

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE GIBSON LTC CENTRE

The “Employer”

AND:

ONTARIO NURSES’ ASSOCIATION

The “Union”

IN THE MATTER OF:

PRELIMINARY AWARD
PENSION CONTRIBUTION GRIEVANCES - (C. Ballesteros and
Policy Grievance)

SOLE ARBITRATOR:

Kevin M. Burkett

APPEARANCES FOR THE EMPLOYER:

Andrew W. Reynolds - Counsel

APPEARANCES FOR THE UNION:

Erin Sobat - Counsel

The Union grieves in this matter (both an individual grievance and a policy grievance) that the Employer failed to make the required 4% Employer contribution to the Nursing Homes and Related Industries Pension Plan (NHRIPP) on behalf of Ms. Charito Ballesteros from 2014 until after the instant grievances were filed on May 28, 2025. The grievor, who had been employed there as an RN from 2004, did not make the required 4% employee contribution during this period as well. The Employer takes the position that the grievances are untimely or alternatively that any retroactive relief should be limited to run from the most recent breach. The Union position is that the grievances are timely. The parties have agreed to treat this matter as a preliminary issue to be decided on the basis of written submissions.

Although evidence has not been called, there is no dispute with respect to the fact that the Employer pension contributions were not made from 2014 until June 23, 2025 or to the chronology of relevant events as follows:

- April 4, 2007, the date that the grievor was hired by Chartwell Master Care, the predecessor employer;
- January 13, 2008, the date Chartwell began making NHRIPP contributions on behalf of the grievor;

- March 2, 2014, the date upon which Chartwell ceased making NHRIPP contributions on behalf of the grievor;
- November 13, 2023, the date AgeCare (the Employer) acquired ownership of Gibson LTC Centre (and other properties) from Chartwell;
- May 28, 2025, the date the Union grieved on behalf of Ms. Charito Ballesteros;
- June 23, 2025, the date AgeCare began making NHRIPP contributions on behalf of the grievor.

There are two sections of the collective agreement that are relevant: the grievance and arbitration procedure and, in particular the timeliness provisions; and the Retirement Income Plan. The grievance timeliness provisions are set out below:

- 1.01 The general purpose of this Agreement is to establish mutually satisfactory employment relations between the Employer and the employees covered by this Agreement. It provides the means for prompt settlement of grievances and establishes salaries, hours of work and other conditions of employment.
- 8.01 The parties to this agreement believe it is important to adjust complaints and grievances as quickly as possible as provided for herein. The employee or Union shall first discuss any individual complaint informally with the Director of Care or designate at the first opportunity.

- 8.03 Should any dispute arise between the Employer and an employee, or between the Employer and the Union, as to the interpretation, application, administration or alleged violation of any of the provisions of this Agreement, the employee or Union Representative will bring it to the attention of the immediate supervisor to settle such differences within ten (10) days of the occurrence.

Step No. 1

If further action is to be taken, then within ten (10) days of the discussion, the employee, who may request the assistance of their Union Representative and/or Labour Relations Officer, shall submit the written grievance to the Administrator or designate. A meeting will be held between the parties within ten (10) days. The Administrator shall give a written decision within ten (10) days of the meeting to the Bargaining Unit President or their designate with a copy to the Labour Relations Officer.

Step No. 2

Should the Administrator fail to render their decision or failing settlement of any grievance under the foregoing procedure, including any questions as to whether a matter is arbitrable, the grievance may be referred to arbitration by either party. If no written notice of intent to submit the matter for arbitration is received within ten (10) days after the decision under Step No. 1 is received, the grievance shall be deemed to have been settled or abandoned.

- 8.05 Time limits fixed in the grievance and arbitration procedures may be extended only by written, mutual consent of the parties. Should the Employer not respond within the time limit(s) fixed, such failure to respond shall be deemed to be a denial of the grievance. Should a grievance not be submitted within the various time limits specified in this Agreement, unless mutually extended, it shall be considered to have been settled or abandoned.

8.10 Policy Grievance – Union Grievance

The Union may institute a grievance alleging a general misinterpretation or violation of this Agreement by the Employer by submitting a written grievance at Step No. 1 within twenty (20) days after the circumstances have occurred. This section shall not apply to disciplinary grievances or application of competitive clauses under this Agreement.

- 8.17 The Board of Arbitration shall have no power to alter, add to, subtract from, modify or amend this Agreement in order to give any decision inconsistent with it.

The collective agreement establishes and regulates the Retirement Income Plan as follows:

18.01 The Nursing Homes and Related Industries Pension Plan

In this Article, the terms used shall have the meanings as described:

"Plan" means the Nursing Homes and Related Industries Pension Plan, being a multi-employer plan.

"Applicable Wages" means the basic straight time wages for all hours worked, including:

- (a) The straight time component of hours worked on a holiday.
- (b) Holiday pay, for the hours not worked.
- (c) Vacation pay.
- (d) Paid Union leaves.

All other payments, premiums, allowances etc. are excluded.

"Eligible Employee" means full-time and part-time (includes casual) employees in the bargaining unit who have completed four hundred and fifty (450) hours of service and who are not prohibited

from contributing to the Plan by legislation or the Plan rules because of their age or because they are in receipt of a pension from the Plan.

- 18.02 Each Eligible Employee covered by this Collective Agreement shall contribute from each pay period an amount equal to four percent (4%) of applicable wages to the Plan. The Employer shall match such contributions, the amount being four percent (4%) of applicable wages.

Notwithstanding the foregoing, where an error has been made in deduction, the Employer shall, upon request, make full payment on any outstanding Employer contributions irrespective of whether the employee pays the matching amount.

The parties agree that this Article in no way prejudices the position of either party as it relates to the retroactivity application if an error is discovered.

- 18.03 The employee and Employer contributions shall be remitted to the Plan within thirty (30) days after the end of the calendar month in which the pay period ends for which the contributions are attributable.

- 18.04 The Union acknowledges and agrees that other than making its contributions to the Plan as set out in this article, the Employer shall not be obligated to contribute towards the cost of benefits provided by the Plan or be responsible for providing any such benefits.

The Union and Employer acknowledge and agree that under current pension legislation, and/or regulations, the Employer has no requirement to fund any deficit in the Plan but is required to contribute only that amount as required by the Collective Agreement in force between the parties.

It is understood and agreed by the Employer and the Union that should the current pension legislation or regulations be changed so that the Employer's obligation to contribute to the Plan exceeds the amount specified in the Collective Agreement then in force, the parties will meet directly to finalize methods to relieve the Employer of this increased obligation to the extent that any such

obligation exceeds that which the Employer would have if the Plan were a defined contribution plan.

- 18.05 The Employer agrees to provide to the Administrator of the Plan, on a timely basis all information required pursuant to the *Pension Benefits Act, R.S.O. 1990, Ch P-8*, as amended, which the Administrator may reasonably require in order to properly record and process pension contributions and pension benefits.

The Employer will endeavour to provide the following information to the Administrator of the Plan in electronic format if the Employer has the technology.

For further specificity, the items required for each Eligible Employee are:

(a) To be Provided Once Only at Plan Commencement

- i) Date of Hire,
- ii) Date of Birth,
- iii) Date of First Contribution,
- iv) Seniority List including hours from date of hire to Employer's fund entry date (for purposes of calculating past service credit).

(b) To be Provided with Each Remittance

- i) Name,
- ii) Social Insurance Number,
- iii) Monthly Remittance,
- iv) Pensionable Earnings,
- v) Year to Date Contributions,

- vi) Employer portion of arrears owing due to error, or late enrolment by the Employer.
- (c) To be Provided Initially and if Status Changes
 - i) Full Address as provided to the Employer,
 - ii) Termination date where applicable (MM/DD/YY),
 - iii) Gender,
 - iv) Marital Status.
- (d) To be Provided Annually but no later than December 1
 - i) Current complete address listing,
 - ii) Details of all absences of members from the workplace due to an injury for which the member received Workplace Safety and Insurance Board benefits,
 - iii) All approved leaves of absence including type of leave.

Any additional information requests beyond that noted above may be provided, if possible, by the Employer at the expense of the Plan, unless the Employer is obligated by law to provide the information.

18.06 If there is an allegation of non-payment of pension contributions, the Union will file a grievance, along with a copy of the grievance to Kevin Burkett. Kevin Burkett will contact the Employer, who will respond within seven (7) days. If no resolve, Kevin Burkett will convene a hearing to determine the matter within thirty (30) days.

18.07 Where legislation or the Plan prohibits an employee from contributing to a pension plan because of age, an amount equivalent to the deductions in Article 18.02 will be paid to the employee on their regular pay.

EMPLOYER

The written submissions are a matter of record and are not herein set-out in detail. That said, the Employer, based on the chronology, relies on the grievance timeliness provisions of the collective agreement set out at article 8 above. Accepting that a 20-day time limit applies to both the individual and the policy grievances, the Employer asks me to find that the grievances were clearly untimely under articles 8.03 and 8.10 and to apply the article 8.05 specific penalty to find these grievances are either "settled or abandoned." Reference is also made to articles 1.01, 8.01 and 8.17 in support of its position. It is pointed out that under both article 8.03 and article 8.10 the time limit begins to run not from when the Union became aware but from the date of the breach so that the "discovery principle" does not apply.

The Employer asks me not to exercise my discretion under Section 48(16) of the Act to relieve against a breach of the collective agreement time limits. It is submitted that, given the "strong" wording of article 8.05, the "extreme" delay, the fact that the grievor must have been aware from the outset from viewing her pay slip, the prejudice that would now flow to AgeCare because of the lateness of the grievances and to the fact AgeCare complied immediately upon being put on notice, that this is not a case warranting the exercise of my discretion to relieve.

The Employer refers to extensive case law in support of the proposition that mandatory time limits are to be strictly construed and that the relief that might flow

from a continuing grievance is limited to the most recent occurrence in respect of which the grievance filed was timely.

UNION

The essential position of the Union is that article 18.06 of the collective agreement sets out a dedicated grievance/arbitration process for allegations of employer non-payment of pension contributions. The Union submits that the grievances are timely as they were filed in compliance with article 18.06. It is argued that the general article 8 time limits do not apply in the specific case of an alleged failure to make the required pension contributions under article 18 because article 18 has its own grievance/arbitration provision. The Union relies on the mandatory requirement to make the 4% contribution and the specification that "where an error has been made in deduction, the Employer shall, upon request, make **full payment** of any outstanding Employer contributions" (emphasis added). The Union distinguishes "retroactivity application" (which, under article 18.02, is not to be prejudiced) from the timeliness of the grievance. Finally, in this regard, the Union argues that the absence of time limits under article 18 is consistent with the Pension Benefits Act that does not contain specific time limits under which proceedings must be commenced to recover delinquent pension contributions.

The Union argues in the alternative that, accepting that employees do not compare their pay stubs line by line, it did not become aware of the employer's failure to make its required article 18 pension contributions, until May 2025 such that on an application of the "discovery principle" (i.e. when the Union first became aware) the grievances are timely under article 8.03/8.10. *Toromont Cat and IUOE, Local 904 (Emberley)*, 2021 CarswellNfld 61, *Nutrien Inc. v. USW, Local 7689*, 2000 CanLii 50727 (Ponak) and *Cherubini Metals v. Nova Scotia*, 2007 NSCA 38 are cited in support.

In addition to the foregoing, the Union argues that because these are continuing grievances that seek to recover the grievor's vested and accrued pension benefits dating back to 2014, they are, under the PBA, amounts held in trust by the Employer for the grievor's benefit. *Oakland Construction Services Inc. v. LIUNA*, December 15, 2016 (Steinberg) is cited in support of the proposition that pension contributions are vested benefits over which the arbitrator has jurisdiction under both the predecessor collective agreements and the PBA.

Finally, the Union argues in the alternative that even if the article 8 time limits are found to apply, I should exercise my discretion under Section 48(16) of the Act to extend these time limits. Citing *Becker Milk and Teamsters (1978) CarswellOnt 885 (Burkett)*, the Union asserts that there are reasonable grounds: the Union grieved when it became aware; pension contributions are "mandatory, vested and accrued benefits"; the Employer has a contractual duty to provide accurate and timely reporting; the consequences to the grievor would be severe; and the article 18 contemplates

"grievances for historic pension delinquencies following their discovery". As for prejudice to the Employer, the Union argues that an employer cannot benefit from its own reporting breaches under article 18, nor from the transfer of the business from Chartwell to AgeCare and its claim that it is unable to recover damages from Chartwell. In any event, the Union argues that as a matter of law, there can be no prejudice relating to an employer's failure to make mandatory pension contributions. *OSSTF and Brant Haldimand Norfolk Catholic District School Board (Heywood grievance)*, 2012, *CarswellOnt 13805 ONSC 1657 (Div. Ct.)* is cited.

EMPLOYER REPLY

The Employer makes a number of points in reply. Firstly, absent any reference to a "knowledge requirement" in articles 8.08 and 8.10, it must be found that these two sophisticated parties did not intend to have the mandatory timelines run from when the grieving party knew or ought to have known. It is submitted that the Ontario case law holds that time limits do not begin to run from the date of "discovery" unless the language incorporates a knowledge requirement – particularly in the context of a continuing grievance. The Employer submits that in Ontario, absent express "discovery" language, time limits begin to run from the date of the alleged infraction.

Secondly, while conceding that the Dayco line of cases establishes that certain benefits may be vested, such that an arbitrator has jurisdiction to consider alleged breaches that occurred during the life of predecessor collective agreements, the Employer argues that the Dayco line of cases do not suggest that collective agreement time limits are meaningless in the context of "vested" benefits. The Employer restates its reliance on the article 8.03 and 8.10 time limits.

Thirdly, the Employer asserts that unlike in Brant (supra) (the Ontario Superior Court judgement relied on by the Union), it is not relying on a waiver argument but rather the application of mandatory and mutually agreed upon collective agreement time limits. These time limits, it is argued, limit the time period for retroactive relief in the context of pension contribution grievances in the same manner as any other continuing grievance. The Employer disputes that the effect of applying these time limits would be to allow it to contract out of its pension contribution obligations. Rather, it is argued, the effect is to bar the Union from belatedly holding it retroactively liable for alleged breaches of the PBA that predate by more than a decade the mandatory time limit. The Employer notes that article 18.02 preserves its right to argue against retroactive application which, it submits, would be rendered meaningless if the mandatory time limits do not apply.

Fourthly, the Employer argues that there is no merit to the Union's suggestion that article 18 is somehow a "complete code" in regard to the grievance and arbitration process pertaining to alleged breaches of that article such that there are somehow no

article 18.06 time limits for the filing of these grievances. It is the Employer's position that express wording would be required to effect such a result. Absent such language, it argues that it must be found that article 18.06 does not in any way detract from the requirement that such a grievance be filed in a timely manner under articles 8.03 and 8.10.

Finally, the Employer submits that there is no basis upon which the arbitrator should to exercise the statutory Section 48(16) discretion to relieve against the article 8 time limits. The Employer disputes the Union claim that it had no knowledge prior to grieving; argues that the alleged vested nature of the benefit does not detract from the significance or effect of the agreed upon articles 8.03 or 8.10 time limits; submits that it cannot be a response to a timeliness objection to argue that the grievance is meritorious; and disputes that it has been "systematically non-compliant". Furthermore, the Employer relies on the quantum of liability that would accrue if I were to exercise my discretion to relieve against the article 8 time limits. Family and Children's Services of Renfrew County v. OPSEU (2004) 124 LAC (4th) 321 (Knopf) and FPC Flexible Packaging and Graphic Communications Intl. Union (1998) 77 LAC (4th) 198 (Bendel) are cited in support of the proposition that to relieve against the time limits in a case such as this, where the Union waited some 10 years to grieve, would run counter to a grievance/arbitration process designed to be a "quick and effective" method of dispute resolution. I am asked not to exercise my discretion to relieve against the article 8 time limits in this case.

DECISION

It is not disputed that the article 8.03 and 8.10 time limits are mandatory and that these grievances would be untimely under article 8 as they were filed more than 10 years after the Employer stopped making its required pension contributions. Apart from the "knowledge principle", (i.e. that the time limit for filing is deemed to run from first knowledge of the alleged breach), that cannot be given effect without the benefit of viva voce evidence as to who knew what when, these continuing grievances would also be limited in their remedial reach by the article 8.03/8.10 time limits. However, the Union position is that articles 8.03 and 8.10 do not apply in this case. Rather, the Union position (disputed by the Employer) is that article 18 contains a separate and distinct process for the resolution of complaints related to allegations of Employer non-payment of pension contributions and that within this separate and distinct process there is no time limit for the filing of this type of grievance. The question thus posed is whether the article 8.03/8.10 time limits apply or whether article 18.06, that does not specify a time limit for filing, applies. The answer to this question is to be found on a contextual reading of the relevant provisions of the collective agreement.

Article 18.06, is within a self-contained section entitled "Retirement Income Plan" that sets out the various terms and conditions that both establish and regulate the NHRIPP as it applies within this employment relationship (definitions, eligibility, contributions, reporting, etc.). Article 18.06 stipulates:

If there is an allegation of non-payment of pension contributions, the Union will file a grievance, along with a copy of the grievance to Kevin Burkett. Kevin Burkett will contact the Employer, who will respond within seven (7) days. If no resolve, Kevin Burkett will convene a hearing to determine the matter within thirty (30) days.

Article 18.06, situated as it is within a self contained section of the collective agreement, provides a workable dispute resolution process for grievances that allege Employer non-payment of pension contributions (i.e. direct referral to a named arbitrator, notice to the Employer, 7 day resolution period, convening of an arbitration hearing within 30 days). Absent a time limit for the filing of such grievances under article 18.06, the issue, to repeat, is whether the article 8.03/8.10 time limits for filing apply.

When article 18.06 is read together with article 8, it is clear that the parties put their mind to what interconnection, if any, there should be between article 8 and article 18.06. This is evidenced by the fact that article 8 provides for a two step grievance procedure after a 10 day discussion period while article 18.06, on the other hand, provides for a direct referral to the arbitrator without a prior discussion period and without the two step grievance procedure. Keeping in mind that the specific (Article 18.06) overrides the general (article 8.03/8.10) and keeping in mind the substantive deviation from the general article 8 grievance procedure, the absence of a filing timeline under article 18.06, more likely than not, confirms the intention that article 18.06 is to operate as a self contained dispute resolution process that does not specify a time limit for the filing of grievances that allege Employer non-payment of pension contributions.

There is further contextual support for this conclusion. When considered within the context of pension administration generally as regulated by the Pension Benefit Act; the content of article 18 read as a whole; and to the authority that holds that Employer pension contributions are employee vested benefits, the intention of the parties must have been that article 18.06 would be a dispute resolution process for this type of grievance to the exclusion of article 8.

By way of explanation, when the parties negotiated article 18.06, they knew that allegations of Employer non-payment of pension contributions could, as in this case, go back many years; they knew that under the PBA pension plan contributions accrue on a daily basis and are deemed to be held in trust for the benefit of the employee including unpaid Employer contributions; they knew that under article 18.02 the Employer is required to make full payment of any outstanding Employer contribution, irrespective of whether the employee pays the matching amount; and they knew, also under article 18.02, that even without a time limit for the filing of such grievances issues under 18.06 related to retroactivity (a separate and distinct issue from time limits) would not be affected. This knowledge informed the parties' negotiation and made it more likely than not that they intended article 18.06 to apply as a separate and distinct dispute resolution process for this type of grievance without a time limit for filing.

Furthermore, the parties would also have known that the Employer contributions are a vested employee benefit. As arbitrator Steinberg so aptly put it Oakland Construction Services (*supra*):

The employees have promised to provide their labour for the benefit of the employer. In return the parties have negotiated a monetary package that consists of a number of different payments that the employer has promised to pay. One of these payments is a contribution to the Pension Fund. For each hour that an employee works the collective agreement and the PBA require the employer to make payments to the Pension Fund. For the benefit of or to the credit of the employee. The employees have fulfilled their promise to work the hours for the employer and the right to have the employer make its contributions to the Pension Fund is therefore vested.

It follows that if an employer's pension contribution is a vested employee benefit, as it is, the parties would have put their mind to whether the application of the generally applied grievance time limit for filing should apply to this specific type of grievance or whether, there should be no time limit for filing. Given the preparedness to deviate from the article 8 grievance process, given the knowledge that informed their negotiation, given that article 18.06 constitutes a stand alone dispute resolution process for this type of grievance within a discreet section of the collective agreement, and given that the effect of applying the article 8.03/8.10 time limits could significantly erode the value of an employee's vested pension contribution benefit by effectively reducing the employer's pension contribution obligation, the absence of a time limit for the filing of this type of grievance under article 18.06 must be taken to mean that more likely than not, the parties intended that article 18.06 would apply to the exclusion of article 8, including article 8.03/8.10 time limits for filing.

Article 18.07 confirms that the parties understood that pension contributions are a vested employee benefit. Under article 18.07 "an amount equivalent to the deductions in Article 18.02 will be paid to the (pension-ineligible) employee on their regular pay." The only reason the parties would have agreed to pay a pension-ineligible employee the equivalent of the Employer pension contribution would have been because they understood that pension contributions constitute part of the compensation package that once earned becomes due and owing and hence vested. It would be a strange result, indeed, if a pension-ineligible employee received the cash value of the employer's pension contribution while a pension eligible employee is denied the recovery of a missed employer pension contribution by reason of the operation of a strict time limit for filing.

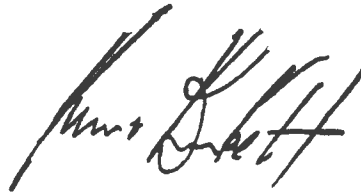
Having regard to all of the foregoing, article 18.06 is the dispute resolution process that applies to grievances alleging non-payment of employer pension contributions and that the absence of a time limit for filing under article 18.06 means that under this collective agreement there is no time limit for the filing of this specific type of grievance. Accordingly, because the instant grievances were filed under article 18.06, they are timely and properly before me.

If I am somehow mistaken in concluding that the article 8.03/8.10 mandatory time limits for filing do not apply and that the grievances before me have been properly filed under article 18.06, I would nevertheless exercise my discretion under Section 48(16) of the Act to relieve against the article 8.03/8.10 time limits. I would do so on

the basis that Employer pension contributions constitute a vested benefit to the grievor (as explained herein) and that regardless of how far back in time, the parties have agreed that where there has been an error the Employer will make “full payment”. Further, I would take into account that the prejudice to the individual employee caused by enforcing the article 8.03/8.10 time limits would far outweighs any prejudice to the Employer in relieving against them. The change in business ownership would not alter my rationale nor otherwise affect the exercise of my discretion to relieve against the application of the article 8.03/8.10 time limits as under the Act, for purposes of labour relations, the successor stands in the shoes of the predecessor.

This matter is to be put on for a hearing.

Dated this 26th day of August, 2026.

A handwritten signature in black ink, appearing to read 'Kevin Burkett', written in a cursive style.

Kevin Burkett