IN THE MATTER OF AN ARBITRATION PURSUANT TO
THE *LABOUR RELATIONS CODE*, [RSBC] 1996 c.244

BETWEEN:

FORTISBC ENERGY INC. ("FORTISBC ENERGY") AND
FORTISBC CUSTOMER SERVICE CENTRE ("FORTISBC CSC")

(the "Employers")

AND:

MOVEUP – CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES'
UNION, LOCAL 378

(the "Union")

(Administration of Sick Leave Benefits
Policy Grievances 17-0777 and 17-0778)

ARBITRATOR:	Corinn Bell, Q.C.
COUNSEL:	Stephanie Gutierrez for the Employer Jessica L. Burke and Elisabeth A. Finney for the Union
WRITTEN SUBMISSIONS:	May 5, 31 and June 16, 2021, November 8, 2021, November 12, 2021, and November 25, 2021
AWARD:	December 22, 2021

I. INTRODUCTION

1. The Union filed two policy grievances under two Collective Agreements: the FortisBC Energy Collective Agreement (the "Gas Collective Agreement") and the FortisBC CSC Collective Agreement (the "CSC Collective Agreement") (together the "Collective Agreements").

2. In these Grievances, the Union takes issue with the Employers' requirement that employees return to their regular pre-disability hours of work before they are considered on "active duty" for the purposes of resetting entitlements to paid sick leave, arguing the practice is discriminatory. Specifically, the Union takes issue with the Employers interpretation of Article 10.08(a) of the Collective Agreements. That provision requires an employee to return to "active duty" for a period of one or three months (depending on whether the employee experiences a new disability or the recurrence of the same or related disability respectively) in order to qualify for sick leave benefits once an employee has exhausted their sick leave bank, and their disability has carried over into a new plan year.

3. The Employers' interpretation of the term "active duty" requires an employee's return to their full pre-disability hours of work before their entitlement to sick leave will be reset under Article 10.08(a) of the Collective Agreements. Employees on modified work hours (i.e., as part of a graduated return to work program) are not considered returned to "active duty" until they return to their pre-disability hours or have been permanently accommodated into a position with reduced hours, at which point the reduced hours will constitute "active service" for the purpose of determining sick leave eligibility. Employees who exhaust their sick leave bank and subsequently return to work on modified hours will not have the time worked on modified hours counted towards the prescribed one or three month period of "active duty" required to have their sick leave bank reinstated. The Union argues this interpretation leaves disabled employees who temporarily require modified hours without access to sick leave benefits.

4. The parties requested that I wait for decisions rendered by Arbitrators Saunders and Peltz as those decisions may impact my Award. I will address those decisions below.

5. As the facts in this case are not in dispute, the parties agree to have this matter heard by written submissions, which I note were thorough, well-organized and of great assistance in rendering this Award.

II. THE COLLECTIVE AGREEMENTS AND HUMAN RIGHTS CODE PROVISIONS

6. For the purposes of the Grievances, it is most significant that both Collective Agreements include the requirement that employees who have exhausted their sick leave bank must return to "active duty" for a period of one or three months before their sick leave bank entitlement will be reinstated, depending on whether there is a new disability or a recurrence of the same or related disability respectively.

7. Regular full-time and regular part-time employees are eligible for sick leave benefits. Article 10.02 provides for a sick leave bank per plan year of 26 weeks of sick leave benefits under the Gas Collective Agreement, and 15 weeks of sick leave benefits under the CSC Collective Agreement.

8. For reference, Article 10 of the Gas Collective Agreement states, in part:

> **ARTICLE 10 – PAID SICK LEAVE ALLOWANCES**
>
> 10.01 A regular employee becomes eligible for paid sick leave benefits after accumulating 3 months of service with the company.
>
> 10.02 Employees who are unable to work as a result of a disability caused by an off-the-job sickness or accident will be eligible to receive the following paid sick leave benefits:
>
> **a) Paid Sick Leave Allowance Per Plan Year**

Period of Service with the Company at Previous July 1	**Full Regular Earnings For**	**Followed By 70% of Regular Earnings For**
3 mos – 1 yr less 1 day	3 weeks	23 weeks
1 yr – 2 yrs less 1 day	5 weeks	21 weeks
2 yrs – 3 yrs less 1 day	7 weeks	19 weeks
3 yrs – 4 yrs less 1 day	10 weeks	16 weeks
4 yrs – 5 yrs less 1 day	13 weeks	13 weeks
5 yrs – 6 yrs less 1 day	15 weeks	11 weeks
6 yrs – 7 yrs less 1 day	17 weeks	9 weeks
7 yrs – 8 yrs less 1 day	19 weeks	7 weeks
8 yrs – 9 yrs less 1 day	21 weeks	5 weeks
9 yrs – 10 yrs less 1 day	24 weeks	2 weeks
10 yrs – and more	26 weeks	0 weeks

b) Employees who had less than 3 months service as at the previous July 1st, or who were not employed by the Company at the previous July 1st, will have their period of service determined as the period of time from the date their employment with the Company commenced until the date of their disability.

10.03 A plan year is defined as a 12 month period beginning on July 1st, and ending on June 30th.

10.04 a) For purposes of the Article "regular earnings" means the daily rate in effect at the date of disability, for the employee's normal job classification, as determined by dividing the employee's normal bi-weekly salary by ten.

[…]

10.06 Any unused days of paid sick leave allowance at full regular earnings cannot be carried over from one plan year to the next. If a disability continues into a new plan year, the amount of benefits at full regular earnings for that disability in the new plan year will be the balance of what is left from the previous plan year's full regular earnings entitlement.

10.07 Employees may utilize part of the paid sick leave allowance accruing to them under Article 10.02 in the event of injury or illness to a dependent child on the following conditions:

a) a maximum of one-half of annual full regular earnings allowance may be used for this purpose; but

b) no more than a total of 5 days may be used for this purpose in any plan year; and

c) use of this provision is limited to a maximum of 4 separate occurrences per plan year.

10.08 a) If an employee has received 26 weeks of paid sick leave benefits and returns to active duty, the employee will have their entitlement as at the previous July 1st, reinstated after 1 month's service in the case of a new disability, and after 3 months' service in the case of the same or a related disability.

[…]

10.13 b) The Company recognizes its duty to accommodate to the point of undue hardship, employees with medical disabilities. Where it is clear that an employee's absences are related to a recognized disability, the Company will endeavour to work with the employee, the employee's doctor and the Union, in order to accommodate the employee in preference to continually requesting medical certificates pursuant to Article 10.13(a) above. This process does not prejudice the employee, the Company or the Union from implementing other process that are legally available to them.

9. Article 10 of the CSC Collective Agreement states, in part:

ARTICLE 10 – PAID SICK LEAVE ALLOWANCES

10.01 A regular employee becomes eligible for paid sick leave benefits after accumulating three months of service with the Company.

10.02 Employees who are unable to work as a result of a disability caused by an off-the-job sickness or accident will be eligible to receive the following paid sick leave benefits:

a) Paid Sick Leave Allowance Per Plan Year

Period of Service with the Company at Previous July 1	**Full Regular Earnings For**	**Followed By 70% of Regular Earnings For**
3 mos – 1 yr less 1 day	1 week	14 weeks
1 yr – 2 yrs less 1 day	2 weeks	13 weeks
2 yrs – 3 yrs less 1 day	3 weeks	12 weeks

3 yrs – 4 yrs less 1 day	4 weeks	11 weeks
4 yrs – 5 yrs less 1 day	5 weeks	10 weeks
5 yrs – 6 yrs less 1 day	6 weeks	9 weeks
6 yrs – 7 yrs less 1 day	7 weeks	8 weeks
7 yrs – 8 yrs less 1 day	8 weeks	7 weeks
8 yrs – 9 yrs less 1 day	9 weeks	6 weeks
9 yrs – 10 yrs less 1 day	10 weeks	5 weeks
10 yrs – 11 yrs less 1 day	11 weeks	4 weeks
11 yrs – 12 yrs less 1 day	12 weeks	3 weeks
12 yrs – 13 yrs less 1 day	13 weeks	2 weeks
13 yrs – 14 yrs less 1 day	14 weeks	1 week
14 yrs or more	15 weeks	0

b) Employees who had less than three months service as at the previous July 1st, or who were not employed by the Company at the previous July 1st, will have their period of service determined as the period of time from the date their employment with the Company commenced until the date of their disability.

10.03 A plan year is defined as a 12-month period beginning on July 1st, and ending on June 30th.

10.04 For the purposes of the Article “regular earnings” means the daily rate in effect at the date of disability, for the employee’s normal job classification, as determined by dividing the employee’s normal b-weekly salary by ten.

[…]

10.06 Any unused days of paid sick leave allowance at full regular earnings cannot be carried over from one plan year to the next. If a disability continues into a new plan year, the amount of benefits at full regular earnings for that disability in the new plan year will be the balance of what is left from the previous plan year’s full regular earnings entitlement.

10.07 Employees may utilize part of the paid sick leave allowance accruing to them under Article 10.02 in the event of injury or illness to a dependent child on the following conditions:

a) a maximum of one-half of annual full regular earnings allowance may be used for this purpose; but

b) no more than a total of five days may be used for this purpose in any plan year; and

c) use of this provision is limited to a maximum of four separate occurrences per plan year; and

d) no more than two days may be taken for each occurrence.

10.08 a) If an employee has received 15 weeks of paid sick leave benefits and returns to active duty, the employee will have their entitlement as at the previous July 1st, reinstated after one month's service in the case of a new disability, and after three months' service in the case of the same or a related disability.

[…]

10.13 b) The Company recognizes its duty to accommodate to the point of undue hardship, employees with medical disabilities. Where it is clear than an employee's absences are related to a recognized disability, the Company will endeavour to work with the employee, the employee's doctor and the union, in order to accommodate the employee in preference to continually requesting medical certificates pursuant to clause 'a' above. This process does not prejudice the employee, the Company or the union from implementing other process that are legally available to them.

For reference, Article 21.04 of the Gas Collective Agreement is as follows:

21.04 LONG TERM DISABILITY

a) Eligibility is defined in the MoveUP benefits summary below.

b) Coverage for regular employees will be effective their date of hire or transfer. Employees are required to satisfy the 26 week qualifying period (short term disability) prior to receiving benefits under Long Term Disability.

[…]

10. For reference, Article 24.01 of the CSC Collective Agreement is as follows:

21.04 Long Term Disability

(a) The Company pays the full cost of the premium for a Long Term Disability Plan. The Plan provides a benefit to eligible employees at the rate of 70% of normal regular monthly earnings (to a maximum benefit of $4,000 per month) while sick or disabled. Benefits commence to eligible employees in the 16th week of continuous disability.

(b) Coverage for regular employees will be effective on the first day of the month immediately following 3 months of continuous service.

11. The parties referred to the following provisions of the British Columbia *Human Rights Code,* RSBC 1996, c. 210 (the "*Code*") in the course of their submissions.

> Discrimination in Employment
>
> 13(1) A person must not
>
> […]
>
> (b) discriminate against a person regarding employment or any term or condition of employment because of […] physical or mental disability. […]
>
> […]
>
> (3) Subsection (1) does not apply
>
> […]
>
> (b) as it relates to marital status, physical or mental disability, sex or age, to the operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan, whether or not the plan is the subject of a contract of insurance between an insurer and an employer.

III. DECISIONS OF ARBITRATORS SAUNDERS AND PELTZ AND SUPPLEMENTARY SUBMISSIONS

(i) Fortis Energy Inc. and FortisBC Inc. (Customer Service Centres) and MoveUp – Canadian Office Professional Employees' Union, Local 378 (Annual Vacation and Sick Leave Entitlement)

12. In *Fortis Energy Inc. and FortisBC Inc (Customer Service Centres) and MoveUp – Canadian Office Professional Employees' Union, Local 378 (Annual Vacation and Sick Leave Entitlement),* October 21, 2012 (unpublished) (the

"*Saunders Award*"), Arbitrator Saunders described the issue for determination as follows at paragraph 89 of the decision:

> The issue for determination is whether the parties mutually intended that service for part-time employees (including periods of part-time employment) be calculated based on a calendar period of employment, or the Employer's method of calculating an accredited service date.

13. The Union filed a submission on November 8, 2021 respecting the application of that decision to this matter. The Union pointed to paragraphs 96, 98, 100, 104, 119 of that decision respecting the issue of whether service following a return from sick leave was based on status or work. Specifically, the Union points to paragraph 96 of that decision which reads:

> I find that on the plain meaning of the preceding two articles, read together, and in conjunction with the entirety of the Collective Agreement it is vacation and sick leave entitlements that are prorated. It is only those "entitlements" that are subject to pro-ration based on time worked, not service which is defined by Article 4.06. Article 4.06 unambiguously dictates that service for purposes of the Collective Agreement "shall be established on the basis of employment with the Company." Reading these provisions in context and with the extrinsic evidence, I conclude that the disputed language does not admit ambiguity. I do not find that it is the parties' mutual intention that service as defined in Article 4.06 is to be prorated.

14. The Union also points to paragraph 118 of that decision which reads:

> I will briefly address the parties' submissions regarding *CustomerWorks*. One of the issues in dispute concerned the refresh of sick leave benefits under Article 10.08. I find the award turned on the meaning of "returns to active duty," not on the definition of service. Arbitrator Greatbatch offered her view of the meaning of service under Article 4.06. However, it appears the issue at hand—namely, the distinction between hours worked and time lapsed since the "date last employed" was neither argued nor specifically considered.

15. In its November 8, 2021 supplementary submission, the Union writes:

> You will recall that the provision in question requires a return to "active duty" and one or three months' "service". Arbitrator Saunders' finding is essentially that Arbitrator Greatbach's findings focussed on the meaning of "active duty" and any implications drawn from her comments regarding "service" would be *obiter.*

16. On November 21, 2021, the Employer provided a supplementary submission. In that submission, the Employer submitted that the issue in dispute before me was different than the issue in dispute before Arbitrator Saunders. In its supplementary submission, the Employer writes:

> As is evident from Arbitrator Saunders' decision, the matter before him related to the proportion of sick leave benefits to be paid at 100% vs. 70% of regular earnings for part-time employees, with the issue in dispute being whether service is calculated based on period of employment since the date last employed, or based on full-time hours such that it can be reduced proportionately for part-time work. He determined that service is based on period of employment. As the same time, he determined that the Union is estopped from enforcing that interpretation of service in light of its representations to the Employer's longstanding practice of calculating service based on time worked, until the conclusion of bargaining for the renewal of the parties' Collective Agreement in order to restore the Employer's lost opportunity to bargain different or clarifying language, and address consequential monetary impacts in the bargaining process. Arbitrator Saunders expressly distinguished service from the requirement to "return to active duty" which was interpreted in *CustomerWorks Inc.* and *OPEIU, Local 378 (Shokar), Re* (2003), 73 C.L.A.S. 288. The requirement to "return to active duty" prior to the reinstatement of sick leave benefits was not before Arbitrator Saunders.

(ii) Okanagan College and Okanagan College Faculty Association and the Attorney General of British Columbia (Mandatory Retirement Grievance

17. In *Okanagan College and Okanagan College Faculty Association and the Attorney General of British Columbia (Mandatory Retirement Grievance)*, November 8, 2021, (unpublished)(the "*Peltz Award*"), Arbitrator Peltz was

expected to issue a decision respecting the constitutionality of Article 13(3)(b) of the *Code*. That decision deals with whether the Collective Agreement requires benefits to be provided to employees who work past the age of 65. The issue of the constitutionality of the *Code* was bifurcated and a decision on that will be heard at a later date.

18. The Union takes the position that if I find that s.13(3)(b) of the *Code* is relevant to this matter, I ought to wait to hear the outcome of the constitutionality question before Arbitrator Peltz.

19. For reasons described below, I determine that I need not wait for that decision.

IV. BACKGROUND

(i) The Administration of Sick Leave Benefits

20. As set out in Article 10.03 of the Collective Agreements, a plan year is defined as "a 12-month period beginning on July 1st and ending on June 30th". Employees' sick leave banks are accordingly provided at the beginning of the plan year for employees to draw from throughout the plan year as needed. Once an employee exhausts their sick leave bank, it is not replenished until July 1st of the following year. In other words, there is no replenishment of the sick leave bank during the same plan year once the benefit has been exhausted.

21. Unused days of the sick leave benefits bank in one plan year cannot be carried over to the next plan year, except where a disability continues into a new plan year. In that scenario, the sick leave benefit entitlement in the new plan year for that disability is the balance of what is left from the previous year's sick leave bank. Once an employee exhausts their sick leave bank, they must return to work for the prescribed period of "active duty" before their sick leave bank is replenished. As noted, it is the Employer's exclusion of modified work hours from its calculation of "active duty" that is at issue in the Grievances.

(ii) The Interplay Between Sick Leave and LTD Benefits

22. An employee who has exhausted their sick leave bank and remains unable to work may apply for long-term disability (LTD) benefits. Whether or not the employee qualifies for LTD benefits depends, of course, on whether they meet the requisite eligibility thresholds as set out in the plan.

23. Under the Gas Collective Agreement, employees may choose one of four LTD coverage options. Depending on which LTD plan an employee chooses, the employee will be entitled to LTD benefits providing either 60% or 70% of their pre-disability earnings for the duration of their LTD claim. Pursuant to Article 21.04(b) of the Gas Collective Agreement, employees must complete a 26-week qualification period before applying for LTD benefits. However, to qualify for LTD under the CSC Collective Agreement, employees must complete a 15-week qualification period. CSC employees do not have a choice of LTD benefit plans, and all CSC employees in receipt of LTD benefits are entitled to 70% of their regular earnings for the duration of their LTD claim.

24. Under the Disability Management portion of the LTD plans, if an employee takes up rehabilitative employment as part of an approved Disability Management return to work program, the LTD benefit is reduced. An employee who returns to work on modified hours while in receipt of LTD is paid by the Employers for the hours of work they perform, and by the LTD carrier for any non-working hours in accordance with the terms of the specific LTD plan. This includes payment for any sick days the employee takes regardless of whether the sickness is related to the illness for which the LTD claim was approved.

25. There are both direct offset and indirect offset provisions under each of the LTD plan. These set out that an employee performing work for the Employers, but who is working less than their pre-disability hours, may earn up to 85% of their pre-disability income without incurring any corresponding offset to their LTD benefits.

(iii) The Historical Interpretation of "Active Duty"

26. The Employers' interpretation of "active duty" that requires an employee to return to their pre-disability hours of work is consistent with the Arbitrator Greatbach's conclusion in *Customerworks Inc. and OPEIU, supra* ("*Customerworks*"), a decision involving the parties' predecessors and consideration of almost identical language to that considered in the present case. In that case, Arbitrator Greatbatch concludes as follows at paragraph 108:

> [...] When looking at the purpose of the clause and its practical application, I am persuaded by the Employer's submission that the term "return to active duty" must be interpreted in conjunction with the remainder of the article, which requires the employee to have been back at work for a period of one to three months before their sick leave bank is reinstated. This requirement leads me to conclude that the intent of the authors of the language was that an employee must be not be disabled for three months by the condition that caused her to be off work in the first place, before the employee qualifies to have her sick leave entitlement for that plan year reinstated.

27. In *Customerworks, supra*, the Union alleged the employer had violated the Collective Agreement by not paying the grievor sick leave benefits for the portion of the working day that she was unable to work due to her disability, and its failure to reinstate the grievor's sick leave benefits. The Employer took the position that the Grievor did not requalify for sick leave benefits because she had not yet returned to her pre-disability hours. The Union argued the grievor was entitled to have her sick leave bank reinstated because she was engaged in "active duty" during most of the period by virtue of being at work, and that an employee is eligible for reinstatement of sick leave benefits while working in their position for any number of hours.

28. Finding the grievor was ineligible for reinstatement of her sick leave bank, Arbitrator Greatbatch found in *Customerworks, supra*, that "active duty...means that an employee who has used all 15 weeks of sick leave must return to their pre-illness position, including their regular hours of work, before they are

entitled to have their sick leave bank reinstated for the remainder of the plan year". The Employers have been applying this interpretation since at least the time of the *Customerworks, supra* decision.

V. POSITIONS OF THE PARTIES

(i) The Union

29. The Union argues that the requirement that employees who have exhausted their sick leave bank return to their regular hours prior to having their entitlement to sick leave benefits reinstated contravenes Section 13(1) of the *Code*, which prohibits discrimination on the basis of disability. The Union seeks a declaration that the Employers' practice contravenes the *Code* and compensation for any Union members affected by the Employers' impugned practice.

30. The extent to which the Employers' interpretation of "active duty" impacts an employee, the Union observes, depends on whether the employee is on an approved LTD claim or not. According to the Union, employees working modified hours while on an approved LTD claim are unable to use their sick bank to top up their earnings to 85% of their pre-disability income if they exhausted their sick leave benefits in the previous year. Employees working modified hours who are not in receipt of LTD benefits do not have access to paid sick leave until they return to their full hours of work or are permanently accommodated in a position with fewer hours, at which point they may start to accrue "active duty" for the purposes of determining eligibility for sick leave.

31. While the Union acknowledges the term "active duty" in the Collective Agreements was interpreted in *Customerworks, supra*, specifically as requiring a return to full hours in order to reinstate sick leave entitlement, it stresses the Union in that case did not argue this interpretation was discriminatory as is argued in the present case. The Union also submits that in the *Saunders Award, supra*, the finding was "essentially that Arbitrators Greatbach's findings focussed

on the meaning of "active duty" and any implications regarding "service" from that decision would be obiter."

32. The Union's position is that, when a human rights analysis is applied to the language, it is clear it has established a *prima facie* case of discrimination in respect of the Employers' practice of excluding employees on modified hours from accumulating service for the purpose of requalifying for sick leave benefits. In the Union's submission, the Employers have failed to discharge their requisite burden to prove that their conduct is justified.

33. The Union asserts it does not matter if sick leave benefits are status-based benefits (i.e. tied to a worker's status as an employee) or work-based benefits (i.e. tied to the work performed by the employee). Employees who return to work, performing at least 18.75 hours of work per week but less than their pre-disability hours of work, are both performing work for the Employer and maintaining their status as employees. As such, the Union argues these employees are entitled to the same treatment as all other employees.

34. The Union takes issue with the Employers' position that Section 13(3)(b) of the *Code* provides a full defense in this case. The Union says that it does not. In taking this position, the Union disputes that sick leave benefits are just a short-term disability provision that works hand-in-hand with the LTD plan. The Union does not agree that the parties negotiated sick leave benefits and LTD benefits as a "package" where elements within that package were "traded-off" against each other. The Union denies these two distinct benefits together form a "comprehensive disability scheme".

35. According to the Union, sick leave benefits have a much broader purpose than mere income replacement for short-term disabilities. In the Union's submission, sick leave benefits provide income replacement for any non work-related illness or injury that renders an employee unable to attend work. Further, the Union argues, while sick leave benefits may be exhausted by a single illness or disability that turns into a long-term disability, they may also provide income

replacement where an employee suffers from the flu, and recovers, then undergoes minor surgery, then recovers, then suffers from a migraine, and recovers, etc.

36. The Union accordingly submits that the Employer's vision of sick leave benefits as merging seamlessly into LTD benefits is too rigid a conception of illness and injury. In the alternative, the Union notes the constitutionality of Section 13(3)(b) of the *Code* is currently being challenged in a different proceeding and takes the position that, as such, any decision in this case ought to be postponed until a determination has been made about its constitutionality if that provision of the *Code* bears any relevance.

37. The Union further takes issue with the Employers' arguments attempting to justify its impugned conduct, noting that intention to discriminate is not relevant, nor are any other considerations at the *prima facie* stage of analysis.

38. The Union also disagrees that reinstatement of sick leave benefits is a work-based benefit. The Union notes there is no dispute that the amount of sick leave benefits which employees are entitled to is based on their length of service and that length of service means the time an employee has held the status of employee. It submits it would be inconsistent to find the reinstatement of these same benefits is based on work, arguing such a "piecemeal" approach is inconsistent with arbitral law. The Union further points to the definition of part-time employee in the Collective Agreement, as an employee who is normally scheduled for 18.75 hours of work, as a further indicator that sick leave benefits, for which part-time employees are eligible based on their status, are a status-based benefit. Regardless of whether sick leave benefits are status-based or work-based, the Union states, the Employer's interpretation of "active duty" is discriminatory.

39. The Union disputes the Employers' assertion that "the 26 or 15 weeks of sick leave bank are prorated for part-time employees pursuant to Article 19.02" when a part-time employee moves into a full-time position, noting there is an

outstanding grievance on this issue. The Union requests that, if this Arbitrator determines that the factual issue of whether the CSC Collective Agreement provides for the proration of sick leave entitlement for part-time employees is necessary for the determination of this grievance, this decision be deferred until after the release of an arbitration decision expected on this issue. The Union refutes the Employers' contention that Article 10.08 was a trade-off to the benefit in Article 10.06, and points to the absence of supporting extrinsic evidence.

40. Finally, the Union notes the absence of extrinsic evidence to support the Employers' claim that employees do receive a top up of LTD benefits with sick benefits. The Union states that no employee has raised the issue and as such, the Union is unaware how far back any alleged practice extends. In any event, the Union submits, any alleged practice was likely the effect of the discriminatory provision at issue. Furthermore, the Union contends that arbitrators have consistently held that employees are entitled to continue taking sick leave benefits after becoming eligible for LTD, and that there is "no hard and fast line between sick leave benefit entitlement and LTD entitlement".

41. The Union relies on the following authorities in support of its position: *Customerworks Inc. and OPEIU, Local 378* (Shokar), Re (2003), 73 CLAS 288 (Greatbatch); *Vancouver (City) v. Canadian Union of Public Employees, Local 15* (Vacation Prorating Grievance), [2018] B.C.C.A.A.A. No. 112 (McPhillips); *Burnaby (City) v. Canadian Union of Public Employees, Local 23* (Vacation Pro-Rating Grievance), [2015] B.C.C.A.A.A. No. 136 (Hall); *Battlefords and District Co-op v. Gibbs*, [1996] 3 S.C.R., 566 (SCC)(Lamer, C.J.); *CULE and PSAC (Urrutia), Re*, 2015 256 L.A.C. (4th) 377 (Lynk); *Nelson v. Bodwell High School*, [2016] B.C.H.R.T.D No. 75 (BCHRT)(McCreary); *Building Service Workers' Union, Local 220 v. Sarnia General Hospital*, (1972) 24 L.A.C. 181 (Shime); *Northern Electric Co. v. U.A.W., Local 1530*, (1974), 6 L.A.C. (2d) 181 (Johnston); *Sifto Canada Corp. v. C.E.P., Local 16-0*, (2010) 198 L.A.C. (4th) 325 (Surdykowski); *Brooks v. Canada Safeway Ltd.* [1989] 1 S.C.R. 1219(SCC)(Dickson, C.J.); *Rouge Valley Health System and ONA (Ng), Re,* (2014) 119 C.L.A.S. 87(Trachuk); *Health*

Sciences North and CUPE, Local 1623 (A), Re (2017), 130 C.L.A.S. 291 (Trachuk); *McCormick Home (Parkwood Hospital) and London and District Service Workers Union, Local 220, Re (1996)*, 45 C.L.A.S. 72 (Surdykowski); *Ottawa Hospital v. O.P.S.E.U., Local 464*, (2008) 93 C.L.A.S. 148 (Keller); *Ottawa Hospital v. O.P.S.E.U., Local 464*, (2009) 247 O.A.C. 201(Ont.Sup.Div.Crt.)(Hackland, J., Karakatsanis J., and Swinton J.); *London Health Sciences Centre and ONA (Johnson), Re*, (2018), 134 C.L.A.S. 150 (Hayes); *Perth and Smiths Falls District Hospital and CUPE, Local 2119 (*Short Term Sick Leave Benefits), Re (2017), 130 C.L.A.S. 239 (Petryshen); *Kingston (City) and CUPE, Local 109 (02-109-15), Re* (2016), 127 C.L.A.S. 39 (Surdykowski); *Pacific Press v. G.C.I.U., Local 25-C,* (1995), 41 C.L.A.S. 488 (Bird); *Fraser v. Canada (Attorney General)*, 2020 S.C.C. 28 (Wagner); *C.U.P.E., Local 2478 v. West Coast Huron Energy Inc.*, 2010, 103 C.L.A.S. 144 (Ont. Arb.)(Jesin); *Capital District Health Authority and PARI-MP* (Sapru), Re, 2012, CarswellNS 1059 (N.S. Arb.)(Ashley); *Cardinal Transportation B.C. Inc. v. C.U.P.E., Local 561*, 47 C.L.A.S. 344 (Devine); *Catalyst Paper v. C.E.P., Local 1123*, 111 C.L.A.S. 42 (Hall); *Palmer and Snyder, Collective Agreement Arbitration in Canada* (Bendel, et al.), 6th Ed., *Definition and Presumption* Against *Pyramiding*; *Barker v. Molson Coors Breweries*, 2019 BCHRT 192 (Cousineau); *Talos v. Grand Erie District School Board*, 2018 HRTO 680 (Grant); insurance. 2021. In Merriam-Webster Dictionary Merriam-Webster.com.; insurance. 2021. In Oxford Dictionary; *St. James Assiniboia Teachers' Assn. No. 2 v. St. James Assiniboia School Division No. 2,* 2001 M.B.Q.B. 300 (Sinclair); *Okanagan College v. Okanagan College Faculty Assn.* (Mandatory Retirement Grievance), [2018] B.C.C.A.A.A. No. 41 (Peltz); *Brown & Beatty* 2:3124, Canadian Labour Arbitration, 5th Edition, 2:3124 - Policy grievances; *British Columbia Emergency Health Services and Ambulance Paramedics of British Columbia (CUPE, Local 873)* (Scheduling and Payroll Software Switch), Re, [2013] B.C.W.L.D. 7976 (Dorsey); *Kevin Plaza Holdings Co. and HEU, Local 180*, Re 1979 CarswellBC 1765 (Smith); *Cornwall Community Police Services Board and CPA* (Pay in lieu of Benefits), Re 2016 CarswellOnt 3922 (Snow); *British Columbia Arbitration British Columbia Telephone Co. v. T.W.U.*, [1990] B.C.C.A.A.A. No. 406 (Coleman); *Fortis Energy*

Inc. and FortisBC Inc (Customer Service Centres) and MoveUp – Canadian Office Professional Employees' Union, Local 378 (Annual Vacation and Sick Leave Entitlement), October 21, 2021 (unpublished); *Okanagan College and Okanagan College Faculty Association and The Attorney General of British Columbia* (Mandatory Retirement Grievance) ("Okanagan College #1"), November 8, 2021(unpublished).

(ii) The Employers

42. The Employers take the position that the impugned practice is not discriminatory. Relying on the decision in *Customworks, supra*, the Employers argue that the term "active duty" has been interpreted since at least 2003 to mean a return to regular hours. Once an employee has recovered from the disability that rendered them unable to work and have returned to their regular work hours, the employee will have their full sick leave benefits bank reinstated following the one or three month prescribed period.

43. The Employers argue that, unlike the issue in the *Saunders Award, supra*, the issue before me is whether the requirement to return to active duty, which is the requirement to return to regular, pre-disability hours, is discriminatory.

44. The Employers assert that employees with disabilities impacting their ability to perform the full scope of their role, duties and hours are reasonably accommodated on a case-by-case basis. For instance, it submits, if an employee is working reduced hours not as part of a gradual return to work program while on LTD, but rather as a permanent accommodation and no longer covered under any LTD claim, those permanently reduced hours would be considered the employee's regular hours for the purposes of determining whether they are engaged in "active duty". The Employers state this is situation that has rarely, if ever, occurred.

45. The Employers submit sick leave benefits and LTD benefits are part of one "continuous scheme", serving "different but complimentary purposes". According

to the Employer, Article 10.08(a) must be interpreted within the context of Article 10, as well as the overall disability benefits scheme. When an employee has exhausted their sick leave bank and remains unable to work, they may apply for LTD benefits with the insurer.

46. In support of its position that sick leave benefits and LTD insurance are part of a continuous scheme, the Employers point to the fact that the elimination or qualification period under the applicable LTD insurance plans match the duration of the sick leave benefits bank: 15 weeks for CSC employees and 26 weeks for Gas employees. According to the Employers, there is a progression of coverage under the sick leave benefits plan to the LTD insurance plan at the 15 or 26 week mark. This is further confirmed, it submits, by the fact that Article 10.08(b) provides for a bridging benefit for disabled employees who have exhausted their paid sick leave benefits prior to the expiry of the 15 or 26 week elimination period for LTD.

47. The Employers assert that Section 13(3)(b) of the *Code*, which provides that subsection (1) does not apply to the operation of a *bona fide* group or employee insurance plan, provides "a complete defence to the Union's allegation of discrimination arising from the operation of the sick leave benefits plan." The Employers note there is no contention by the Union in this case that the sick leave benefits plan the parties have negotiated is not *bona fide*, nor is there any argument or evidence that the parties acted in bad faith with the motive of defeating any protected rights under the *Code.*

48. According to the Employers, the requirement to return to regular hours before reinstatement of sick leave benefits which have already been exhausted for that continuous disability, serves the purpose of the sick leave benefits plan. The Employers state that there is no intent for an employee covered under the terms of the applicable LTD plan to be simultaneously requalifying for sick leave benefits. Indeed, the Employers submit that reinstating sick leave benefits for the long-term portion of that disability is inconsistent with the purpose of the

sick leave benefits plan. In their view, a "continual cycle" of reinstatement of sick leave benefits is contrary to the purpose of the sick leave benefits plan and undermines the overall disability benefits insurance scheme negotiated by the parties.

49. The Employers contend that Article 10.08(a) represented a negotiated trade off to the benefit provided in Article 10.06, stressing that the parties negotiated the terms when the sick leave bank in that new plan year will be reinstated once the previous plan year's bank has been exhausted. According to the Employers, they have never "topped up" LTD benefits with sick leave benefits, and sick leave benefits and LTD benefits have never been provided concurrently. The Employers additionally note that sick leave benefits in this case are fully employer-funded, and that Article 10.15 recognizes the plan may be altered from time to time.

50. The Employers ask that the Grievances be dismissed and that the interpretation of "active duty" remain as decided by Arbitrator Greatbach in *Customerworks, supra*.

51. In support of its case, the Employers rely on the following authorities: *Canadian Union of Public Employees, Local 2669 v. Saskatoon Public Library Board*, 2017 CanLII 10839 (Denysiuk, Burkart and Den Hollander); *Hayes Forest Services Ltd. V. United Steelworkers, Local 1-85*, [2005] B.C.C.A.A.A. No. 216 (McPhillips); *Johnston v. Vancouver (City)*, 2015 BCHRT 90 (Trerise); *Langley (Township) v. CUPE, Local 403* (Proration of Vacation Pay), Re, 2018 CarswellBC 824, 135 C.L.A.S. 78 (Nichols); *O.N.A. v. Orillia Soldiers Memorial Hospital*, 1999 CarswellOnt 28, [1999] O.J. No. 44 (Dohery, Laskin and Rosenberg) JJ.A.); *Provincial Health Services Authority v. British Columbia Government and Service Employees' Union*, 2015 CanLII 72325 (Nichols); *Saskatchewan Telecommunications v. UNIFOR, LOCALS 1-S* (E.S.L. Top-up and Requalification), Re, 2018 CarswellSask 656, 141 C.L.A.S. 5 (Ish); *SEIU, Locals 299 & 333 v. Extendicare (Canada) Inc.*, 2002 CarswellSask 951 C.L.A.S. 152 (Norman);

C.L.A.S. 152; *St. Clair Technologies Inc. v. U.A.W., Local 251*, 2002 CarswellOnt 5463, [2002] O.L.A.A. No. 854 (Williamson); *Wallace v. Westcan Industries and another*, 2018 BCHRT 209 (Cousineau); *Human Rights Code*, RSBC 1996, c 210, s. 13; *Human Rights Code*, RSO 1990, c H-19, ss. 5, 22, 25*Fortis Energy Inc. and FortisBC Inc (Customer Service Centres) and MoveUp – Canadian Office Professional Employees' Union, Local 378* (Annual Vacation and Sick Leave Entitlement), October 21, 2021 (unpublished).

VI. DECISION

(i) Is the Employer's Impugned Practice Discriminatory?

52. The starting point to assess the merits of the Grievances is to determine whether the Employers' interpretation of the term "active duty", requiring a return to full pre-disability hours, is *prima facie* discriminatory against employees with disabilities.

53. Differential treatment alone is not sufficient to establish discrimination. In a situation where eligibility for a benefit is based on the amount of work performed by an employee, for example, rather than tied to an employee's length of service or employee status, it would not be discriminatory to deny an employee unable to work due to disability that benefit because they are not actively at work. For example, in *O.N.A.*, *supra*, an employer's practice of distinguishing between employees actively at work and those not actively at work was held not to constitute prohibited discrimination because the exclusion of certain employees was in accordance with the purpose of the benefit.

54. Conversely, in cases where the exclusion and purpose of the benefit are not aligned, and the exclusion is based on a prohibited ground, the exclusion will be found to be discriminatory. For instance, an employer's policy prorating vacations for parental leaves was found to violate the collective agreement in *Federated Cooperatives Ltd. and Miscellaneous Employees Teamsters Local Union 987* (2004), 130 LAC (4th) 185 (Ponak), because vacation with pay in that

collective agreement was based on years of continuous service, and the employer's proration of entitlement for employees on parental leave was therefore inconsistent with the purpose of the status based benefit.

55. Whether or not differential treatment constitutes discrimination was held to depend on whether the differential treatment is consistent with the purpose of the benefit. In *CULE and PSAC (Urrutia), supra*, Arbitrator Lynk set out an instructive set of principles to apply when determining whether the denial of benefits to an employee claiming protection on a human rights ground is discriminatory. At paragraph 51, he wrote:

> i. The three step *Meiorin* test is the usual analytical starting point.
>
> ii. When assessing whether a particular form of compensation, whether wages or benefits, is consistent with human rights obligations, the purpose of the compensation item must be determined.
>
> iii. If the purpose of the compensation item is to provide an equitable exchange for an active work status, then tying the availability of the compensation item to maintaining that status is consistent with human rights. Employer payments for benefit insurance premiums would be an example of this.
>
> iv. If, however, the purpose of the compensation item is linked to an employee's general employment status, then the availability of the compensation item is to be extended to any employee, whether on active work status or not, as long as he or she maintains the employment status. Seniority accumulation is an example of this.
>
> v. On its face, discrimination would exist if the employer provided different levels of compensation for work because of disability or another human rights protected ground. Likewise, it would constitute discrimination if the employer provided different levels of compensation for not working because of disability or another human rights protected ground.
>
> vi. If the purpose of the compensation was the same, but the compensation differed as to the type of disability or other

protected human rights ground, or differed for a reason that was not tied to the purpose where a human rights ground was involved, then discrimination may well exist.

vii. Caution should be employed in the use of comparator group analysis. Experience has shown that the analysis can be applied in a mechanical and rigid fashion that belies the objective of human rights. The real question to ask in a human rights case is whether the law, rule or collective agreement provision disadvantages the employee, or perpetuates a stigmatized view of him or her.

56. As is clear from the above, determining the purpose of a benefit is integral to determine whether excluding certain employees on the basis of characteristics protected under the *Code* from access to a benefit, is a discriminatory practice.

57. The Supreme Court of Canada held that the inquiry into the purpose of a benefit in this context must be "purposive" and "consonant with the goals of human rights legislation". In the *Gibbs, supra* case, the Supreme Court considered whether it was discriminatory to place a restriction on the insurance benefits payable to individuals suffering mental health disabilities but not individuals suffering physical disabilities. In upholding the Court of Appeal's judgment that the restriction for those with mental health disabilities was discriminatory, the Supreme Court found the purpose of the insurance benefit at issue was to insure employees against the income-related consequences of becoming disabled and thus unable to work. In determining that the clause limiting the benefits extended to mentally disabled employees was discriminatory against the mentally disabled, the Court compared their income replacement benefits with those receiving disability benefits generally.

58. Given that the disability insurance was designed for the same purpose regardless of whether an individually is physically or mentally disabled, and that the benefits were only limited if an employee had a mental disability, the Supreme Court found that the benefit had been limited "because of" disability and was therefore discriminatory.

59. The Supreme Court in *Gibbs, supra* made clear that it is not necessary to a finding of discrimination that all persons bearing the relevant characteristic have been discriminated against. Indeed, discrimination against a subset of the relevant group, in that case the mentally disabled, may be considered discrimination against the relevant group generally for the purposes of human rights legislation.

60. This purposive approach was applied by the BC Human Rights Tribunal (the "Tribunal") in the more recent case *Nelson, supra*. In that case, the complainant challenged the employer's Child Benefit Scheme which paid $1,200 per dependent child annually to each of its full-time employees with more than one year of service. The Complainant in that case argued that he was not eligible for the benefit solely because he did not have any children and that this constituted discrimination on the basis of his family status contrary to s. 13 of the *Code*.

61. In finding the employer's practice not discriminatory, the Tribunal confirmed the starting point for analysis is to determine the benefit's purpose, summarizing the appropriate approach at paragraph 41, as follows:

> There are cases that address the circumstance where an employer provides benefits to some employees but not others. In such cases, in order to determine whether there has been discrimination, the decision makers reviewed the following:
>
> a) the purpose of the benefit; and
>
> b) whether the exclusion of certain employees is in accordance with that purpose. If not, and the exclusion is based on a prohibited ground, then the exclusion is discriminatory.

62. In that case, the Tribunal had no difficulty determining that the purpose of the benefit at issue was to assist employees with the high costs associated with raising children. The exclusion of individuals without children, therefore, was found to be consistent with the purpose of the benefit. At paragraph 54, the

Tribunal observed that "[w]here the exclusions are not explained or justified completely by the benefit's purpose, then they will be discriminatory so long as the distinction between groups of workers is made based on their protected characteristics".

63. Similarly, excluding non-biological parents from maternity benefits was held not to be discriminatory in *BCGEU v. BC* (2002), 216 DLR (4th) 322 (BCCA), a case cited with approval at paragraph 49 of *Nelson v. Bodwell High School, supra,* because those benefits are targeted to "the health and well being of pregnant women and new biological mothers" at not simply new parents. The denial of benefits to those who had not given birth, was therefore not discriminatory, since the denial was consistent with the purpose of the benefit.

(ii) The Purpose of Sick Leave under the Collective Agreements

64. Turning now to the benefit at issue in this case, I find that the purpose of sick leave benefits is to compensate employees who are absent from work on a short-term basis due to illness and non-work related injuries. Under the terms of the Collective Agreements, all regular full-time and part-time employees, who work for a prescribed period, qualify for these benefits.

65. I note that Article 10 contains numerous references to length of service as the basis for employee entitlement to paid sick leave. Article 10.01, for example, requires that regular employees have accumulated "three months of service" to qualify for sick leave benefits. Article 10.02 sets out the amount of sick leave to which employees are entitled, providing different levels of entitlement to employees based on their "period of service." Article 10.08, the provision at issue in the present dispute, also refers to months of service, stipulating that employees who return to active duty will have their sick leave benefits "reinstated after one month's service in the case of a new disability, and after three months' service in the case of the same or a related disability."

66. Under the Employers' interpretation of "active duty", employees who exhaust their sick leave benefits and who return to work on modified hours do not have access to their sick leave bank should they catch the flu or come down with a migraine. All other regular and part-time employees who are working do have access to this benefit. The reason these working employees are not entitled to the same sick leave that all other regular and part-time working employees are entitled to is because they are disabled and working modified hours. In my view, measuring the exclusion of employees working modified hours from requalification for sick leave benefits disregards the purpose of the benefit. As such, I conclude that the Employers' practice is *prima facie* discriminatory.

67. This is not a case where a distinction is being made between employees actively at work and those who are not, such as was the case in *Wallace, supra*. In that case, the employer terminated the employee's extended health and dental benefits and stopped paying his MSP premiums because he was not actively at work for a period of six years and thus no longer met the eligibility requirement that he be actively at work. While his absence from work was due to disability, the benefits at issue were found to be tied to status as an active employee. Thus, the employee was in the same position as other former employees whose benefits had been terminated.

68. The distinction in this case is between employees who are at work and who are able to work their full regular hours, and employees at work who are disabled and thus unable to work their full regular hours. For the first group, the number of hours is not relevant for the purpose of determining whether they requalify for sick leave benefits after these benefits have been exhausted. So long as they are a regular part-time or full-time employee, and have worked for the prescribed period of service, those employees will have their sick leave entitlement replenished in the next plan year.

69. In contrast, employees in the second group do not automatically requalify for sick leave benefits based on their employee status and length of service like

employees in the first group. Employees in this second group—all of whom are disabled—must work a set number of hours during the prescribed period of active duty in order to qualify for the same benefit that other employees are eligible for based solely on their status and active service generally.

70. On its face, this practice treats employees who require modified hours differently than employees who do not require modified hours. It is my view this distinction clearly treats employees differently on the basis of a protected characteristic under the *Code.* A regular part-time employee, for instance, can work fewer hours under the Employers' interpretation yet still qualify for sick leave benefits when a disabled employee working modified hours cannot.

71. Further, such a practice is not consistent with the purpose of the benefit, which is to provide paid sick leave to active employees who may fall ill and require time off work. In my view, to exclude disabled employees on modified hours from the ability to requalify for sick leave benefits, on the basis that they are not working a certain number of hours, is not justified by the benefit's purpose. In fact, the practice appears to undermine the benefit's purpose.

72. As such, I find that the Employer's impugned practice is *prima facie* discriminatory.

(iii) Other Cases Considering Similar Practices

73. The Employers rely on several cases that have upheld an employer's practice of requiring that employees who exhaust their sick leave bank return to their regular pre-disability hours before they requalify for sick leave benefits. One such case is *Saskatchewan Telecommunications, supra*, where the arbitrator explicitly contemplated whether an employer's practice of requiring employees to return to their full pre-disability hours before requalifying for sick leave benefits was discriminatory. In that case, the arbitrator concluded that it was not.

74. However, in my view, *Saskatchewan Telecommunications, supra*, is distinguishable on the basis of the different collective agreement language considered. In *Saskatchewan Telecommunications, supra,* the language specifically referred to the requalifying period involving a "new disability" or a "recurrence of the previous disability". Notably, the language at issue in the present case makes no reference to "recurrence". Further, in the *Saskatchewan Telecommunications, supra,* case, the language expressly stated that paid sick leave benefits shall terminate when disability ceases and "in no case shall extend beyond the periods designated in Clauses 6 and 7".

75. Given that language, the arbitrator in *Saskatchewan Telecommunications, supra,* found the parties did not contemplate a restart of sick leave benefits after an employee has received maximum sickness disability benefits for the same continuing illness or disability. The arbitrator noted the reference to a "new disability" or "a recurrence of the previous disability" as the basis for requalification meant that the existing sickness, illness or disability must have ended before requalification entitlement could begin again.

76. Bolstering the arbitrator's conclusion in *Saskatchewan Telecommunications, supra*, is the fact that the collective agreement language at issue in that case expressly contemplated the employer and union could agree to waive the period required for reinstatement of sick leave benefits in the event of an enduring "chronic illness". In my view, this reference strongly supports that, absent an agreement amongst the parties, chronic illness would not trigger requalification.

77. This can be contrasted with the language considered in these Grievances, which does not contain a similar reference to "recurrence" of the previous disability, nor an express reference to benefits terminating when the "disability ceases". Rather, the language here refers to a new disability or "the same or a related disability" in reference to the prescribed period of "active duty" necessary to requalify for sick leave benefits.

78. There is no similar express requirement in Article 10 or elsewhere in the Collective Agreements that employees must recover from their disability before they will requalify for sick leave benefits. To counter any assertion that full recovery is implicitly required before employees will requalify for sick leave benefits in the present case is the fact that employees who require accommodations that do not involve a reduction in working hours are considered to be engaged in "active duty" for the purposes of replenishing their sick leave bank.

79. The Employers also rely heavily on *Customerworks, supra*, which contained essentially identical language considered in the present case, as the collective agreement in that case was actually the template upon which the present Collective Agreements were predicated. However, a review of the decision makes clear the arbitrator did not consider whether excluding employees working modified hours from requalifying for sick leave benefits was discriminatory under the *Code*. Given the absence of any human rights analysis in that case, I cannot rely in this case on the arbitrator's conclusion at paragraph 108 of that decision.

80. Rather, I find the reasoning in *Rouge Valley, supra*, more persuasive. In that case the arbitrator found it was discriminatory to deny employees the ability to reinstate their sick leave bank where an employee had returned to their pre-disability hours of work but was performing modified work. At paragraph 48, Arbitrator Trachuk wrote:

> The analysis applied by the court is equally applicable to this case. "The purpose of the re-qualification provision is allow a worker who has accessed the short term disability benefits previously, and has returned to work, to take advantage of the short term disability benefits again in the event of a new short term disability." The denial of any opportunity to re-qualify for sick pay benefits for those who return to modified duties and who experience another illness is inconsistent with the purpose of the plan. The provision discriminates against a nurse who has returned to full-time hours but modified duties because that nurse is unable to access a further

> period of sick pay benefits if she suffers from another short term disability.

81. A similar conclusion was reached in *Health Sciences North, supra*, a case involving a disability plan that required nurses to be “actively at work” in order for sick leave benefits to be reinstated. Under the terms of the plan, as in the present case, employees performing modified duties and/or modified hours were not considered to be “actively at work”. As a result, such employees were not able to reinstate their entitlement to sick leave benefits until they were able to perform unmodified duties and hours in their own position.

82. The arbitrator in that case found at paragraphs 51 and 56 that denying employees performing modified duties and/or modified hours of work the ability to re-instate their sick bank was discriminatory:

> […]
>
> The C*ode* prohibits discrimination on the basis of disability. Disabled employees are, therefore, a protected group under the *Code*. The nurses in issue in these grievances require modified duties because they are disabled. Disabled nurses on modified duties are subject to adverse treatment under 1992 HOODIP because their sick pay benefits are not reinstated. The adverse treatment is directly related to the nurses' disabilities and those disabilities are, therefore, a factor in the adverse treatment. The nurses' disabilities require them to be accommodated and, since they are being accommodated, they are not entitled to the same right to sick pay benefits that other full-time employees have. The plan itself is clear about that because it defines nurses on modified duties as being not "actively at work". Any nurse not "actively at work" is subject to the adverse treatment with respect to the reinstatement of sick pay benefits. The Association has, therefore, made out a *prima facie* case of a violation of Section 5 of the *Code*.
>
> […]
>
> Whether or not a disabled employee returns to work on modified duties in an attempt at an early return to work or requires permanent accommodation is irrelevant to the underlying fact that the employee is working. An employee who is working is not totally disabled even if HOODIP says that they are. They are "actively at work" even if HOODIP says that they are not. An employee who

> comes back from sick leave and does not require modified duties re-establishes their entitlement to short term sick leave benefits in three weeks. An employee who returns on modified duties does not. That is *prima facie* discrimination. It is discriminatory because that person is working but is being treated differently because their disability requires modifications for them to work. It does not matter if the modifications are temporary, or are part of the GRTW, or if the Hospital is going beyond what the *Code* requires and bringing back employees as "extras". The Hospital is requiring employees to come to work, to contribute, to follow its rules and directions. Employees on modified duties are entitled to be treated like other employees for the purposes of sick leave benefit requalification [...].

83. I find the facts in *Health Sciences North, supra*, are substantially the same as the fact scenario under consideration in the present case. Both involve employees returning to work on modified hours after a period of disability and are unable to achieve reinstatement of their sick bank because the employers do not consider such employees on “active duty”.

84. As in *Health Sciences North, supra*, the reason the employers are treating such employees differently is because of their disability, which requires that they work modified duties rather than full duties. Therefore, the reason for the differential treatment is the employee’s disability, which is a prohibited ground under the *Code*.

(iv) Is the Differential Treatment Justified?

85. It is well-settled that once a *prima facie* case of discrimination has been established, the burden shifts to the Employer to justify the conduct.

86. In this case, the Employers argued that sick leave and LTD benefits together are part of a “continuous scheme” therefore arguing that the exemption for a *bona fide* insurance scheme in Section 13(3)b) of the *Code* applies. For the reasons that follow, I do not accept that Section 13(3)(b) applies to exempt this discriminatory practice in respect of the administration of sick leave benefits.

87. I respectfully reject the notion put forward by the Employers that, in these circumstances, sick leave and LTD benefits together form part of a "*bona fide* insurance scheme". Rather, I find these two benefits, while both providing income replacement for illness or non-work-related injuries, are two distinct schemes serving two different purposes.

88. As the Union points out, paid sick leave is available to be used for a variety of ailments that may, or may not, meet the threshold for long-term disability benefits. It is possible for employees to exhaust their sick leave benefits after suffering a variety of ailments but not meet the threshold requirement for LTD benefits. Sick leave benefits are administered by the Employers under the terms and conditions negotiated by the parties in the Collective Agreements.

89. LTD benefits, on the other hand, are insurance benefits intended to provide income replacement to employees in cases of long-term injuries or illnesses. These benefits are provided by a third-party provider pursuant to a contract outside the Collective Agreements. Employees who exhaust their sick leave benefits are not automatically entitled to LTD benefits.

90. Given the differences between the purposes and administration of these two benefits, I am not prepared to uphold this otherwise discriminatory practice on the basis that it is allowable under a *bona fide* insurance scheme. Nor has the Employer advanced any other justification for its practice that meet its onus to justify its discriminatory conduct.

91. Having found section 13(3)(b) of the *Code* not applicable to this case, there is no need to reflect on the constitutionality of this provision nor to postpone the issuance of this Award as alternatively sought by the Union. I accordingly allow the Grievances and declare the Employer's interpretation of "active duty", as requiring a return to normal pre-disability hours, contravenes the *Code*.

92. The Union has requested that the affected employees be made whole in its submission. The Employers did not address remedy in its submission. I submit

this Award back to the parties for discussion and resolution respecting remedy. I remain seized, in the even that the parties require further assistance in implementing the Award.

Dated at the City of Kamloops, BC this 22nd day of December 2021.

CORINN M. BELL, Q.C.

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