IN THE MATTER OF AN ARBITRATION

BETWEEN

Nova Scotia Government and General Employees Union

("NSGEU")

-and-

Canadian Union of Public Employees, Local 1867

("CUPE")

-and-

Province of Nova Scotia
As represented by the Public Service Commission

(the "Employer")

AWARD

Policy Grievances - Short Term Illness Benefits Overpayment

Arbitrator:	Lorraine P. Lafferty, Q.C.
Representing the NSGEU & CUPE:	David Wallbridge
Representing the Employer:	Dorianne Mullin
Written Submissions:	December 2019
Date of Award:	January 31, 2020

1. The Employer is the Province of Nova Scotia. The Employer's Long-Term Disability Plan provides short-term illness (STI) benefits to its employees, including bargaining unit members belonging to the NSGEU and CUPE, Local 1867 (the "Unions"). The Unions grieved the Employer's practice of recovering overpayment of STI benefits by making unilateral deductions from the wages of their union members.

2. The relevant facts were not contested. Government employees submit STI claims to the Employer's STI plan administrator, Morneau Shepell. When an STI claim is rejected as ineligible by the administrator, an employee may appeal the decision and, although not required to do so, the Employer pays STI benefits until the appeal process is completed. Where an appeal is unsuccessful, the employee is in an overpayment situation having received STI benefits when not eligible to receive them. The Employer is then entitled to recover any overpayment amount from the employee.

3. In order to recover an STI benefits overpayment, the Employer sends the employee a letter requesting they contact the Payroll Coordinator to arrange a repayment schedule. If an employee does not contact the Payroll Coordinator, the Employer deducts a default amount of 10% from the employee's gross bi-weekly pay until the overpayment is repaid. Where the employee contacts the Payroll Coordinator, an agreement may be worked out for an alternate repayment schedule out of wages or, if no agreement is reached, the Employer collects the default amount of 10% from bi-weekly pay. When a Union member is in an overpayment situation the Employer does not inform the employee's Union and does not involve the Union when working out a repayment schedule with the employee.

4. The Unions grieved that the Employer's recovery of STI benefits overpayment by unilateral deduction of 10% of gross pay, or by agreeing with an employee to an alternate repayment schedule out of wages without Union consent, is contrary to the collective agreement. The Unions submitted the Employer may recover the overpayment but may not deduct the amount owed out of wages unless by agreement with the Union or by obtaining an order from an adjudicator.

5. For the reasons that follow, the Union's grievance regarding recovery of overpayment is allowed. In the circumstances, the Employer is not entitled to act unilaterally to deduct STI benefits overpayments from the wages of a Union member and is not permitted to enter into a repayment schedule with the employee out of wages unless consented to by the employee's Union.

Positions of the Parties

6. The Unions submitted that their collective agreements with the Employer establish them as sole bargaining agents for their members. The agreements also include pay provisions requiring the Employer to pay employees for their work according to specified biweekly (NSGEU) or hourly (CUPE) wage rates. Article 42 of the NSGEU agreement and Article 30.03 of the CUPE agreement require that any change or modification to the collective agreements, including payment of wages, be made by mutual agreement of the parties which requires Union consent. The Unions also relied on the recognition clauses of their collective agreements to argue the Employer is prohibited from entering into side agreements with individual employees regarding payment of wages.

7. The Employer submitted it has authority at common law to deduct STI benefit overpayments from employee wages and also has statutory authority to do so pursuant to s. 65(1) of the Nova Scotia *Finance Act*, SNS 2010, c. 2. The Employer also relied on management rights to recover any overpayment submitting that collective agreements with the Unions do not contain any provisions altering or abridging the management right to make a deduction from pay to recover an overpayment.

Decision

8. The parties proceeded by way of written submissions. In their submissions, they addressed three grounds put forward by the Employer to justify unilateral deduction of STI benefits overpayment from employee wages: (1) common law; (2) the *Finance Act*, s. 65 (1); and (3) management rights.

(1) Common Law

9. The Employer first relied on common law to justify deducting STI benefits overpayment from wages. At common law an employer can recover an overpayment of benefits if that overpayment was made as a result of a mistake of fact. Brown and Beatty acknowledge this principle in *Canadian Labour Arbitration*, 5th ed. Online: Westlaw Canada, at 8:1410:

> At common law, if the mistake that caused an overpayment, such as a clerical or mathematical error, can be characterized as a mistake of fact (rather than a mistake of law), the Employer can recover whatever money has been paid unless there has been some detrimental reliance by the Employees, there are limitations in the collective agreement or the Employer has been guilty of unreasonable delay in seeking to enforce its rights. In most jurisdictions, however, the common law rule has been overtaken by legislation that restricts an Employer's right to act unilaterally to recover the

> money it is owed. Typically, in order to recover an overpayment an Employer must either secure the consent of the employee or file a grievance and obtain an order of repayment from an arbitrator.

10. The Employer referred to a number of arbitral cases to support this principle of restitution including *Re United Electrical Workers, Local 512 and Standard Coil Products (Canada) Ltd.*, 1971 CarswellOnt 887 (Weiler). There the employer paid statutory holiday pay as a result of a clerical error in the accounting department and subsequently deducted the overpaid sum from employee wages. The arbitrator held as follows (at para. 10):

> However, there is a well-established principle of the law of restitution that money paid as a result of a mistake of fact is recoverable in the absence of injurious reliance by the Employees. . . . the company was entitled to exercise its right of set-off to recover the money mistakenly paid to the grievors.

11. In a more recent arbitral award referred to by the Employer, *London Police Services Board v. L.P.A.*, 2010 CarswellOnt 8394 (Snow), an employee successfully claimed and received both workers' compensation insurance benefits paid directly by the employer and a top up amount paid by the employer pursuant to the collective agreement. The employer then successfully overturned the claim on appeal. At arbitration, the employer was not permitted to recover the insurance benefits paid since any decision on recovery of those benefits was vested with the insurer, but the employer was permitted to recover the top up amount paid to the employee pursuant to the collective agreement. The arbitrator found that since the employee's initially successful claim for benefits was disallowed, the employer had not been obligated to pay the top up amount and held that "having recognized its error" the employer could correct the error and recover the amount paid (at para. 77). This award too confirmed that overpayments made under mistake of fact are recoverable.

12. A mathematical error or clerical error, or a successful appeal of benefits paid, would constitute a mistake of fact. A preliminary question here is whether an STI benefits overpayment made by the Employer can in the circumstances be characterized as a mistake of fact. The Employer submitted that when STI benefits are paid pending an employee's appeal of the plan administrator's decision to deny eligibility and the appeal is not successful, the benefits have been paid to the employee as a result of a mistake of fact permitting unilateral recovery by the Employer. The Union submitted there is no mistake of fact in these circumstances noting that when an employee is determined ineligible for STI benefits by the plan administrator, the Employer is aware the employee is ineligible for benefits and is not obligated to pay benefits pending appeal. When the Employer pays STI benefits until the appeal is completed, payment is made on a voluntary basis. The Employer acknowledged that it pays benefits to an employee pending appeal in a good-faith effort to ensure the employee is not without pay during the appeal process which can take time. The

Employer's decision to continue paying the employee pending appeal is respectful and considerate in its regard for the welfare of employees. Having said that, I must find nonetheless that payment of benefits during the appeal period is a voluntary gesture on the Employer's part made when there is no obligation to pay and with the knowledge that the payment may not be payable and may result in an overpayment situation. The Employer's voluntary payment of benefits pending appeal is therefore a conscious, informed decision and not as a mistake of fact like a mathematical or clerical error or other misapprehension of fact. I find the Employer's informed decision is not a mistake of fact and does not allow the Employer to deduct the resulting overpayment from wages unilaterally based on mistake of fact.

13. The Unions did not contest that where an employee's STI benefits appeal is unsuccessful the employee must repay the Employer for the benefits received. Clearly the employee should not be unjustly enriched at the Employer's expense. The Unions contested not the employee's obligation to repay the Employer, just the Employer's manner of recovering overpayment unilaterally out of employee wages.

14. The parties disagreed whether provincial labour standards legislation, particularly section 79A(1) of the *Labour Standards Code,* RSNS 1989, c. 246, has limited an employer's common law right to recover overpayment of benefits out of wages in the absence of statute, written consent of the employee, or an order of the court. In light of my finding that in the circumstances presented here there is no mistake of fact by the Employer giving rise to a unilateral common law right of recovery from wages, it is not necessary to decide the impact of s. 79A(1) of the *Labour Standards Code*.

(2) Finance Act, s. 65(1)

15. The second justification relied on by the Employer for deducting STI benefits overpayment from an employee's wages is statutory authority. Specifically, the Employer relied on s. 65 (1) of the *Finance Act*. This provision reads:

> **Set-off by Province of debt**
>
> **65 (1)** Where, in the opinion of the Minister, a person is indebted to the Province, including as a result of overpayment, in any specific sum of money, the Minister may retain by way of deduction or set-off the amount of the indebtedness out of any sum of money that is or may be due and payable by the Province to the person.

16. In essence the Employer submitted that an employee who has received STI benefits when ineligible to receive them is "a person indebted to the Province . . . as a result of

overpayment" and accordingly pursuant to s. 65(1) "deduction or set-off of the indebtedness" may be taken "out of any sum due and payable" to the employee, including wages.

17. The Unions submitted that s. 65(1) of the statute providing that the Minister "may" deduct or set-off indebtedness is permissive in nature, not mandatory, and therefore is a discretionary provision. Being a discretionary provision, the Unions argue the Employer can, and did, contract with them to limit its ability to use the discretionary power. The Unions submitted that by agreeing to pay wages for work performed at the wage rates established in the collective agreements, the Employer contracted out of its discretionary authority to deduct or set-off indebtedness from wages.

18. In support of its position the Unions referred me to the award of Arbitrator Veniot in *Halifax Regional Municipality and Halifax Civic Workers' Union, C.U.P.E., Local 108*, 2009 CarswellNS 889. In that case the employer municipality sought to recover from the union money paid to an employee for which the union had assumed responsibility to repay. The municipality gave the union notice that it would be applying 50% of the municipality's required contributions to the union's insurance plan as set-off for repayment of the money owing until the debt was repaid in full. The municipality relied on s. 119 (3) of the *Municipal Government Act* to withhold funds from the union. The provision read:

> **119 (3)** A municipality may set off a sum due from a person to the municipality against a claim that person has against the municipality.

Similar to s. 65(1) of the *Finance Act*, the provision used the word "may" denoting a permissive right to set-off money owed to the municipality against money owed by the municipality.

19. In his award, Arbitrator Veniot found that the municipality could, and did, by entering into a collective agreement with the union contract not to exercise its discretion with respect to the right of set-off in s. 119 (3). His finding relied on the ruling of the Supreme Court of Canada in *Wilson v. Nova Scotia (Civil Service Commission)*, 1981 CarswellNS 101 involving an employee dismissal. There the Court held that by ratifying a collective agreement containing an arbitration clause the employer agreed to exclude the application of legislation that would allow it to dismiss an employee without cause and without notice. The applicable legislation read:

> 22. Except where otherwise expressly provided, all appointments to the Civil Service shall be upon examination . . . and shall be during pleasure.

> 57. Nothing herein contained impairs the power of the Governor in Council to remove or dismiss any Deputy Head or employee.

The Supreme Court wrote (at para. 18 and 20):

> [18] The contention is that both ss. 22 and 57 of the *Civil Service Act* operate to limit the reach of the collective agreement to provide protection against allegedly unjustified discharge and to require arbitration of a discharge grievance. I do not think this contention is maintainable. In my view, the combined effect of the approved regulation under s. 9 of the *Civil Service Act* ratifying the collective agreement with the Association and the incorporation into the arbitration clause of that agreement of the provision for arbitration in the *Civil Service Joint Council Act* is to exclude the application of s. 22. . . .
>
> [20] . . . the essential feature of s. 57 is that it does not constitute a grant of any fresh statutory power. It is merely a holding provision and leaves the power of the Governor in Council subject to such limitations as he may contract to accept. Far from s. 57 swallowing up the collective agreement entered into by the Crown and swallowing up the approving regulation under s. 9 of the *Civil Service Act*, the collective agreement, carrying the approval of the Governor in Council as well as the Civil Service Commission, amounts to a deliberate subordination of whatever unilateral power of dismissal the Governor in Council might otherwise have had.
> (*underlining added*)

20. Arbitrator Veniot went on to find that the municipality agreed as part of the collective agreement to make contributions to the union's insurance fund and was bound to honour the collective agreement notwithstanding s. 119 (3) of the *Municipal Government Act* that would permit it to apply set-off. Therefore withholding contributions from the union to use for set-off was not permitted. Arbitrator Veniot reinforced his finding by referencing a provision in the collective agreement requiring that any changes made to the collective agreement required mutual agreement of the parties. Referring to the municipality, he wrote at para. 105:

> Because it agreed to do things a certain way, it cannot now say it will not follow the requirements of Article 34. It must conform its actions to the requirements of the agreement.

21. The Unions argue that having contracted in the collective agreement to pay employees certain wages for their work performed, the Employer agreed to pay wages at established wage rates and is not permitted now to opt out of its contractual commitment by exercising the discretion afforded by s. 65(1) of the *Finance Act* not to pay wages as per the agreement. The Unions argue that whatever statutory power the Employer may have in s.

65(1) to act unilaterally is now subordinated to the wage provisions of the collective agreement. Further, the Employer has also agreed that any changes to the collective agreement must be made by mutual agreement with the Unions.

22. The Employer distinguished the Veniot award from the case at hand on the basis of the factual situation since the facts before Arbitrator Veniot did not involve a situation of overpayment by the Employer directly to the employee. While it is true the facts differed, the legislation relied on by the employer in Arbitrator Veniot's case and by the Employer here in order to override payment provisions of the collective agreement was similar in both cases. Arbitrator Veniot's analysis of the interaction between legislation and the collective agreement is key to the issue more so than the factual situation and his analysis had behind it the weight of the Supreme Court of Canada's decision in *Wilson v. Nova Scotia (Civil Service Commission), supra*, which likewise addressed the interaction between legislation and a collective agreement.

23. I find that s. 65(1) gives the Employer discretionary authority to recover overpayment by set-off from any persons, including employees, subject to any contractual obligations that may fetter the Employer's discretion. The Employer had authority to contract with the Unions regarding payment of wages and did so by entering into collective agreements with the Unions. By doing so the Employer limited the effect of s. 65(1) could have regarding set-off against employee wages. The duly executed collective agreements are evidence of the Employer's intention to contract out of the discretionary power of the statute as part of its bargains with the Unions. There was no evidence that in doing so the Employer bargained imprudently or not in the public interest.

24. In considering the foregoing, I conclude the Employer cannot rely on s. 65(1) of the *Finance Act* to act unilaterally to deduct STI benefits overpayment from employee wages and so find.

(3) Management Rights

25. I have found that the Employer has no right at common law and no authority under s. 65(1) of the *Finance Act* to collect STI benefits overpayment unilaterally from employee wages. The Employer also relied on management rights to justify deducting the STI benefits overpayment from employee wages. Both the NSGEU and CUPE collective agreements contain a management rights provision found in Article 7 of the NSGEU agreement and Article 2 of the CUPE agreement. These Articles allow the Employer to retain all rights not abridged by the collective agreement. In the Employer's submission the right to recover overpayment is not abridged by any provision in the collective agreements.

26. The Employer submitted that deducting payments from wages to recover overpayment does not alter an employee's wage rate and is analogous to statutory deductions and deductions for union dues that reduce an employee's take home pay but do not alter wages earned. I cannot agree with the Employer's analogy. A deduction for STI benefits overpayment is neither mandated by statute in the manner of income tax remittances or Canada Pension contributions and is not provided for by agreement as union dues are. Discretionary deductions, like payroll savings or optional medical or dental coverage, are voluntary on the employee's part, not imposed unilaterally by an employer.

27. The Unions argued that the Employer must have a specific clause in the collective agreement in order to collect an overpayment from wages. There is some authority for this position. The Union and referred me to *I.A.F.F., Local 2779 v. McLaughlin,* 2011 CarswellNB 647 (Filliter Chair) where employees overpaid for vacation time were advised by the employer the overpayment would be set-off from earned overtime wages until the overpayment was recovered. The arbitration board held the employer was not permitted to recover an overpayment unilaterally unless a specific clause in the collective agreement allowed (at para. 29-30):

> The board accepts that the more convincing line of authority suggests that unless there is a specific clause in the collective agreement that allows for recovery an employer may not have the inherent right to do so (*Canada Post v. CUPW* (2002), 70 CLAS 381 (Ready)).
>
> That is not to say that an employer can never recover an overpayment from an employee, but without legislative authority or alternatively authority in the collective agreement such action cannot be taken unilaterally as was done in this case.

In the Unions' submission there is no specific clause found in the collective agreements allowing the Employer to act unilaterally to recover overpayment out of employee wages.

28. The Employer argued on the other hand there is no prohibition in the collective agreements against arranging a repayment schedule directly with an employee. The Unions disagreed referring to the recognition clauses of the collective agreements identifying the Unions as exclusive bargaining agents for the employees. These clauses restrict the Employer from negotiating individual agreements with employees. The principle is explained by Brown and Beatty, *supra,* at 9:1100:

> Arbitrators have generally been very vigilant in protecting a union's status as exclusive bargaining agent. Although not all direct communications and meetings between employers and employees are outlawed, agreements between employers and individual employees have been declared invalid where they are inconsistent with the terms of

> the collective agreement, including those which benefit an employee. Indeed, it has been held that employers and individual employees cannot even negotiate special deals on subjects that are not explicitly covered by the terms of the agreement. Arbitrator have struck down individual agreements on a wide variety of subjects concerning: benefits and compensation, seniority, discipline and the terms under which a disabled employee would be returned to work.

29. It is true as the Employer stated that there are many situations on a daily basis in which the Employer discusses matters directly with its employees without Union consultation. Management rights permit the Employer to manage the workplace in its own way but within the framework of the collective agreements and not in a way inconsistent with the collective agreements. In the situation here the collective agreements to which the parties have agreed govern the payment of wages and therefore any change regarding the payment of wages to a bargaining unit member requires Union involvement. Negotiating with individual Union members regarding deduction of STI benefits overpayment from wages without Union consent is inconsistent with the recognition clauses of the collective agreements and also those articles of the collective agreements that require any change or modification to the provisions of the agreement, such as the wage provisions, be made by mutual agreement of the parties.

30. I find that it is not within the Employer's management rights to act unilaterally to deduct STI benefits overpayment from employee wages.

Conclusion

31. In conclusion, I have found that in the circumstances described, the Employer does not have a common law right to recover overpayment of STI benefits based on mistake of fact. Further the Employer cannot rely on s. 65(1) of the *Finance Act* to act unilaterally to deduct from an employee's wages an amount to off-set STI benefits paid pending appeal of the plan administrator's decision to disallow a claim. Finally, the Employer cannot rely on management rights to act unilaterally to deduct the overpayment from wages or enter into a repayment schedule out of wages without Union consent.

DATED at Halifax, Nova Scotia this 31st day of January, 2020.

Lorraine P. Lafferty, Q.C.
Arbitrator