

IN THE MATTER OF AN ARBITRATION
BETWEEN
Kingston Health Science
And
CUPE, Local 1974
(Union Policy Grievance on August 11, 2023 (# 2023-25-37))

Before: William Kaplan, Chair
Robert Little, Employer Nominee
Michael Wright, Union Nominee

Appearances

For the Employer: Carolyn Kay
Hicks Morley
Barristers & Solicitors

For the Union: Nadine Blum
Husna Sarwar
Goldblatt Partners
Barristers & Solicitors

The matters in dispute proceeded to a hearing held by Zoom on September 25, 2026.
The Board met in Executive Session on September 28, 2026.

Introduction

The Canadian Union of Public Employees Local 1974 (the “Union”) filed a Policy Grievance which raised a number of concerns about the Kingston Health Science’s (“the Hospital” or “Kingston Health”) Attendance Management Program (“AMP” or “Program”) (the “Grievance”).

The Hospital responded to the Grievance on September 19, 2023.

We were appointed to hear and determine two issues arising from the Grievance, namely, whether the Employer is in violation of the Collective Agreement by counting absences toward enrolment and progression in the AMP:

- a. That relate to dates when an employee is symptomatic with COVID-19; and/or
- b. That took place during the period during which the AMP was suspended.

Background

The Hospital has had an AMP in effect for many years wherein absenteeism is monitored on a rolling twelve-month period. The AMP places employees on consecutively higher steps where absenteeism fails to improve over the designated period.

During the COVID-19 pandemic, Kingston Health, like all hospitals and other healthcare institutions at the time, experienced significant staffing challenges. It became almost impossible to manage and enforce the AMP. For this and other reasons, the Hospital decided at various points in time to pause the AMP.

The most recent pause that preceded the instant grievance began in January 2022. Although the AMP was not being enforced, the Hospital continued to track absenteeism.

In November 2022, the Hospital announced that it was restarting the AMP. The AMP was restarted in phases with the first cohort being those who had the highest absenteeism over the previous 12-month period running from November 2021 to 2022.

The second phase looked at absenteeism for the period December 2021 to December 2022, and so forth over the next year or so.

At the time the Program was restarted, the Hospital gave all employees the opportunity to request the exclusion from the Program of any absences from the November 2021 to November 2022 period which were COVID-19 related, provided there was objective evidence to support the exclusion. This was without prejudice to the Hospital’s position on the appropriateness of the exclusion.

When the Program restarted, the Hospital placed anyone with absenteeism during the 12-month period ending in November 2022 that exceeded the AMP’s threshold at Step 1, regardless of whether they had been on a higher step under the Program previously.

In addition, once the Program was restarted, absences related to symptomatic COVID-19 were no longer excluded from the AMP. The Hospital took the position that for an employee who was unable to work due to COVID-19, only absences where that employee was asymptomatic and under a doctor's care were excluded from the Program.

The Parties' Positions

The Union's position is that COVID-19 is a disability under the Ontario *Human Rights Code* and absences due to COVID-19 must be excluded from any AMP on that basis. In the alternative, if the question of whether an employee with COVID-19 has a disability must be decided on a case-by-case basis (which is denied), then the Hospital's blanket inclusion of days where an employee is absent due to symptomatic COVID-19 for the purposes of the AMP fails to allow for a case-by-case assessment. Either way, the blanket inclusion of employees who are absent due to symptomatic COVID-19 for the purposes of the AMP is itself discriminatory and unreasonable.

In addition, the Union's position is that absences due to COVID-19 are excluded because they give rise to leaves protected under the *Employment Standards Act* (ESA).

Article 3.02 of the Collective Agreement specifically requires the exclusion of absences that would qualify as leaves under the ESA:

3.02 – ATTENDANCE MANAGEMENT

Days of absence arising out of a medically-established serious chronic condition, an on-going course of treatment, a catastrophic event, absence for which WSIB benefits are payable, medically necessary surgical interventions, or days where the employee is asymptomatic and is under a doctor's care from the commencement of symptoms for a confirmed communicable disease (and has provided medical substantiation of such symptoms) but is required to be absent under the Hospital or public health authority protocol, will not be counted for the purposes of being placed on, or progressing through, the steps of an attendance management program.

Leaves covered under the *Employment Standards Act*, and leaves under Article 12 will not be counted for the purposes of being placed on, or progressing through, the steps of an attendance management program.

Regulation 228/20 under the *Employment Standards Act* identifies COVID-19 as a "designated infectious disease." The *Employment Standards Act*, sections 50.1(1.1)(b)(i) – (iv) and 50.1(1.2) provides employees with infectious disease emergency leave ("IDEL") where they cannot perform their duties because they were:

- (i) undergoing medical investigation, supervision or treatment related to a designated infectious disease;

- (ii) complying with an order under s. 22 or 35 of the Health Protection and Promotion Act;
- (iii) quarantining, isolating or self isolating pursuant to public health, government or medical information or directions; or
- (iv) directed by their employer not to attend work because of a concern that they could expose others in the workplace to the designated infectious disease.

The Union's position is that at the time of and since the filing of the grievance employees with symptomatic COVID-19 would have met, and will meet, the requirements for IDEL under the *ESA*.

The Union's position is also that the Employer's inclusion of and reliance on absences that took place during the period during which the AMP was suspended was unreasonable and a violation of *KVP* principles.

The Employer's position, at the time of its response and in the lead up to this proceeding, was that it had acted reasonably in counting absences, as it did, during the period of the AMP's suspension, and that it was only required under the first paragraph of Article 3.02 to exclude days where an employee with COVID-19 is "asymptomatic and is under a doctor's care from the commencement of symptoms".

Discussion and Decision

We heard from the Hospital that at the time of filing the grievance the Hospital did not understand that the Union was relying upon the IDEL provisions under the *ESA* for the purposes of the second paragraph of Article 3.02 of the Collective Agreement.

In preparation for the arbitration hearing, however, the Hospital came to understand that the Union was relying upon the IDEL provisions under the *ESA*.

The Hospital does not dispute that the collective agreement excludes from the AMP those absences that meet the criteria of section 50.1 of the *ESA*.

Prior to the arbitration hearing the Hospital advised that it was prepared to allow the Grievance on the following basis:

- Absences from the rolling 12-month period beginning November 2021 to November 2022, when the AMP was restarted, will not be included in determining whether an employee ought to be in the Program.
- Employees who had been placed at Step 1 upon the restart of the Program, based on absences included at any point in the 12-month rolling period from November 2021 to 2022, AND who are still in the Program and at a Step higher than 1, will be placed one step lower.

- On a go-forward basis, the Hospital will exclude from the count of absences under the AMP, any COVID-19 related absences that meet the criteria of s. 50.1 of the Employment Standards Act (related to infectious diseases designated under the Act).
- On a go-forward basis, the Hospital agrees that whether COVID-19 is or is not a “disability” under the *Code* must and will be determined on a case-by-case basis.

The placement contemplated by the second bullet was in recognition that the Parties had, pursuant to Minutes of Settlement in 2025 with respect to a revised AMP, already agreed to reduce all employees by one step in the AMP.

It was also in recognition that an employee who was still in the Program in 2026 would not still be in the program on the basis of absences from November 2021 to November 2022. Their continued placement in the Program would be based on more current absences.

We were also made aware that grievances were filed on behalf of individual members where the Employer included in the AMP days where those individuals were off work due to symptomatic COVID-19, and that those individual grievances have now been resolved.

The Hospital will advise the Union of the individuals affected by the review contemplated above.

In the circumstances, we are satisfied that the foregoing remedies offered by the Hospital resolve the outstanding grievance such that there is nothing further to be arbitrated.

Should there remain any disputes about implementation of the remedy above, including with respect to revised step placements within the AMP, we remain seized to deal with those.

DATED at Toronto this 30th day of September 2026.

“William Kaplan”

William Kaplan

“Robert Little”

Robert Little

“Michael Wright”

Michael Wright