IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT, 1995*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

VICTORIA MANOR

- The Employer

-and-

SERVICE EMPLOYEES' UNION, LOCAL 210

- The Union

AND IN THE MATTER OF a policy grievance regarding sick pay

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Kimberly Michaelis - Counsel
Jana Obradovic - Administrator

On behalf of the Union:

James A. Renaud - Counsel
Virginia Hills - Union Representative

Hearing held November 16, 1998, May 26 and October 12, 2000 in Windsor, Ontario.

AWARD

I. INTRODUCTION

This collective agreement contains a provision for the annual payment for "any unused sick leave days", a provision which was not in the previous agreement. The issue raised was this: Does the phrase "any unused sick leave days" include those unused sick leave days which employees had accumulated under the previous collective agreement?

II. THE FACTS

Although this arbitration began two years ago, no evidence was led until October of this year.

The facts were not in dispute. Virginia Hills, a Union representative, testified for the Union and identified a number of documents. The Employer called no witnesses.

Victoria Manor is a retirement home in Windsor which had been owned by Diversicare. The Union had a collective agreement with Victoria Manor and in early 1996 the Union began negotiations with Diversicare for a new agreement.

Effective April 1, 1996 Victoria Manor was sold to Joe Joksimovic. Collective bargaining for a new collective agreement began again. Mr. Joksimovic was the primary representative of the Employer in those negotiations and Ms Hills was the Union's chief negotiator.

A major issue in the negotiations was sick pay. Under the last collective agreement with Diversicare, employees were entitled to one day of sick pay per month, to a maximum of 16 days. At the end of that agreement many employees had accumulated unused sick leave

time, up to and including the maximum 16 days.

Mr. Joksimovic wished to reduce the sick leave benefits. The parties discussed reducing sick leave benefits and introducing payment for unused sick days. June 30, 1996 the Employer gave the Union a list of employees with their accumulated sick leave, including those days accumulated under the old agreement. August 14, 1996 the Employer gave the Union another list with each employee's accumulated sick leave entitlement under the old agreement and also the monetary value of that sick leave in a column headed “estimated liability”.

In August 1996 the parties reached a tentative agreement reducing paid sick leave to one-half (1/2) day per month, to a maximum of six (6) days. In addition, new language was introduced which provided for an annual payment for “any unused sick leave days”. It was the meaning of “any unused sick leave days” which led to this grievance.

The parties signed a Memorandum of Agreement dated August 15, 1996 in which they recorded their agreement for a new three-year collective agreement. The Memorandum contained language for later inclusion in the new collective agreement to provide for one-half day of sick leave per month and for the payment for unused days. The Memorandum also contained the following:

> It is understood that all sick leave days accrued up to and including March 31, 1996 shall be paid out in full to all affected bargaining unit employees.

Ms Hills said the above statement accurately reflected the parties’ intention - the parties intended the phrase “any unused sick leave days” to include the unused sick leave days accumulated as of the start of this agreement. The August 15 Memorandum was written in a manner that indicated that the parties did not intend to include the above sentence in the collective agreement.

The August 15 Memorandum of Agreement was rejected by the Union membership. Ms Hills and Mr. Joksimovic had further discussions and agreed to add one additional day of bereavement leave. A new Memorandum of Agreement, signed August 26, incorporated the items included in the August 15 memorandum and indicated that there was one additional agreed item. That memorandum was ratified by the employees September 10, 1996.

About the time of the ratification Ms Hills met with Jana Obradovic, Mr. Joksimovic's daughter and the Administrator of the Manor. Ms Hills and Ms Obradovic agreed on the amount of each employee's accumulated sick leave as of March 31, 1996, the amount used by September 10, 1996 and the value of the payment which was to be made for the unused sick leave. Ms Hills recorded their agreement on these items and she provided a copy to Ms Obradovic. Ms Hills testified that there was no difference between the parties either with respect to the fact that the Employer would provide payment for accumulated sick days or with respect to how much money was owed to each employee.

About that same time Mr. Joksimovic indicated to Ms Hills that he hoped to recover some of the money for sick pay from Diversicare. Ms Hills testified that Mr. Joksimovic appeared to be in this business for the long term and that the Union and the employees wanted to work with him and assist him and, in any event, the employees knew the money was owed to them. Thus Ms Hills agreed with Mr. Joksimovic that the Employer would be permitted time to pursue Diversicare and that payment for the accumulated sick pay would be made either when the Employer received the money from Diversicare, or at the end of the collective agreement, whichever came first.

A collective agreement was prepared and signed. Although the collective agreement is dated September 10, 1996, it appears that it may have been prepared and signed later, and simply dated for the day the Union ratified the August 26 Memorandum of Agreement. The

changes to the collective agreement contemplated by the Memorandum were made in the sick leave article but the sentence:

> It is understood that all sick leave days accrued up to and including March 31, 1996 shall be paid out in full to all affected bargaining unit employees.

was not included.

In 1998 Ms Hills was informed by the Employer that Diversicare was not going to contribute to the sick leave payments and that the Union would have to pursue Diversicare if it wanted to obtain the money. On July 21, 1998 Ms Hills wrote to the Employer inquiring about the date of payment of this money; this grievance followed on September 3, 1998.

I note that the Memorandum of Agreement stated that the sick leave was to be paid by December 31 but the collective agreement says April 1. Ms Hills testified that the date was changed to April 1 by agreement of the parties to conform to the Employer's fiscal year.

Finally I note that the Memorandum of Agreement was for "a three (3) year agreement which shall expire December 31, 1998". The printed text of the collective agreement is for a three year agreement coming into effect April 1, 1996 and ending April 1, 1999. However, in an earlier grievance Arbitrator Hinnegan has decided that the collective agreement expires December 31, 1998 [see *Victoria Manor and Service Employees' Union, Local 210* (April 5, 2000) unreported (K. A. Hinnegan)]. I thus use April 1, 1996 as the day the agreement began and December 31, 1998 as the day it ended.

III. PROVISIONS OF THE AGREEMENT

The relevant provisions of the Collective Agreement are as follows:

ARTICLE 16 - SICK LEAVE

. . .

16.02 a) All full time bargaining unit employees currently employed and new full time bargaining unit employees from commencement from date of employment [sic], shall be entitled to sick leave with pay at the rate of one-half (1/2) day per month to a maximum of six (6) days per year.

Any unused sick leave days shall be paid out in full, at the current wage rate no later than the 1st day of April of every year.

. . .

IV. POSITION OF THE UNION

The Union first said that the language was clear and that "any unused sick leave days" had a very general meaning and included the unused sick leave days which employees had accumulated as of the beginning of the collective agreement.

In the alternative, if the provision was ambiguous, the Union said that the evidence of the negotiations, of the Memorandum of Agreement, of the parties' agreement on the number of sick leave days and the value of the payments for those days, and of the agreement to defer the payment until the Employer had an opportunity to pursue a contribution from Diversicare, all clearly pointed to the parties' intention that the Employer pay for the sick leave days which employees had accumulated as of April 1, 1996.

The Union asked for a declaration that Article 16.02 a) required the payment of sick leave days accrued as of April 1, 1996. The Union sought an order for payment for all those days which had not been used as sick time or otherwise paid out and for interest to be paid on those amounts from the date of the grievance or from the end of the agreement The Union also asked that I remain seised.

In reply to the Employer's submissions, the Union said the Employer's claim that the provision was clear supported the Union's alternative argument that it was ambiguous. In addition, the Union said that the Employer's submission that the parties had not resolved the issue of what was to happen to the sick leave accumulated as of the beginning of the collective agreement simply could not stand. The parties had resolved all issues and it was my task as arbitrator to determine what the parties had agreed upon.

V. POSITION OF THE EMPLOYER

The Employer submitted that this provision was clear but the Employer gave it a different interpretation from that given by the Union.

In substance, the Employer said it was not responsible for payment for any sick leave which had been accumulated prior to Mr. Joksimovic assuming ownership. The Employer said the payment provision contained in the second paragraph of Article 16.02 a) applied only to the one-half day per month accumulated under the previous paragraph (that is the first paragraph of Article 16.02 a)) of the agreement. The first payment had been due April 1, 1997 and that payment was for only the time accrued under the new language found in Article 16.02 a). In other words, the phrase "any unused sick leave days" referred only to the one-half day per month of sick leave which had been accumulated under this new agreement.

In response to my question as to what had happened to those unused sick leave days which the employees had accrued prior to this collective agreement, the Employer said that issue was not clear, that matter had not been resolved.

In response to my question as to the Employer's position on what conclusion I should reach if I found the provision to be ambiguous, the Employer simply said that the August 1996

Memorandum of Agreement had merged into the collective agreement and that I could rely on only the collective agreement.

VI. CONCLUSIONS

I begin by recording a ruling made at the hearing May 26, 2000. The Employer requested a ruling as to whether the disputed provision was clear or ambiguous. Because some evidence, such as evidence of negotiating history, is used primarily to interpret an ambiguous collective agreement, the Employer sought this ruling to assist in determining the scope of evidence to be presented. If the provision was clear, the Employer anticipated that the parties would lead less evidence than if the provision was ambiguous. The Union agreed to the Employer's request, but noted that if I concluded that the provision was clear and had the meaning the Employer gave it, the Union would still lead all its evidence of the negotiations in order both to demonstrate a latent ambiguity and to resolve the ambiguity in the Union's favour. However, the Union said that if I found that the provision was clear and had the meaning the Union gave to it, the amount of evidence would be considerably reduced.

I advised that I was unable to find the clear intention of the parties by examining the collective agreement alone, in the absence of any evidence; instead, I concluded that the provision was ambiguous. Looking only at the words "any unused sick leave days", the parties may have intended to refer only to the new one-half day accumulation or they may have intended to include the previously accumulated sick leave. The hearing was then adjourned to allow the Employer time to prepare for the presentation of evidence.

Turning to the substance of the grievance, in interpreting a collective agreement the objective is always to determine the intention of the parties. The parties expressed their

intention in the language used in the collective agreement and it is thus the language of their agreement that an arbitrator first examines to determine intention. If the language is clear and the intention can be determined from that language alone, arbitrators do not consider other evidence. However, such other evidence as negotiating history may be used to resolve doubt as to the parties' intention and it may also be used to show that a provision which appears to be clear is not.

The specific provisions of a collective agreement are not to be interpreted in isolation - they must be read in the context of the entire collective agreement. The relevant context here is a revised provision on sick leave in which several changes were made from the previous collective agreement. The monthly entitlement was reduced from one day to one-half day. The maximum number of days of sick leave was reduced from 16 days to 6 days. At that same time a new provision for the payment of unused sick leave was introduced. As of the April 1, 1996 beginning of this new collective agreement, many employees had unused sick leave time.

What, then, did the parties intend when they agreed to payment for "any unused sick leave days"? The phrase is a general one and would appear to include all sick leave days including any days which an employee may have from an earlier year. Moreover, it seems to me likely that the parties would have intended to address both the sick days accumulated as of the April 1, 1996 beginning of the collective agreement and those new days which would accumulate under the new provision. If the parties had intended to simply start fresh and, in so doing, ignore any days which an employee had accumulated as of April 1, 1996, they would more likely have used other language to express that intention. If the parties had intended to make a break from the past and wipe out all accumulated unused sick time, I would expect that such a change would have been stated in clear words. Thus I think it likely that the parties intended to include *all* unused sick leave, including days which had

accumulated before this agreement, when they used the phrase “any unused sick leave days”.

While I think one interpretation is more likely than the other, I cannot say that the parties’ intention is clear. The language is capable of the interpretation advanced by the Employer, although I think that such an interpretation is less likely to have been the parties’ intention. Nevertheless, it is possible that the parties intended that the only sick leave days to be paid out were the sick leave days accumulated under the new one-half day per month system and that the previously accumulated days were to simply disappear. In view of this ambiguity, I consider the evidence of the negotiations to see whether that evidence assists in determining what the parties intended by this language.

This is a situation where the evidence of negotiating history is clear and consistent and helps to determine the parties' intention. No doubt that is because I had only the uncontested evidence of one witness, the Union’s chief negotiator.

What, then, does the evidence of the negotiations indicate? There were four key points:

1. The parties discussed this issue in the negotiations and they agreed that payment would be made for the previously accumulated sick days.
2. In their August 15, 1996 Memorandum of Agreement (incorporated in their August 26 memorandum), the parties set out the language to be included in the collective agreement as Article 16.02 a). However, in addition, they included the following sentence setting out what would happen to the accumulated time:

   > It is understood that all sick leave days accrued up to and including March 31, 1996 shall be paid out in full to all affected bargaining unit employees.

   Those days were included as part of the “any unused sick leave days”.
3. The parties (i.e. Ms Hills and Ms Obradovic) calculated how many days each employee had accumulated and they agreed on the precise value of the payment for

those days.

4. The parties (i.e. Ms Hills and Mr. Joksimovic) agreed that the Employer would have some time to pursue Diversicare (the owner when those days were earned) but agreed that the money was owed by the Employer and would be paid when Diversicare made a contribution or at the end of the collective agreement.

I note that in each instance the evidence is not simply what the Union was hoping to achieve but the evidence is the shared intention of the two parties. The parties agreed in negotiations that the Employer would pay for the days; the parties noted in their Memorandum of Agreement their understanding that the Employer would pay for the days; the parties calculated the exact amount of each payment; and, finally, the parties agreed to allow the Employer time to seek a contribution from Diversicare, something which only makes sense if the Employer was required to make payment for the days which had accumulated when Diversicare was the owner. Each point suggests the conclusion that the parties intended that the Employer would pay for the accumulated sick leave; the four points together leave me with no doubt as to what the parties intended.

I conclude that, in using the phrase "any unused sick leave days", the parties intended that the Employer would pay for both the unused sick leave days which had accumulated under the previous agreement and the unused time which accumulated under the new agreement.

I note that this result is the same as would be reached if one simply considered the August 15 Memorandum of Agreement; that Memorandum expresses this intention much more clearly than does the collective agreement. However, I wish to be clear that I have based my conclusions on the language the parties included in Article 16 of their collective agreement, not on the August 15 Memorandum of Agreement. I have simply used the four points listed above, one of which was the language which the parties included in their August

memorandum, to assist me in determining what the parties intended by the ambiguous words which they included in the collective agreement.

As an aside, I wish to direct a few words specifically to those employees who may read this award. Employees covered by this collective agreement may reasonably ask "Since the Memorandum of Agreement which we ratified is explicit on the requirement to pay for sick leave accumulated during the previous collective agreement, what is the problem?" This is an understandable concern and I will attempt to answer it.

The Memorandum of Agreement which the employees ratified did make clear what was to happen. It included the following: "It is understood that all sick leave days accrued up to and including March 31, 1996 shall be paid out in full to all affected bargaining unit employees." However that ratified Memorandum of Agreement was replaced by the signed collective agreement which does not include the above sentence. Once the parties signed the collective agreement, the Memorandum ceased to have any legal effect. The signed collective agreement replaced the Memorandum and thereafter only the collective agreement regulated the employment relationship. The Employer and the Union were then bound to follow the collective agreement, not the earlier Memorandum. The question to be determined was whether the printed collective agreement, as distinct from the Memorandum of Agreement ratified by the employees, required the payment for days accumulated under the old collective agreement. It is not permissable for an arbitrator to simply assume that the intent expressed in the Memorandum holds true for the collective agreement - the parties may have changed their intention as they clearly did with the date the payment was to be made, changing that date from December 31 to April 1.

Returning to the grievance, in addition to the unused sick leave days earned since the beginning of this collective agreement, the Employer is directed to pay for the sick leave

time which employees had accumulated as of April 1, 1996, less any days which may have been taken as sick leave or otherwise used or paid out. (It appeared, for example, that some sick days were taken in the period of the negotiations between April 1, 1996 and the signing of the new collective agreement September 10, 1996.)

The Union also sought an order for the payment of interest.

The remedy should make the aggrieved employees whole. Those employees have been deprived of the use of this money and the Employer has had the use of the money. Interest is a measure of the value of the use of money and I conclude that this is an appropriate case for the award of interest.

When should the payment of interest begin? About the time of ratification (September 1996) the Union agreed to allow the Employer to delay payment until either money was received from Diversicare or the end of the collective agreement, whichever came first. It would now be unfair to require the Employer to pay interest for the period the Union had agreed the Employer need not pay the money.

When, then, did the Union's consent to delay payment come to an end? While the evidence was not as clear as one might like, I conclude that the delay was an indulgence on the part of the Union, and that the indulgence came to an end by early September, 1998. By then the Union had asked for a date for payment and was about to grieve. The Union suggested that interest might begin as of the date of the grievance (September 3) and I accept that as an appropriate date. I order the Employer to pay interest on the unpaid amounts effective September 3, 1998.

The issues in this case were dealt with as matters of principle - I was not asked to determine

the precise amounts owing to each employee nor was I asked to calculate the amounts of interest. In summary, then,

1. I direct the Employer to pay for all the unused sick days, including those days accumulated as of the beginning of this collective agreement; and,
2. I direct the Employer to pay interest on the unpaid amount from September 3, 1998.

I leave it to the parties to calculate the precise amounts owing to the employees, including the appropriate amounts for interest, but I retain jurisdiction to deal with those two issues and any other issues which may arise in the implementation of this award.

Dated at London, Ontario this 10th day of November, 2000.

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Howard Snow, Arbitrator