In The Matter Of:

The Trade Union Act, R.S.N.S. 1989, c. 475

And

In The Matter Of:

A Collective Agreement and an adjudication thereunder

Between:

Nova Scotia Government and General Employees Union, Local 97

Union

And

Nova Scotia Health Authority

The Employer

Heard by: William M. Wilson, Q.C.

Appearances: David Roberts for the Union
Tom Groves for the Employer

Award

Preliminary:

1. I was asked to act as sole arbitrator in this matter on November 25, 2014 by agreement of the parties. The hearing took place on June 2, 2015. There were no preliminary issues raised. All time limits for filing an award were waived.

Facts:

2. The parties proceeded by way of an agreed statement of facts. The agreed statement is as follows:

Background

1. Capital District Health Authority was, at the time of the grievance, an acute care health facility, established pursuant to the *Health Authorities Act*. It provided a full range of health services, from emergency care to tertiary care to continuing care, to the public. Although not relevant to this grievance, the CDHA has been continued as a part of the Nova Scotia Health Authority.

2. Local 97 of the Nova Scotia Government and General Employees Union represented one of two Nursing bargaining units at CDHA, comprising registered nurses. Articles 19 and 21 of the collective agreement provided for various forms of paid leave for employees. A copy of the collective agreement between CDHA and Local 97 is attached as **Exhibit "A"**.

3. The collective agreement expired on October 31, 2012, and the parties commenced bargaining a new collective agreement in September of 2013.

4. By the spring of 2014, the parties had reached an impasse in collective bargaining, and Local 97 was in a legal strike position under the *Trade Union Act* by April 3, 2014.

5. Pursuant to Article 6.03 of the collective agreement, the parties are required to establish a joint Emergency Services Evaluation Committee for the purposes of ensuring that emergency services would continue in the event of a legal strike.

6. By way of a letter dated April 2, 2014, Kathy MacNeil wrote on behalf of the CDHA to Kieran Tompkins of the NSGEU proposing protocols that would govern the parties during the legal strike. A copy of the letter is attached as **Exhibit "B"**.

7. By way of a letter dated April 2, 2014, Shawn Fuller replied to Ms. MacNeil on behalf of the NSGEU agreeing to the provisions outlined in Ms. MacNeil's letter. A copy of the letter is attached as **Exhibit "C"**.

8. The strike commenced at 7 a.m. on April 3, 2014 and lasted until 7 a.m. on April 4, 2014, with the passage of the *Essential Health and Community Services Act*.

9. The parties ultimately concluded a new collective agreement in accordance with a final offer of settlement tabled by the CDHA in conciliation on September 29, 2014. A copy of the accepted offer is attached as **Exhibit "D"**.

10. During the 24 hours of the legal strike on April 3, 2014, employees who were on paid leave immediately prior to the commencement of the strike, including short term illness leave, maternity leave/parental leave top up and educational leave did not receive any paid leave.

11. Two employees, Carol Godin and Sarah Sexton, who were in receipt of paid leave for illness immediately prior to the commencement of the strike, did in fact receive paid leave for illness for April 3, 2014.

12. On May 7, 2014, Local 97 filed a policy grievance alleging that CDHA had failed to pay employees who were off as a result of the day of strike on leave, illness and injury benefits. A copy of the grievance is attached as **Exhibit "E"**.

13. On May 27, 2014, CDHA provided a response to the grievance, denying the grievance. A copy of the response is attached as **Exhibit "F"**.

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3. Attached to the statement are the exhibits identified therein. I will refer to them as required.
4. Upon admission of the agreed statement the parties proceeded by way of oral argument.

Discussion:

Issue

5. The issue for determination is whether employees off on the day of the strike and on Leave, Illness and Injury Benefits are entitled to payment of those benefits for that day.

Position of the parties

6. The Union's position is that an employee is entitled to be paid benefits if the right to the leave had vested prior to the strike. The employer they say cannot change the status of the employee on leave because of the strike and the retroactive provisions of the new agreement fill any gaps created by the expired collective agreement.

7. The Union concedes that an employee is not entitled to paid leave if the language of the collective agreement basis entitlement to the benefit on an employee working on the day of the strike. Bereavement leave would be an example.

8. The Union bases its position on precedent developed and applied consistently in their view many times.

9. The Employer acknowledges the precedent established by the case law relevant to this case but says that the jurisprudence does not support the Union's position.

10. The Employer says that entitlement to benefits while on strike depends in each case on the specific language of the collective agreement under consideration. They say that there are several important points to consider. The timing of the new collective agreement to see whether it retroactively cures the gap between the benefit lost due to the strike and the application of the new collective agreement. The requirement that the benefit must have been earned and vested prior to the strike.

11 The Employer says that in this case the retroactivity clause is limited and only the items named are retroactive. It further says that the benefits at issue were not earned.

12. The Employer also questions the validity of the grievance because it was filed under the old collective agreement.

Case Law

13. The parties referred to a number of cases they say support their respective positions.

14. In I.U.O.F., Loc. 700 v. Hamilton, [1963] O.L.A.A. No. 3 the issue was the payment of sick leave during the period that the Union was engaged in a lawful strike. The employer contended that the grievor was not entitled to sick leave during the strike because (1) the collective was terminated by the strike and (2) the memorandum of settlement did not specifically address sick leave benefits.

15. The union contended that the grievor remained an employee and consequently his right to fringe benefits under the collective agreement were retained and that the settlement agreement renewed all of the provisions of the former collective agreement which had expired.

15. The Board found that the memo of settlement was clear and unambiguous and that there was no need for it to specifically reference sick leave in order to revive the provisions of the expired agreement. The renewal revived all of the benefits under the former agreement not cancelled or amended by the memorandum.

16. In Waterloo v C.U.P.E. Local 1542, [1974] O.L.A.A. No.125 sick leave was cancelled during the strike. The new collective agreement was made retroactive to cover the period of the strike. Sick leave benefits were earned at 1.5 days per month. The Board found that an employee who is absent from work on sick leave at the time the strike commenced couldn't have his status changed by the fact that other employees engaged in a strike. Sick leave benefits were earned and the grievor was entitled to them prior to the strike.

17. In York Region Board of Education v. C.U.P.E. Local 1196 [1990] O.L.A.A. No. 52 the grievor was scheduled for elective surgery beginning the day of the strike. The employer denied sick leave pay because in its view no wages or benefits are paid out during a strike. In allowing the grievance the arbitration board commented as follow:

> ".....when an employee is on sick leave, the analysis as to whether that employee would have been "an employee who had continued to work, or an employee who had ceased to work, for the duration of a lawful strike, is not relevant, and purely speculative." The rights of an employee on sick leave must flow from the provisions of the pre-existing collective agreement, under which that employee had already accumulated his sick leave days."

18. In Teamsters Local Union No. 213 and Tree Island Industries Ltd. [1997] B.C.A.A. No. 33 the employer refused to pay contributions to continue Health and Welfare benefits during the strike or reimburse the local after the strike. The contributions withheld

included sums payable prior to the strike. The board found that employees had a right to continued contributions that had vested before the collective agreement terminated and allowed the grievance in part.

19. In Foothills School Division No 38 v Alberta Teacher's Association [2005] A.G.A.A. No. 68 benefits for sick leave and maternity leave were suspended during a strike. The Board among other issues was required to determine whether it had jurisdiction to hear the grievance because it was filed when the collective agreement had expired. In finding that grievances remain arbitral even after the collective under which they were filed has expired the Board referred to the following from Re Dale Foods Ltd. and B.C.T., Loc. 264 (2000), 91 L.A.C.(4th) 311:

> " The case law supports the proposition that a union may bring a grievance under a collective agreement which has expired, in respect of rights which vested or accrued during the currency of the collective agreement, whether or not the alleged breach occurred after the expiry of the collective agreement:....."

In allowing the grievance the Board concluded as follows:

> " In our view the impact of the 'accrued or vested rights approach' and 'the fundamental reason for absence approach' lead to the same result for employees who begin their absence and become eligible for the benefits before the strike begins .....we are not persuaded that these benefits are simply 'day wages' that can be withheld when employees not off on sick leave or maternity leave strike. Rather they are accrued and vested benefits to which the employee has become entitled before the advent of the strike."

20. In Dayco (Canada) Ltd. V National Automobile, Aerospace and Agriculture Implement Workers Union of Canada [1993] 2 S.C.R. 230 the Supreme Court of Canada considered the jurisdictional issue whether a grievance can be heard arising from an expired collective agreement. The court found that a promise to pay benefits to retired employees could survive the expiration of the collective agreement under which the promise was made. The court concluded that a union may bring a grievance under a collective agreement, which has expired, in respect of rights which vested or accrued during the currency of the collective agreement. A collective agreement is like a contract for a fixed term, which expires by mutual consent at the end of the term. It ceases to have prospective application but the rights that have accrued under it continue to subsist.

21. In Western Forest Products v United Steelworkers of America, Coastal Locals (Benefits Premium Grievance) [2008] B.C.C.A.A.A. No. 159 the issue was whether an employer could recover benefit premiums it paid on behalf of employees who were on

strike and on behalf of employees who were on lay-off, weekly Indemnity, or WCB, prior to the commencement of the strike. The arbitrator concluded that they could recover premiums paid on behalf of employees who were on strike. In commenting on the difference between employees who were on strike and an employee in receipt of benefits prior to a strike the arbitrator had this to say:

> "49. Generally, there are two types of benefits under a collective agreement. One type of benefit derives from work or service that is being provided on an ongoing basis. The benefit is tied directly to the actual hours or days worked, wages are a good example. However, a second type of benefit accrues over time and is related to an employee's status. For example, vacation may be tied to years of service(seniority). This is an accrued benefit, and even if an employee is off work for a period of time, they do not lose whatever benefit has accrued (although they may not continue to accumulate additional benefits while off work).
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> 50. The first type of benefit is seen to flow from the employee's daily or weekly compensation package. Thus, when an employee is not working, for example, they are on strike, they are not receiving either wages or benefits which comprise their compensation package.
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> 51. However the second type of benefit may be characterized as an 'accrued' or 'vested' benefit, and even in those instances where a collective agreement has terminated, those benefits remain.....
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> 52. The arbitral jurisprudence has long upheld the right of employees, who are on benefits prior to the commencement of a strike, to have those benefits continue during the course of a strike.....
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> 53. The rationale for this approach is that an employer is not entitled to change the status of an employee already on benefits during the course of a strike. For example, an employee who is receiving disability benefits when a strike commences, occupies a status that is not based on active employment; rather, their status derives from an accrued or vested right under the collective agreement. Therefore, the employer is not able to terminate unilaterally these benefits in response to the commencement of a strike as it can with an active employee. "

22. In Drapeau, Drapeau and Ducet 1982 Carsewell ND 456 the greivors were on sick leave during a strike. After reviewing the case law the Arbitrator concluded that the sick leave benefits were earned because of services rendered in the past. He concluded that the benefits had been established before the strike and they were on leave because of

illness and not the strike. The agreement was clear on how one was to be paid while on illness leave. In the course of his decision the Arbitrator quoted with approval the following from Palmer at p. 580;

> "..... what does emerge however is the principal that certain employee rights under the collective agreement remain intact during period when they are not working. This principal is based, as a rule, on the proposition that because they remain as an employee of the company, they are entitled to all negotiated benefits which are based on their status as employees as opposed to those benefits which are tied to service, or hours worked."

23. In Herb Fraser and Associates Ltd. and United Steelworkers, Local 7022 1979 Carswell Ont. 2121 the employer laid the grievor off while he was on sick leave. The Arbitrator concluded that the employer could not change the status of an employee while on sick leave. He was therefore entitled to the benefits of an employee.

Benefits in issue

24. The grievance alleges a violation of Articles 2, 5,19 and 21. In particular the Union seeks reimbursement for those employees who were denied pay for the day of strike while on Leave, Illness and Injury Benefits. 25 employees are said to have been on short-term illness, 12-14 were on pregnancy/parental leave and one employee was on educational leave.

25. Article 21 provides for short-term illness benefits. It is new to the collective agreement attached as exhibit "A" to the agreed statement of facts. In general it provides 75% of normal salary for those who are unable to work because of injury or illness for a period in excess of three consecutive working days up to a maximum 100 days for each incidence of short-term illness. It is granted upon application to the Employer and for a period in excess of 5 working days must be supported by a medical certificate. The first three days are paid at 100% salary and the days are deducted from the General leave provided for in Article 19.11. It is granted by the employer provided the employee has the necessary sick leave credits. An alternate medical examination may be requested by the Employer. Benefits are not paid when an employee is receiving designated holiday pay, is on suspension or leave of absence without pay or the illness or injury is covered by the Workers Compensation Act.

26. Employees are permitted to top-up their STI benefits by drawing from a bank of sick leave credits accumulated under previous collective agreements and in accordance with Article 2 of Memorandum of Agreement #1.

26. Article 19.11 entitles an employee to leave with pay for General Leave not to exceed 15 days per year. If an employee uses 7 days or less General Leave five days will

be credited to their sick leave bank. General Leave is used for illness or injury, family illness, emergencies and medical/dental appointments.

27. Pregnancy/Parental Leave allowance is provided under Article 19.08. To qualify for pregnancy/parental an employee must have been employed for at least one year and be eligible to receive E.I. benefits. The E.I. benefits are topped-up in accordance with Article 19.08.

28. The Employer may grant a leave of absence with pay to employees who are required and authorized to pursue an educational program pursuant to Article 19.17 (b) and (d). In addition the Employer pays certain costs to attend.

Should eligible employees been paid these benefits for the day of the strike?

29. The Employer's position is that they should not.

30. The Employer says that the Union filed its grievance under the wrong collective agreement. The grievance was filed on May 7, 2014. The new collective agreement was concluded on September 29, 2014. They say that this distinguishes the facts in this case from the authorities referred to by the Union. In those cases the grievances were filed under a new agreement. The facts in this case differ in another substantial way. On the day of the strike the Province passed the Essential Health and Community Services Act, which effectively ended the strike. The parties then resumed their relationship under the existing collective agreement. It was appropriate in my view for the Union to file the grievance when it did under that agreement. In any event as found in the Dayco decision a grievance filed under an expired agreement is still arbitrable.

31. The Employer refers to the protocol agreement attached as Exhibit "B" as support for its position for two reasons. The agreement provides that only certain members of the bargaining unit will be allowed to work. In some case commentary referred to by the parties it was considered significant that employees on leave may chose to work. In my view the better view is that employees on leave are there for the purpose of the leave. It is not relevant to consider that they may have the option of returning to work as support for not depriving them of benefits. The second reason the protocol is said to support the Employer's position is the inclusion of what the Employer will pay for while its employees are on strike. What is absent in the protocol is any mention of how employees on leave are to be treated.

32. The Employer says that there are two aspects of entitlement to a benefit while on strike. It must have been earned and it must have vested prior to the strike. They argue that sick leave under the collective agreement in this case is not earned; it is there to be drawn upon and not earned. In the Western Forest Products case the arbitrator discussed the distinction between earned or accrued benefits and others dependent upon attendance at work. An employee on leave is not required to attend work in order

to draw sick leave, pregnancy/paternal leave or education leave benefits. They must however have accrued or vested entitlement to those benefits before the strike.

33. The Employer says that the language of the new agreement does not make it retroactive and does not fill the gap between the expired agreement and the new with respect to the right to these benefits. The Employer's Settlement Offer included as exhibit "D" to the statement of facts proposes a term November1-October 31, 2014 and includes those provisions of the current agreement not changed. The signed agreement provides that it will be in effect for the same term. (Article 45.02).

34. The Union's position simply put is that those employees who were on leave (sick, pregnancy/paternal and educational) at the time of the strike are entitled to be paid their benefits for the day of the strike. They say that the right to the benefit had vested prior to the strike and that the Employer cannot change their leave status because of the strike. They say that they were entitled to grieve this issue under the collective agreement and that any gaps in the application of the agreement that may have affected that right has been filled by the new collective agreement.

35. I have read and considered the jurisprudence offered at the hearing and heard the able arguments of counsel and concluded the following.

36. In determining whether an employee is entitled to the continuation of a benefit during a legal strike it is necessary to consider the language of the collective agreement and its application to the benefit claimed. Is the employee entitled to the benefit claimed? Regarding STI leave has the employee been granted leave, accompanied with a proper medical certificate. Regarding pregnancy and paternal leave has the employee provided the proper documentation regarding UI entitlement and is the employee otherwise entitled to the leave. Regarding educational leave is there a return of service agreement and has the Employer requested that the Employee pursue the educational program. Once it is determined that the employee qualifies for the leave and it has been granted to him he has a vested right to it.

37. The next issue is whether the employee has accrued sufficient credits for the leave granted. Employees on sick leave are allotted 100 days per incidence of STI. Does the employee have sufficient days left on the particular illness to cover the strike? The first three days of illness are covered from General leave and the balance of the STI benefit can be topped up from a sick leave bank. Employees on pregnancy and parental leave are required to have been employed for one year prior to the leave. Employees on educational leave are it appears considered on an individual basis. This inquiry is sometimes referred to in the cases as whether the benefits are earned or accrued. The important point is that entitlement to and the extent of the benefit is established prior to the strike and the employee is not required to work on strike days or be available for work on those days in order to qualify for the benefit.

38. The next issue for determination is whether the leave granted is of the type that is terminated when there is a strike. First is there anything in the collective agreement that affects the continuation of the leave during a strike. I can find no specific language in the agreement that would limit the leaves at issue from continuing during the strike. Is it the type of leave that is dependant on working or earning a wage on strike days? The leaves at issue do not anticipate that those employees would be working or earning wages during the strike.

39. Having reached this stage I have concluded that the benefits at issue should not have been interrupted for those on leave. The Employer does not have the right to change the status of these employees in order to affect their benefits.

40. The right to the benefits having been established before the strike can either be enforced under the old collective agreement or the new one that was made applicable for the period covering the strike.

Conclusion

41. The grievance is allowed to the extent addressed above.

41. If necessary I will retain jurisdiction if necessary to address any individual situations that cannot be resolved between the parties.

Dated at Halifax, this 22nd day of September, 2015.

William Wilson,Q.C.
Arbitrator