IN THE MATTER OF AN ARBITRATION
PURSUANT TO THE *LABOUR RELATIONS CODE* OF BRITISH COLUMBIA
R.S.B.C. 1996, c. 244

BETWEEN:

THE FAIR HAVEN UNITED CHURCH HOME

(the "Employer")

AND:

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 882

(M. Corsi – Employer Grievance)

(the "Union")

ARBITRATOR:	Christopher Sullivan
COUNSEL:	Delayne Sartison and James Kondopulos for the Employer
	Rick Edgar for the Union
DATE AND PLACE OF HEARING:	December 15, 2008 Vancouver BC
PUBLISHED:	February 23, 2009

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The parties agree I have jurisdiction to hear and determine the matter in dispute. The case involves a grievance filed by the Employer alleging Marie Corsi has violated Article 31.12 of the Collective Agreement, by not paying it back certain sick leave benefits she received, and for which she was later compensated for as part of wage loss in a settled insurance claim.

Article 31.12 states as follows:

> **31.12 Other Claims**
>
> In the event that an employee is absent from duty because of illness or injury in respect of which wage loss benefits may be payable to the employee by the Insurance Corporation of British Columbia (ICBC), the liability of the Employer to pay sick pay shall rank after the ICBC. Notwithstanding such liability, the Employer shall pay the employee such sick leave as would otherwise be payable under this Agreement. The employee shall not be obliged to take action against the ICBC, but the Employer shall be entitled to subrogate to the rights of the employee and to take whatever action may be appropriate against ICBC at any time after six (6) months following the illness or injury, unless the employee first elects to take action on her/his own behalf. **To the extent that the employee recovers monies as compensation for wages lost, the Employer shall be reimbursed any sick leave pay that it may have paid to the employee.**
>
> Where the Employer recovers monies from the ICBC, the employee's sick leave credits shall be proportionately reinstated.
>
> (emphasis added)

The factual circumstances surrounding the grievance were included in a statement of agreed facts provided by the parties. Ms. Corsi is a full-time Housekeeping Aide for the Employer. She has worked in that position since commencing with the Employer on November 2, 1987.

On May 27, 2003 Ms. Corsi was involved in a motor vehicle accident in which she was injured and which caused her to be absent from her position with the Employer for approximately nine months.

In accordance with Article 31 of the Collective Agreement, for the period of time from May 27 to August 29, 2003, the Employer paid sick leave pay to Ms. Corsi out of her accrued sick leave credits. Ms. Corsi was paid a total of $9,389.52 in sick leave pay. By August 29, 2003 Ms. Corsi had exhausted her accrued sick leave credits. She took a leave of absence from work for the period of time from August 30 to November 6, 2003. For the period from November 9, 2003 to February 21, 2004 Ms. Corsi worked in a graduated return-to-work program for the Employer and, during that period of time, she was paid a total of $2,065.96 by the Employer.

On February 24, 2004 Ms. Corsi returned to her full-time position with the Employer.

At some point after her motor vehicle accident, Ms. Corsi retained legal counsel, Vertlieb Dosanjh, and commenced an action in the B.C. Supreme Court in relation to the accident. Some time after the commencement of the court action, and with the assistance of her legal counsel, Ms. Corsi entered into a lump-sum settlement with ICBC.

By way of correspondence date August 17, 2006 ICBC communicated to Vertlieb Dosanjh the following:

> This will confirm our agreement that the above matter be concluded for the all-inclusive sum of [blank space substituted for settlement amount].
>
> I have enclosed our cheque [for] the settlement funds made payable to your firm "in trust" and our Final Release. Please do not disburse the settlement funds until the Final Release has been executed. This will further confirm

> that you will attend to the reimbursement of any subrogated interest with respect to Ms. Corsi's income loss....

The evidence indicates Ms. Corsi refuses to reimburse the Employer for the $9,389.52 of sick leave pay claimed by the Employer. She has communicated to the Employer, through her legal counsel, that any such reimbursement should take into account legal fees and disbursements incurred by her in relation to her motor vehicle accident and subsequent settlement with ICBC.

On or around April 27, 2007 Ms. Corsi, through her legal counsel, made a without prejudice settlement proposal to resolve the Employer's claim, and on May 4, 2007 HEABC acting for and on behalf of the Employer, refused that proposal and informed Ms. Corsi's legal counsel that the Employer would be seeking full redress through the grievance procedure.

The statement of agreed facts indicates Article 31.12 was a new provision added to the 1996 to 1998 collective agreement negotiated between HEABC and the Facilities Bargaining Association. It was added as a result of an HEABC proposal to Arbitrator Stephen Kelleher, who was appointed to deal with the "melding and leveling" of several health care collective agreements. HEABC proposed, and Arbitrator Kelleher accepted, the language that is contained in Article 31.12. The rationale for HEABC's proposal as contained in its submission to Arbitrator Kelleher on January 31, 1997 states:

> This proposed language (now Article 31.12) currently is found in the BCGEU and HEU Standard Agreements (Long Term Care Sector). The Union has stated publicly that individuals should not be entitled to double up on wage loss benefits. This proposal ensures that the system is reimbursed for any double payments received.

Arbitrator Kelleher's Melding Award issued on February 28, 1997 awarded HEABC's language, stating: "It is already found in the HEU and BCGEU Standard Agreements. The proposal simply ensures that individuals are not paid double wage loss benefits".

SUMMARY OF PARTIES' POSITIONS

On behalf of the Employer, Ms. Sartison argues Ms. Corsi's refusal to pay back to the Employer all of the sick leave pay she received due to her motor vehicle accident constitutes a clear violation of Article 31.12. Counsel asserts that given it was Ms. Corsi who elected to commence an action, as opposed to leaving it to the Employer to commence its own subrogated claim, it was she who retained and instructed legal counsel and was responsible for payment of those costs.

Ms. Sartison points out Article 31.12 includes mandatory language requiring repayment of sick leave benefits that are reflected in wage loss compensation, adding this requirement is not qualified for legal fees or any other deduction. She states this is not a case to be determined by reference to "typical insurance terms", but rather the case involves a labour relations matter involving the interpretation of disputed collective agreement language.

Counsel submits the language of Article 31.12 does not, without some amendment, bear the meaning the Union attributes to that provision. The language does not address legal cost deductions of any sort and, notably, does not speak to the matter of how one would determine what portion of an employee's legal fees and disbursements are properly attributed to and therefore to be deducted from the wage loss portion of an award or settlement.

Ms. Sartison poses a hypothetical whereby "an employee goes through an expensive 10-day trial about the quantum of non-pecuniary or punitive/exemplary

damages, despite the fact that wage loss damages were admitted early in the action". She asks: "Is the Employer still obligated to pay some or all of the employee's legal bills? What if the bulk of "disbursements" relate to expensive experts retained solely to address the quantum of non-pecuniary damages? Is the Employer still required to pay some or all of those disbursements?"

Ms. Sartison adds Article 31.12 is silent on these matters precisely because the provision does not anticipate the Employer will pay any portion of the employee's legal bills when the employee elects to commence her or his own action. Ms. Corsi is essentially seeking a monetary benefit, without "the kind of clear, specific and unequivocal language necessary to evidence an intention to confer the kind of financial or monetary benefit that would flow from the Union's interpretation".

The Employer seeks a declaratory order to the effect that Ms. Corsi's refusal to reimburse any sick leave pay received by her and later recovered by her in her action against ICBC is in breach of Article 31.12. It also seeks an order that the Employer be made whole, and be compensated by Ms. Corsi and/or the Union "for any and all damages, losses, costs or expenses sustained or incurred as a result of the breach of Article 31.12", and an order for interest.

The Employer cited the following authorities: *Health Employers Assn. of British Columbia v. Hospital Employees' Union*, [2000] B.C.C.A.A.A. No. 513 (Munroe); excerpt from *Black's Law Dictionary*, 6th ed. (St. Paul, Minn.: West Publishing, 1990) at p. 1375; *Noranda Mines Limited (Babine Division) and U.S.W.A., Loc. 898*, [1982] 1 W.L.A.C. 246 (Hope); *Wire Rope Industries Ltd. and United Steelworkers, Local 3910*, [1982] B.C.C.A.A.A. No. 317 (Chertkow); *Cardinal Transportation British Columbia Inc. and Canadian Union of Public Employees, Local 561*, [1997] B.C.C.A.A.A. No. 83 (Devine); *Canada Post Corp. v. C.U.P.W. (Schlosser Grievance)*, [1993] C.L.A.D. No. 1139 (Bird); *Health Employers Assn. of British Columbia and H.E.U., Local 180*, [1996]

B.C.C.A.A.A. No. 646 (Morrison); and *Simon Fraser Health Region and B.C.N.U.* (2000), 94 L.A.C. (4th) 115 (McPhillips).

On behalf of the Union, Mr. Edgar argues the Employer is not entitled under Article 31.12 to repayment of sick leave benefits that exceed the net amount Ms. Corsi received in compensation from her motor vehicle accident. Counsel asserts Article 31.12 constitutes a contractual right of subrogation, and this position is supported by a plain reading of the provision, the relevant interpretive principles, and the collective bargaining history.

Mr. Edgar states "a fundamental principle underlying any right of subrogation is that the party who is entitled to subrogate the rights of another is to be in 'no better position than the party to whom they are subrogating'." The doctrine of subrogation serves to prevent an insured party from being paid twice for the same loss.

Counsel submits the purpose behind Article 31.12 was made clear in the Employer's bargaining proposal that led to the provision being accepted into the Collective Agreement through the 1997 melding process. The Employer wrote at that time: "This proposal ensures that the system is reimbursed for any double payments received". This was the clear and express basis upon which the provision was accepted by Arbitrator Kelleher in the Melding Award.

Mr. Edgar asserts all that was intended by Article 31.12 was that an employee would only collect once for the same loss of wages. The provision "was never intended to put an employee in a worse position, should they pursue civil action for damages against the tortfeasor, than if they chose not to do so". Counsel adds if the Employer is successful and an employee must make full repayment of the sick bank without any regard to the costs paid out by the employee to obtain that compensation, then an

employee could end up worse off than if they simply ignored that sick bank claim and pursued their lawsuit without regard to it.

Counsel states the Employer could have, under Article 31.12, taken action on its own behalf against the tortfeasor for repayment of the sick bank. This is a direct right of subrogation and if exercised, would have required the Employer to pay its own legal fees and expenses. The Employer in the present case is seeking "to avoid accounting to the employee for the cost the employee is put to protect the interests of the Employer", and this is inequitable, and inconsistent with the language of Article 31.12 and the purpose it was proposed to achieve.

Mr. Edgar argues the "recovery of monies" contemplated in Article 31.12 must take into account the cost required to obtain a money judgment or settlement. This is the only approach that addresses the "double recovery" issue that the clause is intended to address. He adds that by the Employer's logic, an employee who receives a "dry judgment", would nonetheless still have to repay to the Employer the entire amount of the sick benefit paid, meaning that "while she supposedly had the 'benefit' of the sick bank, she collects nothing from it". Further, the amount of benefit an employee would actually receive from the sick bank would depend on how much their lawyer charged them to pursue the lawsuit. The more charged, the less benefit they get from the sick bank.

The Union cites the following authorities: *Gibson v. Sun Life Assurance Co. of Canada*, (1984) 6 D.L.R. (4th) 560 (Ont. H.C.J.); *Government of the Province of British Columbia and British Columbia Nurses' Union*, [2003] B.C.C.A.A.A. No. 230 (Hall); Brown and Beatty paras. 4:2300, and 4:2100 (Cartwright Group, 2008); *Corporation of the City of Cranbrook and International Association of Fire Fighters, Local No. 1253*, [2001] B.C.L.R.B.D. No. 294; *Fundytus v. Insurance Corp. of British Columbia*, (1989) 59 D.L.R. (4th) 131 (BCSC); *Alfonso v. I.C.B.C.*, February 5, 1992 (BCCA);

Confederation Life Ins. Co. v. Causton, June 20, 1989, (BCCA); *Province of British Columbia and British Columbia Government and Service Employees' Union*, (2003) 122 L.A.C. (4th) 201 (Germaine); and *Health Employers Assn. of B.C. and Hospital Employees' Union*, (2000) 64 C.L.A.S. 183 (Munroe).

DECISION

This case involves the interpretation of Article 31.12 in circumstances where an employee has incurred legal costs to obtain an award or settlement for wage loss compensation. The narrow issue is whether the Employer is entitled to recoup all sick leave benefits paid, or is the employee entitled to deduct the legal fees paid to obtain the compensation.

Having carefully considered all of the circumstances surrounding the grievance, together with the parties' respective submissions and the relevant law, I determine Ms. Corsi is entitled to deduct the legal costs she has expended to obtain her wage loss compensation award. The role of an arbitrator in an interpretive dispute is to determine the mutual intentions of the parties, based primarily on the words selected to reflect their consensus. Viewed in real-life context, the monies Ms. Corsi "recovered" is the net amount she was awarded by way of wage loss compensation less what it cost her to obtain the award.

This conclusion is buttressed by the clearly expressed basis upon which the provision was proposed and accepted in the 1997 melding process. It was clearly included in the Collective Agreement to avoid double recovery, an approach consistent with established legal principles regarding subrogation rights, which also serve to generally prevent the party who is entitled to subrogate the rights of another from being in a better position than the party being subrogated. To obtain wage loss compensation Ms. Corsi had to incur legal costs and, given the language of Article 31.12 and its express

purpose, the Employer is not entitled to essentially receive more than what Ms. Corsi actually recovered under this head of damages.

The Employer's grievance therefore succeeds to the extent it is entitled to repayment of sick leave benefits from Ms. Corsi, and it is entitled to a declaration to this effect.

I also conclude, however, that Ms. Corsi is entitled to deduct from the repayment amount some portion of her legal fees. I remit the precise remedial calculations back to the parties for resolution, and I retain jurisdiction to resolve any issue that may arise out of the implementation of this decision, including remedy.

It is so awarded.

Dated at the City of Vancouver in the Province of British Columbia this 23rd day of February, 2009.

Christopher Sullivan