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Are Employees Entitled to Sick Pay When Self-Isolating? Arbitration Award Provides Guidance

By Shreya Patel

In a recent Arbitration Award, Arbitrator Jesin addressed the issue of whether and when employees who are required to isolate because of possible exposure to COVID-19, are entitled to sick pay or wages during their self-isolation period.

In *Ontario Nurses' Association (the "Union") and Humber River Hospital (the "Employer")*, Arbitrator Jesin was required to interpret the collective agreement between the Union and the Employer or any applicable legislation, so as to determine a claim for employee entitlement to compensation in the following two situations:

1. Employees who are symptomatic or test positive for COVID-19; and
2. Employees who are asymptomatic, do not test positive for COVID-19, are absent from work and are self-isolating due to travel, exposure inside or outside of workplace to COVID-19, or isolating pursuant to a directive or to guidance issued by public health or, pursuant to a directive from the employer to remain off work.

The sick pay provision in the collective agreement between the Employer and the Union required the Employer to provide a short-term sick leave plan for full-time employees. Employees hired prior to January 1, 2006, were eligible for sick pay "if they were absent from work due to total disability, excluding compensable accidents". Total disability was defined as "an inability to perform one's own duties due to injury or illness". Employees hired after January 1, 2006, were entitled to benefits if they were totally disabled as a result of illness or injury, excluding compensable benefits.

With respect to the first situation, the Employer conceded that an employee who tests positive for COVID-19, or presents symptoms and is absent due to illness, is entitled to sick pay during their time off.

With respect to the second situation, the Employer's position was that an employee who isolates as a result of exposure to someone with COVID-19, or as a result of travel but does not test positive or, who

presents symptoms of COVID-19, cannot be considered as absent due to “illness”, and therefore the employee was not eligible for sick pay. Conversely, the Union’s position was that all employees required to isolate should be paid sick pay during their isolation regardless of whether they test positive or are asymptomatic but have to isolate due to travel, exposure to COVID-19 or to a directive issued by public health.

Arbitrator Jesin agreed with the Employer’s position. Specifically, relying on previous arbitration awards, Arbitrator Jesin affirmed that sick pay is only available to employees who are ill. Circumstances requiring employees to self-isolate does not in and of itself make an employee “ill”. Accordingly, it was held that employees who are asymptomatic, do not test positive for COVID-19, and have to self-isolate due to travel or exposure to COVID-19, were not entitled to sick pay during their isolation period under the collective agreement.

Arbitrator Jesin also clarified that under the collective agreement between these parties, employees who are required to self-isolate and then test positive for COVID-19 during their isolation period are entitled to sick pay from the date of the required isolation and not from the date of the positive test. Arbitrator Jesin recognized that while under the *Workplace Safety and Insurance Act*, compensation was paid to employees testing positive from the date of notification of a positive test result and not from the date of isolation, in the case before him, a different result was warranted due to the language in the collective agreement.

Lastly, recognizing that employees may be required to self isolate under guidelines or directives issued by the government, Arbitrator Jesin held that employees who are not entitled to sick pay under the collective agreement are also not entitled to wages during self-isolation that is in compliance with COVID-19 guidelines issued by the government or by public health officials.

While the outcome in the case before Arbitrator Jesin was predicated on the collective agreement language that was negotiated between the Union and the Employer, the principles and reasons that are articulated in this decision are of importance, as they assist employers navigate through some critical decision making that is related to compensating employees during a period of self-isolation.

Should you have any questions and require assistance navigating your sick pay policies, kindly contact a member of our Labour and Employment Group.

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