IN THE MATTER OF AN ARBITRATION

BETWEEN:

MOUNT SINAI HOSPITAL

(“the Hospital”)

and

ONTARIO NURSES’ ASSOCIATION

("the Association")

Hospital Grievance for Reimbursement for Board of Directors Leave pursuant to Article 11:03

Before:
Larry Steinberg, Arbitrator

Appearances:

For the Hospital:
Mark H. Mason, Counsel

For the Association:
Philip Abbink, Counsel

Conference Call hearing on August 22, 2018

[1] The parties have been unable to agree on the proper approach to the calculation of damages owed by the Association to the Employer for the period prior to April 1, 2014 arising from my award dated December 18, 2017 (2017 CanLII 85651 (ON LA)).

[2] The parties filed extensive submissions and authorities and a hearing was convened by conference call on August 22, 2018.

[3] The grievance in this matter was filed by the employer on October 14, 2008. It was preceded by extensive discussions and emails between the parties (see Statement of Agreed Facts at paras. 19ff attached to the award).

[4] Both parties agree that the collective agreement requires that grievances must be filed within fourteen days of the circumstances giving rise to the grievance, that the time limit is mandatory (Articles 7.04 and 7.16) and that the grievance is a continuing grievance.

[5] Both parties also agree that the accepted approach in calculating damages in the case of a continuing grievance is to limit damages to the time period defined by the collective agreement for the filing of grievances unless it would be inequitable to do so.[1]

[6] Applying this approach in this case means that damages run from October 1, 2008 being fourteen days prior to the date the grievance was filed unless it would be inequitable to do so.

[7] Counsel for the employer skillfully argued that this case fell squarely within the exception. He forcefully argued that the inequity arises from the fact that the union was made aware for years prior to the filing of the grievance that the amount the union was required to reimburse to the employer for employees absent on Board of Directors leave was in dispute and, in fact, the employer even quantified the amounts it was seeking.

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[1] See for example, *Union Drawn Steel II Ltd. v. U.S.W.A., Local 2308*, 1998 CarswellOnt 6207 (Gray) at para 29.

[8] Counsel for the employer observed that his client did everything in its power to engage the union on the issue outside of the formal grievance and arbitration process and that to penalize a party for refraining from invoking that process is unfair and inequitable particularly when the union was under no illusions about the fact of the dispute and the amount of its potential liability.

[9] In the employer's view, it is inequitable and unfair to permit the union to shield behind the general rule in a case such as this since it results in a windfall for the union in circumstances where it has been found to have violated the collective agreement.

[10] As a result, the employer argued that damages should be calculated from an earlier point in time and, based on the facts, offered several possibilities other than October 1, 2008.

[11] The union argued that there were no facts present in this case that would support deviating from the normal methodology for calculating damages in the case of a continuing grievance.

[12] I have carefully considered the submissions of the parties and the case law relied on by them. Notwithstanding the very able arguments of counsel for the employer, I agree with the union. It would not be inequitable to apply the normative approach to the calculation of damages in cases of continuing grievances.

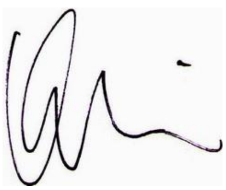
[13] While the decision to engage in extensive communications over a long period of time with the union is to be commended, it did not preclude the filing a grievance. Discussions such as occurred here regularly take place after a grievance has been filed. The fact of such discussions and the desire not to file a formal grievance cannot be the basis for an argument that it would be inequitable to apply the normative approach to the calculation of damages.

[14] A sophisticated employer, such as the employer in this case, must be presumed to be aware of the consequences for the calculation of damages of any delay in filing a grievance in a case of a continuing violation of the collective agreement.

[15] Accordingly, in accordance with the well-established practice in cases of continuing grievances, damages shall be calculated from October 1, 2008.

[16] I continue to remain seized in the event of any further issues arising from the award.

Dated at Toronto Ontario this 27th day of August 2018



Larry Steinberg