

New Brunswick Nurses Union v Management Board, 2024 CanLII 22615 (NB LA)

Source:

Labour Arbitration Awards

Date:

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2021-303-359

Citation:

New Brunswick Nurses Union v Management Board, 2024 CanLII 22615 (NB LA)

IN THE MATTER OF

a grievance filed pursuant to the *Public Service Labour Relations Act* of New Brunswick

AND IN THE MATTER OF

an arbitration

Between:

The New Brunswick Nurses Union

(Union)

-and-

The Management Board, represented by the boards of management of the hospitals listed

in Part III of the First Schedule of the Public Service Labour Relations Act

(Employer)

GRIEVANCE LRS 2021-303-359

APPEARANCES

FOR THE UNION

Me Joël Michaud

Ms. PL (by consent of the parties, the grievor's identity was anonymized)

FOR THE EMPLOYER

Me Daniel Standing

Ms. Karen Desjardins, Manager, Extra-Mural Program/Ambulance New Brunswick

ARBITRATOR: Lynne J. Poirier, Arb. A.

DATE OF ARBITRATION: February 21, 2024

PLACE OF ARBITRATION: Edmundston, N.B.

DATE OF DECISION: March 1, 2024

DECISION

1. The New Brunswick Nurses Union (the “Union”) and Ms. PL (the “grievor”) filed a grievance against His Majesty in Right of the Province of New Brunswick, represented by the Management Board (Department of Health; the boards of management of the hospitals listed in Part III of the First Schedule of the *Public Service Labour Relations Act*) (the “Employer”), alleging that starting on December 3, 2021, the Employer violated the collective agreement by ceasing to grant the grievor her accumulated paid sick leave as provided for in article 23 of the collective agreement dealing with sick leave.
2. This matter relates to the application of the Human Resources Policy of Extra-Mural/Ambulance New Brunswick (the Policy), dated October 8, 2021, which required all employees to provide proof of full vaccination against COVID-19 or a valid medical exemption certificate by November 19, 2021, failing which they would be placed on unpaid leave.
3. By way of remedy, the Union seeks a declaration that the Employer violated articles 7 (discrimination), 9 (management rights), and 23 (sick leave). It also asks that the Employer compensate the grievor for the sick leave supported by medical certificates that was denied to her. It also seeks reimbursement of all lost benefits, including seniority and lost pension contributions, in addition to any other just and equitable remedy.
4. The grievor is a registered nurse holding a permanent position in the Part III Nurses group. She works for the Employer in the Extra-Mural Program (EM/ANB) in a full-time position. In her regular duties, she works in the field as an extra-mural nurse, providing care to patients in their homes. During the relevant period, she also worked at Manoir Bellevue in Edmundston because of outbreaks and a shortage of nurses in nursing homes during the COVID-19 pandemic.
5. No objection was raised to my jurisdiction to hear this grievance.
6. The Union called two witnesses: Ms. PL and Ms. SO, the grievor’s sister.
7. The Employer called two witnesses: Karine Desjardins, Manager of the Extra-Mural Program Ambulance New Brunswick/Medavie Health Services, and Réjean Bédard, Human Resources Consultant with Medavie Health Services.
8. The Union raised a preliminary objection regarding the nature of the measures taken by the Employer, asserting that those measures were disciplinary in nature and that, consequently, the burden of proof in this grievance rested on the Employer. The Union

nevertheless agreed to present its evidence first, asking that this issue be decided in the final decision.

9. The Employer raised a preliminary objection concerning the scope of the grievance. It argued that my jurisdiction derives from the document entitled “grievance presentation,” and that the issues mentioned in that document define my jurisdiction. It therefore submits that my jurisdiction does not include the questions of whether the cessation of sick leave was a disciplinary measure, nor whether the Employer’s COVID vaccination policy was reasonable and whether it contravened the *New Brunswick Human Rights Act*. According to the Employer, the grievance before me is limited to the denial of sick leave and the financial losses incurred by Ms. PL as a result of the Employer’s decision to terminate her sick leave by applying the Policy.
 10. I received in evidence, with the consent of the parties, the documents listed in Appendix 1.
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FACTUAL BACKGROUND

11. The grievor has been employed by the Employer as an extra-mural nurse since 1996. She is represented by the Union. At the relevant time, she worked outside the hospitals, providing care in patients’ homes.
12. Just before the beginning of the pandemic, in March 2020, the grievor experienced the death of her father. She had previously experienced the death of her mother in 2015, after going through a difficult marital separation personally and financially in 2013. Between 2015 and 2020, the grievor was one of the people responsible for caring for her father in the evenings and on weekends, as he was in a wheelchair and suffered from a neurodegenerative disease.
13. In 2020, the provincial population was encouraged not to go to the hospital. As a result, the workload of extra-mural nurses increased. In September 2021, because of the acute need for caregiving staff in nursing homes, the grievor went to work at Manoir Bellevue after her full-time work as an extra-mural nurse. The nature of her work, the circumstances of the pandemic, staff shortages, and the additional duties caused her to become exhausted.
14. On the personal side, her spouse lost his job due to pandemic-related restrictions and then suffered serious health problems in 2020-2021.
15. The grievor became exhausted and was diagnosed by her family physician, who advised that she stop working starting November 17, 2021. She began sick leave supported by her physician and submitted medical notes to the Employer for her absence from November 17, 2021 until her return to work in 2023. The legitimacy of the grievor’s sick leave was never questioned by the Employer.
16. On October 8, 2021, the Province of New Brunswick adopted a directive requiring the Employer to apply the vaccination policy to its employees. That policy required employees to provide proof that they were fully vaccinated, or else a medical exemption, no later than November 19, 2021, failing which they would be placed on unpaid leave. This Policy did not distinguish between employees working in hospitals and those

- working in the Extra-Mural Program, nor between active employees and those already on sick leave at the time of implementation or during the period up to November 19, 2021.
17. The grievor, being on approved sick leave starting November 17, 2021, provided neither proof of being fully vaccinated nor requested an exemption. Thus, starting December 3, 2021, the Employer stopped paying her sick leave and placed her on unpaid leave. Because she was on unpaid leave, she was no longer entitled to the long-term disability insurance (LTD) available to employees in her bargaining unit.
 18. The vaccine mandate was lifted effective on or about April 11, 2022. Starting in May 2022, employees were able to return to work even if unvaccinated.
 19. The grievor was ultimately approved for LTD leave starting September 18, 2022, and received benefits for several months before gradually returning to work in 2023. She began a gradual return to work in 2023 and returned to full-time work in the fall of 2023. By the time of her return, the Policy had been lifted for more than a year.
 20. During her unpaid leave from December 3, 2021 until her LTD leave began on September 18, 2022, the grievor had to withdraw funds from her personal RRSP to support herself. Altogether, she made withdrawals that cost her more than \$20,000. Despite those withdrawals, during that period when she had no income, her spouse helped her financially, and being unable to repay his debts, he lost his house.
 21. The evidence shows that the measure taken by the Employer had serious consequences on the grievor's life.
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POSITIONS OF THE PARTIES

Union

22. According to the Union, the Employer had no right to stop paying the grievor for her paid sick leave, because she had accumulated it under the collective agreement and had medical evidence entitling her to receive that pay for legitimate sick leave. Further, the Employer's decision affected the grievor's ability to receive benefits under the disability insurance plan.
23. According to the Union, the decision to convert the grievor's status to unpaid leave was disciplinary in nature and therefore reversed the burden of proof onto the Employer in this arbitration.
24. According to the Union, that decision also violated the *Human Rights Act* and the collective agreement.
25. The Union argues that it was the Employer's treatment, in depriving the grievor of her income during her illness, that caused a very difficult period for the grievor and aggravated her mental health condition.
26. Although the grievor eventually qualified for LTD benefits, according to the Union there was a shortfall. The insurer refused to grant benefits for the entire absence period from December 3, 2021 to September 18, 2022. According to the Union, that shortfall resulted from the Employer's conduct toward the grievor, and it is responsible for her losses and damages during that period.

27. To support its position, the Union relied on the following decisions: *Conseil scolaire acadien provincial v Nova Scotia Teachers Union (D'Entremont)* (unreported, 2022, arbitrator Morisset), *Fidler v Sun Life Assurance Co. of Canada*, 2006 SCC 30, *New Brunswick Teachers Federation v New Brunswick (Finance, Treasury Board)*, 2023 CanLII 119838 (NB LA) (arbitrator Doucet), *White-O'Connell and Dempsey v New Brunswick Community College*, 2022 CanLII 78873 (NB LA), *Ontario Power Generation Inc. v Society of Energy Professionals*, 2014 CarswellOnt 4901 (arbitrator O'Neill), *Canada Post Corp. v C.U.P.W.*, 1992 CanLII 14648 (CA LA), *Bergey v Canada (Attorney General)*, 2017 FCA 30, *Canadian Union of Public Employees, Local 2745 v New Brunswick (Treasury Board) (Mandy Grievance)*, [2023] N.B.L.A.A. No. 2 (arbitrator Couturier), *Black & McDonald Ltd. v SMWIA, Local 30*, 2016 CarswellOnt 20428 (arbitrator McLean), *Riverdale Hospital v Canadian Union of Public Employees, Local 79 (Delos Reyes Grievance)*, [2000] O.L.A.A. No. 879 (arbitrator Surdykowski), *Power Workers' Union and Elexicon Energy Inc. (UTELE-P-2), Re*, 2022 CarswellOnt 1223 (arbitrator Mitchell), *Coppola v Capital Pontiac Buick Cadillac GMC Ltd.*, 2013 SKCA 80, *Dornan v New Brunswick (Health)*, 2023 CanLII 10433 (NB LA) (arbitrator Filliter), *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486* (1975), 1975 CanLII 707 (ON CA), and Brown, Beatty & Beatty, *Canadian Labour Arbitration*, 5th ed., Thomson Reuters, ch. 2:16.

Employer

28. The Employer's position is that it simply applied the Policy imposed on it. According to it, it had no discretion regarding application of the Policy. Therefore, the Employer acknowledges that it converted the paid sick leave into unpaid leave, as provided for by the Policy. It does not deny taking that measure.
29. However, according to the Employer, if that measure constituted a violation of the collective agreement, the damages sought by the grievor are too remote to be compensable in this case.
30. According to the Employer, even if I conclude that the Employer should not have made this change, the conversion to unpaid leave starting December 3, 2021 had no impact on the LTD benefits the grievor ultimately received as of September 18, 2022 and had no impact on the date she began receiving such benefits.
31. The Employer argues that the grievance — which defines my jurisdiction — makes no mention of the allegation that the decision was disciplinary in nature, nor of the reasonableness of the vaccination policy and its impact on rights protected by the *New Brunswick Human Rights Act*. Consequently, the Employer submits that those issues are not before me.
32. To support its position, the Employer relied on the principles set out in Brown, Beatty & Beatty, *Canadian Labour Arbitration*, 5th ed., Thomson Reuters, ch. 7:56 and 2:9.

ISSUES IN DISPUTE

33. Having heard the arguments and considered the evidence filed by the parties, I have determined that the following issues are in dispute:

- a. What is the scope of the grievance before me?
 - b. Did the Employer act in violation of its obligations under the collective agreement?
 - c. If so, what is the appropriate remedy?
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ANALYSIS

Scope of the grievance

34. The Union submits that the grievance includes the question of whether the Employer's decision to convert the grievor's sick leave into unpaid leave on December 3, 2021 was an unjustified disciplinary measure, and that the burden of proof to justify the measure therefore rests on the Employer.
35. The Employer disputes this assertion, arguing that the grievance does not mention the disciplinary nature of the decision and that issue is therefore not before me.
36. It is undisputed that the scope of my jurisdiction in this case is defined by the collective agreement and the grievance submitted to arbitration. I cannot broaden the issues defined in the arbitration request nor add anything to them.
37. The grievance reads as follows:

Clause(s) or article(s) of the collective agreement or arbitration award that are the subject of this grievance: Articles 7 – Discrimination, 9 – Management Rights, 23 – Sick Leave, and any other relevant article of the collective agreement.

Statement of grievance: I am a registered nurse holding a permanent position under the collective agreement between the NBNU and the Management Board; group: nurses, Part III, expiry date: December 31, 2018. I allege that the employer is violating articles 7, 9, and 23.06 of the collective agreement and all other relevant articles by refusing to continue honouring the medical advice of my physician placing me on medical leave from work, by ceasing to grant me accumulated paid sick leave as indicated in article 23 on sick leave, as of December 3, a date arbitrarily chosen by the employer.

38. The collective agreement provisions cited in the grievance are as follows:

ARTICLE 7 — DISCRIMINATION

7.01 The parties agree that no discrimination, restriction or coercion shall be exercised or practised with respect to the Union, the local, employees, the Employer and its representatives.

7.02 All parties agree that the *New Brunswick Human Rights Act*, as amended from time to time, applies to this collective agreement.

7.03 Where an employee who is incapacitated by illness, disease or pregnancy, or because of advanced age is temporarily unable to perform her normal duties or a casual assignment, as the

case may be, the Employer shall make every reasonable effort to assign the employee to a position, employment, or, in the case of a casual employee, to a casual assignment, employment appropriate to her incapacity, capability or age. The Employer shall not displace any other employee from her position, except a trainee employee, in order to effect this reassignment.

ARTICLE 9 — MANAGEMENT RIGHTS

9.01 The Union recognizes that the Employer retains all functions, rights, authority and powers not explicitly restricted, delegated or modified by this agreement. These rights include, without limitation:

- a) maintaining performance and establishing, modifying and enforcing rules and regulations to be observed by employees;
- b) assigning, hiring, promoting, demoting, transferring, suspending, disciplining or dismissing employees and assigning employees to shifts;
- c) establishing annual leave periods, evaluating jobs, classifying positions and determining employee duties; and
- d) administering and operating the hospital in all respects and, without limiting the generality of the foregoing, determining the number and location of facilities, the services to be provided, the methods and procedures of work, the type and location of instruments and equipment to be used; selecting, controlling and directing the use of all equipment required for hospital operations; requiring suitable dress; scheduling the work to be performed and the services to be provided; and establishing, modifying and enforcing rules governing the use of equipment, tools and services deemed necessary in the interest of the safety and well-being of the public.

ARTICLE 23 — SICK LEAVE

23.01 a) Each full-time and part-time employee in the bargaining unit shall accumulate sick leave credits at the rate of one and one-half (1½) working days per month for each calendar month of continuous employment, to a maximum of two hundred and forty (240) working days.
[...]

23.02 For the purpose of calculating sick leave accumulation, the following days shall count as working days:

- a) days on annual leave,
- b) days on paid leave under this agreement,
- c) days on paid sick leave, and
- d) days absent from work while receiving workers' compensation benefits.

Sick leave credits shall be limited to the number of days that would be granted for twelve (12) months of service in accordance with paragraph 23.01.

[...]

23.05 Where a continuous absence from work on unpaid leave or suspension exceeds, without violating article 32, eleven (11) working days in any one month, no sick leave credit shall be accumulated for that month, but the employee shall retain all sick leave credits accumulated prior to such leave or suspension.

23.06 An employee is entitled to paid sick leave when she is unable to perform her duties because of illness or injury, provided:

- a) such absences are reported as soon as possible to the supervisor or head of department;
- b) she gives the Employer assurance of that condition; and
- c) she has the necessary sick leave credits.

[...]

23.15 a) An employee with two (2) years or more of service who has exhausted her accumulated sick leave credits shall, upon request, be granted an advance of fifteen (15) days of sick leave credits. The fifteen (15) days of sick leave credits granted shall be repaid at the rate of one-half day per month deducted from credits earned after return to work. This privilege applies pro rata to part-time employees.

39. The Union relies on *Blouin Drywall Contractors Ltd.* to argue that defects of form or technicalities should not deprive me of jurisdiction to decide the grievance. According to the Union, the issue is to determine the real grievance to be decided in order to ensure that the appropriate remedy is granted. I recognize, as the Union argues, that a grievance is not the same thing as a formal pleading filed before the courts. A grievance is drafted by a union representative and is not analogous to pleadings in a lawsuit.
40. That said, the parties presented no evidence regarding the substance of discussions during the grievance procedure, nor evidence regarding the Employer's response during that procedure. I therefore have no evidence allowing me to conclude that the parties agreed to broaden the scope of the grievance beyond its wording.
41. A simple reading of the grievance leads to the conclusion that it does not include the allegation that the measure taken by the Employer was disciplinary. The wording of the grievance is neither vague nor lacking in precision. It simply makes no mention of the disciplinary nature of the Employer's measure. Moreover, upon reading the remedy sought in the grievance, I cannot conclude that the real grievance concerns a challenge to discipline. The grievance, and the remedies sought, refer to the Employer's decision to convert the grievor's paid sick leave into unpaid leave on December 3, 2021, without any explicit or implicit mention that this constituted discipline.
42. In all the circumstances, I am satisfied that the scope of the grievance is not broad enough to include the question of whether the Employer's measure was disciplinary in nature. Consequently, the burden of proof rests with the Union.
43. The Union also argues that the Employer's decision, which is the subject of the grievance, violated the grievor's rights protected under the *New Brunswick Human Rights Act* (the Act), and therefore violated the collective agreement. Given the express reference in the grievance to article 7 of the collective agreement, which deals with the Act, I conclude that the grievance permits me to consider whether the Employer's application of the vaccination Policy denied the grievor rights protected under the Act.
44. The grievance was presented as an individual grievance. It was not presented as a general union dispute concerning the vaccination Policy and its reasonableness. Consequently, only the Employer's actions in applying the Policy in the grievor's specific case will be addressed in this decision.

Did the Employer act in violation of its obligations under the collective agreement?

45. It is undisputed that the Employer converted the grievor's status from paid sick leave to unpaid leave starting December 3, 2021, until the vaccination Policy was lifted in spring 2022. The question is whether the collective agreement authorized the Employer to take that measure. For the reasons that follow, I conclude that it did not.
46. The grievor's last pay was issued on December 16, 2021 for the period up to December 8, 2021. In deciding to convert her paid sick leave into unpaid leave, the Employer was applying the EM/ANB COVID-19 vaccination Policy.
47. It is important to provide some context for the coming into force of the Policy in question. On October 8, 2021, the EM/ANB COVID-19 vaccination Policy was communicated by the Employer to its employees. It is undisputed that the Policy had been imposed on the Employer by the Province of New Brunswick, which, as of October 8, 2021, imposed the same requirements on its employees. The grievor received a copy of the Policy. It stipulated that all EM/ANB employees had to provide proof of full vaccination or a valid medical exemption by November 19, 2021, failing which they would be placed on unpaid leave.
48. It is important to emphasize that the grievor was suffering from total exhaustion in the fall of 2021, and that diagnosis was never challenged by the Employer. The reasons that led to her exhaustion are not relevant here. But the evidence reveals that her personal life leading into fall 2021 had been very difficult and that her professional life had been very demanding. The grievor had accepted additional shifts during the pandemic in the context of a nursing shortage, including in regional nursing homes. When the Employer needed additional work from nurses, the grievor volunteered to help and the Employer assigned her work.
49. Having reached the point where she was experiencing serious symptoms of exhaustion, she consulted her family physician. He recommended that she stop working from November 17 to December 20, 2021. This sick leave was approved by the Employer. Although the parties agree that the Employer could have required medical certificates to justify the leave, it did not do so in this case. In any event, the grievor provided notes to her manager, Ms. Desjardins, to justify her medical absence beginning November 17, 2021. She continued to provide notes from her physician confirming her medical absence from November 17, 2021 until her return in 2023.
50. Ms. Desjardins confirmed that the grievor met all the criteria set out in article 23.06 of the collective agreement for entitlement to paid sick leave under the collective agreement for her absence beginning November 17, 2021. She also confirmed that the Employer never took the position that the grievor no longer met the requirements of that article while she was off work, nor questioned the legitimacy of her medical notes.
51. The grievor testified that she was not fit to make decisions regarding the COVID-19 vaccine on November 19, 2021. Thus, when the deadline passed on November 19, 2021, she had not met the requirements of the vaccination Policy. In any event, the Employer took no action concerning her on November 19, 2021.
52. The Employer's evidence shows that the vaccination Policy raised a number of questions among its managers regarding its application, particularly how to deal with people already on sick leave since the announcement of the Policy's implementation. In fact, the directions regarding application of the Policy to employees on sick leave reveal that the Employer had difficulty determining the proper approach for those employees. On

November 19, 2021, emails among members of management show that it was implementing exceptions applicable to employees on approved sick leave.

53. Specifically, in an email of November 19, 2021 addressed to Ms. Desjardins and other managers, her supervisor, the Director of Operations of the Northern Extra-Mural Program, shared a new Employer directive concerning employees on sick leave. According to that directive, managers were to advise employees who were on sick leave and whose leave had begun after October 6, 2021 that they had until December 3, 2021 — two additional weeks — to provide the Employer with medical documentation confirming that their health condition was the reason they could not receive the vaccine. The directive specified:

If they do not provide the necessary medical documentation by that date, their sick leave will end and be replaced by unpaid leave, unless extenuating circumstances justify an extension.

54. On December 3, 2021, the grievor was still on approved sick leave and had not provided the documentation required by the Policy. Thus, on the same day, the Employer chose to terminate her paid sick leave. The Employer explained that this decision was made pursuant to this directive, which had granted the grievor an additional two weeks to satisfy the requirements of the Policy.
55. In light of these facts, I must determine whether the Employer violated the collective agreement provisions dealing with discrimination and paid sick leave. Since the Employer did not present any argument relying on management rights under article 9, it is unnecessary for me to analyze that issue.
56. The uncontested evidence shows that the grievor was entitled to paid sick leave because she met the requirements of article 23.06 of the collective agreement. The evidence also shows that the grievor was suffering from total exhaustion and was not participating in any work-related activity from November 17, 2021 until 2023.
57. The *New Brunswick Human Rights Act* applies to the collective agreement by virtue of article 7.02. Under section 2.1 of the Act, physical or mental disability constitutes a prohibited ground of discrimination. In other words, discriminatory measures may not be taken against an employee with a disability.
58. Under the Act, an employer must accommodate employees on the basis of any protected ground under the Act, when an employee informs the employer of the need for accommodation and/or provides documentation to justify such a need. In cases of undue hardship, the Act would allow the Employer to refuse accommodation. In this case, the Employer raised no argument that accommodation would have caused it undue hardship.
59. In this case, I consider that the directive extending to December 3, 2021 the period to satisfy the requirements of the Policy constituted an accommodation measure for persons with a disability. That directive shows that the Employer recognized it had an obligation to consider the individual circumstances of employees on sick leave.
60. In the grievor's case, the Employer knew that she was on sick leave for an extended period, from November 17 to December 20, 2021. It presented no argument or evidence to show that she was able to perform her duties or satisfy the requirements of the Policy, either on November 19 or on December 3, 2021. On the contrary, the parties agree that the grievor's medical leave was legitimate. The evidence even shows that she became so ill in 2022 that she met the definition required by the LTD insurer to qualify for disability

benefits for several months. The grievor's uncontested evidence is that she was off work due to total exhaustion. For that reason, I conclude that in the grievor's individual circumstances — namely, a legitimate leave of absence for serious illness, not challenged by the Employer — and on the evidence before me, she was incapable of meeting the requirements of the vaccination Policy from November 17 until her return to work in 2023.

61. Given that directive allowing the Employer to consider the grievor's individual circumstances on December 3, 2021, it is surprising that the Employer did not consider her circumstances at all. Remarkably, apart from this two-week extension to December 3, 2021, there is no evidence that the Employer considered or offered any accommodation to the grievor, who was unable to meet the Policy requirements and therefore the requirements of her position for the duration of the Policy.
62. I conclude that on December 3, 2021, the Employer was obliged to provide accommodation to the grievor and to consider her personal circumstances. In the absence of any evidence of such accommodation or even a justification as to why such accommodation was not provided, I conclude that the grievor's rights under articles 7 and 23 of the collective agreement were infringed.
63. I conclude that, but for the Employer's failure to accommodate, the grievor's sick leave under article 23 of the collective agreement would not have been converted to unpaid leave. The evidence is clear that the grievor met all the requirements of article 23 from November 17, 2021 until her return to work in 2023.
64. I conclude that, but for the Employer's cut-off of her paid leave, the grievor would have continued to use her sick leave and accumulate credits in her sick leave bank. She would also have been entitled to an advance of 15 days' leave under article 23.15, which would have bridged her until the vaccination Policy was lifted in mid-April 2022. Her eligibility for disability insurance would also not have been suspended.
65. The uncontested evidence reveals that the grievor suffered significant consequences as a result of the Employer's decision to cut off her sick leave in violation of the collective agreement, including an aggravation of her medical condition.

What is the appropriate remedy?

66. The grievor's paid sick leave was cut off starting December 3, 2021. She remained on medical leave until July 2023.
67. According to Ms. Desjardins, when the vaccination Policy was lifted in April 2022, the grievor was coded once again in the payroll system as being on approved sick leave, because she still had medical notes justifying her absence from work.
68. The evidence is uncontested that the grievor's mental health became more fragile after the Employer cut off her pay. The loss of her income caused very serious financial pressure on her and her spouse.
69. On May 18, 2022, the grievor again consulted her family physician because her condition was not improving. He referred her to a psychiatrist, and starting May 18, 2022, her name was placed on a waiting list for psychiatric consultation. In the meantime, she consulted a psychologist starting September 6, 2022.

70. In June 2022, the grievor applied for LTD benefits with the support of her union representative and family physician. The application did not contain sufficient information according to the insurer and was therefore denied.
71. On September 13, 2022, the grievor succeeded in seeing a psychiatrist through an urgent referral by her family physician. Ms. SO accompanied the grievor to her family doctor that day because she had serious concerns that the grievor posed a risk to her own life. I accept the evidence that the grievor was in a more fragile state in September 2022 than at the beginning of her sick leave and that her case had become a medical emergency.
72. In November 2022, supported by information provided by her psychiatrist and psychologist, her second application for LTD benefits was approved, retroactive to September 18, 2022.
73. The grievor confirms that she had not shared details of her personal life and mental health with her manager. Regardless of management's actual knowledge of her health condition, I conclude that it was reasonably foreseeable that cutting off paid sick leave for an employee in a state of disability would have significant repercussions. The purpose of article 23 of the collective agreement is to guarantee peace of mind for employees, an assurance that they will be financially secure if they become unable to meet the requirements of their duties due to illness. I conclude, as did the Supreme Court of Canada in *Fidler*, a decision involving breach of a disability insurance contract, that the contractual clause in this case was intended to provide the grievor with a psychological benefit such that the Employer could reasonably foresee that its breach would cause mental distress.
74. If the grievor had remained on paid medical leave, she would have been entitled to her bank of 630 accumulated hours of paid sick leave under the collective agreement. If she had remained on paid sick leave between December 3, 2021 and April 2022, she would have continued to accumulate sick leave credits at the rate provided in article 23.02(c) of the collective agreement. Ms. Desjardins' evidence confirms that, but for the conversion of her status to unpaid leave, the grievor would have accumulated six additional days of credits under that provision. Also, under article 23.15 of the collective agreement, if the grievor had remained on paid sick leave rather than being placed on unpaid leave, she would have been entitled to request an advance of 15 sick days once she exhausted her sick leave credits. According to Ms. Desjardins, the grievor would have been entitled to those 15 days upon request, and that would have extended her paid leave into mid-April 2022, after the vaccination Policy was lifted on or about April 11, 2022.

CONCLUSION

75. For the foregoing reasons, I allow the grievance.
76. Consequently, I order the Employer to pay the grievor the accumulated sick leave under article 23 of the collective agreement that was denied to her during the period from December 3, 2021 until her return to work in July 2023, less the amounts received as LTD benefits.

77. I also order the parties to begin discussions within the next 14 days in order to resolve the compensation issues arising from the violation of articles 7 and 23 of the collective agreement and the consequences of that violation. These discussions shall address the amounts to be paid to compensate the grievor for the other impacts of the Employer's breach, in particular on her pension plan, her seniority, and her leave banks.
78. I remain seized to deal with any issues that may arise from the implementation of this decision.

Dated at Halifax, March 1, 2024

Lynne J. Poirier, Arb. A.