 2023 CanLII 91508 (ON LA); *United Food and Commercial Workers' Union, Local 401 v. The Real Canadian Superstore,* 2008 ABCA 210 (CanLII); *UFCW, Local 1006A and National Grocers Co. (Vacation Policy), Re*, 2022 CarswellOnt 8104; *Bruce Power LP v The Society of Energy Professionals,* 2017 CanLII 37863 (ON LA); *William Osler Health System v Teamsters Local 419,* 2020 CanLII 33067 (ON LA); and *Sinai Health System (Mount Sinai Hospital Site) v National Organized Workers Union*, 2022 CanLII 81471 (ON LA).

The Hospital's Submission

6. The Hospital's argument, briefly summarized, is that the Collective Agreement does not entitle employees on pregnancy and/or parental leave to accrue paid vacation time after the first 30 days of absence. From the Hospital's perspective, pregnancy and parental leaves are unpaid leaves of absence and, because they are unpaid leaves of absence, Article 9.04(b) applies. To the extent that this reading offends the provisions of the ESA, Article 9.04(b) must be read down. Vacation time and vacation pay are related but separate benefits, and as a result of Article 9.04, the language of the Collective Agreement does not support ongoing accrual of vacation pay during pregnancy and/or parental leave.

7. The Hospital relied upon the following cases: *Complex Services Inc. v. Ontario Public Service Employees Union, Local 278*, 2011 CanLII 26530 (ON LA); *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56 (CanLII), [2005] 2 SCR 669; *Greater Sudbury (City) v Sudbury Professional Fire Fighters' Association*, 2012 CanLII 90057 (ON LA); *Renfrew County and District Health Unit v Ontario Nurses' Association*, 2013 CanLII 51843 (ON LA); *Kenora District Services Board v Canadian Union of Public Employees, Local 5911*, 2018 CanLII 105353 (ON LA); *Windsor Regional Hospital and OPSEU, Local 143, Re*, 2006 CarswellOnt 10766.

The Union's Reply Submissions

8. In reply, the Union submitted that the Hospital's arguments fail to rationalize the inherent conflicts between Articles 9.04 and 12.06/12.07. If the ongoing accrual of service means the accrual of vacation with pay for the first 30 days of a leave under Article 9.04, it is not reasonable to read Articles 12.06/12.07 to mean that the ongoing accrual of service during pregnancy and/or parental leave results in the accrual of only vacation time, but not the accrual of vacation pay. The Union urged me to pay attention to the collective agreement language in the cases relied upon by the Hospital, and noted that many of the cases involved "formula language" involving a percentage of earnings for accrual of vacation time, such that a percentage of 0 remains 0.

Decision and Analysis

9. Many of the cases were referred to me for the purposes of general principles of collective agreement interpretation about which there was no dispute. Words are to be given their plain and ordinary meaning. The collective agreement must be read as a whole and so as to avoid conflicts and inconsistencies. Where conferring a financial benefit, the collective agreement language must support the claim to compensation.

10. There was also no dispute between the parties about the general principles with respect to vacation benefits. They agree that vacation time and vacation pay are related but separate benefits, to which employees become entitled to the extent that they satisfy the statutory and/or collective agreement requirements: see *Complex Services, supra*, at paragraph 57, and *Greater Sudbury (City), supra,* at paragraph 37. The words used in a collective agreement are critical to determining such entitlement, and one must read the applicable cases keeping this in mind: *see Complex Services, supra*, at paragraph 52. The ESA requires that an employee on pregnancy and/or parental leave be provided with full vacation entitlement, but creates no obligation to provide full vacation with pay during such leave: ESA, section 52, and see *Windsor Regional Hospital*, *supra,* at paragraph 13.

11. Under this Collective Agreement, it is clear that:

a. vacation with pay for full-time employees is based on continuous years of service, and vacation is paid on the basis of the regular straight time rate of pay times the normal weekly hours of work (Article 17.01(A));

b. vacation with pay for part-time employees is based on continuous hours of service measured in hours, with movement for the purposes of progression on the vacation scale, measured on the basis of one year for each 1725 hours worked (Article 17.01(B));

c. credits for service and seniority continue to accumulate for full-time employees on pregnancy leave (Article 12.06(A)(e)) and parental leave (Article 12.07(A)(f))

and for part-time employees on pregnancy leave (Article 12.06(B)(e)) and parental leave (Article 12.07(B)(f)); and

d. during an approved unpaid absence not exceeding 30 continuous days or any approved absence paid by the Hospital, both seniority and service continue to accrue (Article 9.04(a)), resulting in the accrual of paid vacation time.

12. From these collective agreement provisions, reading them in context and the collective agreement as a whole, I conclude that employees are entitled to continue to accrue vacation *with pay* throughout pregnancy and/or parental leave. Vacation pay is based on service, and service continues to accumulate while on pregnancy and parental leave. The entitlement to vacation pay under Article 17 is based on continuous service ("continuous years of service" for full-time employees, and "continuous hours of service" for part-time employees). Articles 12.06/12.07 set out specifically and unequivocally that service continues to accumulate for employees on pregnancy and/or parental leave. Unlike many collective agreements, this is not a collective agreement that includes a requirement for "active service".

13. Also unlike some collective agreements, the entitlement to vacation pay under Article 17 is not based on a measurement that would result in, as the Union describes it, "a percentage of 0 being 0." In some collective agreements, vacation pay accrual is based on actual earnings, and while on pregnancy and/or parental leave, an employee may have no actual earnings from the employer or earnings limited to a top-up. It follows that there would be no or limited paid vacation accrual. The Collective Agreement in this case bases entitlement to vacation on regular straight time and "normal weekly hours" for full-time employees, and an accumulation of 1725 hours for part-time employees, with accumulation on pregnancy and/or parental leave based on "what the employee's normal regular hours of work would have been." The crediting of normal hours of work in this Collective Agreement allows for ongoing accumulation with pay as per "normal".

14. Article 17.01 does specify that vacation pay is subject to the application of Article 9.04. Article 9.04(b) provides that after 30 days on an unpaid leave of absence, credit for service for

purposes*, inter alia*, of vacation shall be suspended. I am not, however, persuaded that Article 9.04(b) applies so as to change the combined and clear operation of Articles 12.06/12.07 and 17.01.

15. If pregnancy and parental leaves are considered unpaid leaves of absence and Article 9.04(b) applied to such leaves, there are two significant problems. First, Article 9.04(b), when strictly construed, stops the accrual of credit for service for purposes of, among other things, "vacation", and such reading is contrary to section 52 of the ESA. That section requires that service accumulates while on protected leave for purposes of vacation time. Any application of Article 9.04(b) to pregnancy/parental leaves would require reading that Article down to limit it to "vacation pay" and not to "vacation time". This was effectively the approach taken in *Windsor Regional Hospital*¸ although obviously a reading which does not necessitate reading the provision down would be preferable. Neither the decision in *Windsor Regional Hospital,* nor the employer in the instant case, provided any compelling explanation for choosing to read down Article 9.04(b) rather than opting for the interpretation which avoids this necessity.

16. Second, it is problematic that the second sentence of Article 9.04(b) makes employees solely responsible for full payment of any subsidized employee benefits in which they are participating for the period of absence (with an exception set out for employees in receipt WSIB for up to 30 months). This directly contradicts the pregnancy and parental leave provisions, which require the Hospital to continue to pay its share of the contributions of the subsidized employee benefits in which a full-time employee on such leave is participating and the percentage in lieu of benefits to part-time employees on such leave. The Hospital likewise provided no answer or response to this latter concern.

17. Given the above, and having fully considered the submissions of the parties and the caselaw they relied upon, I accept that Article 12.06/12.07 is the complete protocol for pregnancy and parent leaves, to which Article 9.04 does not apply, and therefore the ongoing accrual of service while on pregnancy/parental leave results in the ongoing accrual of vacation with pay. I am satisfied that this interpretation is consistent with the plain and ordinary meaning of the words of the collective agreement when read in context. It is also consistent with the principle

that specific provisions prevail over more general ones (see *National Grocers¸ supra,* paragraph 47, and *Bruce Power, supra,* paragraph 49) and the principle that one should first seek to discern whether the provisions of a collective agreement "can comfortably be read in a reconcilable fashion" before resorting to reading one or more provisions down (see *Real Canadian Superstore, supra,* paragraphs 15, 20). This conclusion is consistent with the conclusion reached in *Resolve Counselling, supra,* see pages 9 and 10.

18. On a final note, the caselaw on whether pregnancy/parental leave is a paid or unpaid leave reaches opposite conclusions and has not been helpful in reaching this decision. Facing similar, but not identical, collective agreement language, the arbitrator in *Windsor Regional Hospital, supra*, concluded that pregnancy/parental leave was an unpaid leave of absence, and therefore that the unpaid leave language must apply. The reasons are brief and the benefits issue (set out at paragraph 17 above) either did not arise from that collective agreement or was not argued before that arbitrator. The arbitrator in *Kenora District Services Board, supra,* effectively concluded that pregnancy/parental leave must not be an unpaid leave of absence, because such characterization would be inconsistent with the collective agreement as a whole. Not surprisingly, each party to this proceeding argued that the case which does not support their interpretation of the instant Collective Agreement language was wrongly decided. Given the opposing conclusions and that the cart was pulling the horse to some extent in the reasoning of both cases, neither decision was of assistance in deciding this case.

19. I do not think time is well spent parsing the meaning of unpaid versus paid leave of absence, and I have made no determination herein about whether pregnancy and parental leaves under this Collective Agreement constitute paid or unpaid leaves of absence. From any practical and/or linguistic perspective, pregnancy and parental leaves under a collective agreement which includes a paid supplemental benefit does not fit well in the paid/unpaid dichotomy. Moreover, the effect is the same, whether pregnancy/parental leave is a paid leave such that 9.04(b) does not apply, or whether pregnancy/parental leave is an unpaid leave but, in any event, constitutes a full protocol for these leaves such that 9.04(b) does not apply.

20. This Award addresses the proper interpretation of the Collective Agreement language

based on the arguments presented. As noted above, the case was argued with reference only to the Collective Agreement, the Agreed Statement of Facts and the jurisprudence, and both parties reserved the right to call evidence and make argument with respect to their respective estoppel claims. The parties are directed to contact my office within 30 days of the release of this Award should they wish to pursue the arguments held in reserve. If neither party seeks to do so within that timeframe, the issue of remedy is remitted to the parties as requested.

21. I remain seized with respect to all issues that have yet to be determined, and with respect to any issue arising from the interpretation or administration of this Award.

Dated at Toronto this 13th day of January, 2024.

"Lindsay Lawrence"

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Lindsay Lawrence
Arbitrator