5-15-2001

Re District Health Authority #8 and NSNU

Innis Christie

Re District Health Authority #8 and Nova Scotia Nurses' Union

[Indexed as: District Health Authority #8 and N.S.N.U. (Re)]

Nova Scotia
I. Christie

Heard: March 23, 2001
Decision rendered: May 15, 2001

UNION GRIEVANCE concerning reduction of sick leave credits. Grievance allowed.

L. MacMillan and others, for the union.
J.A. Greer and others, for the employer.

AWARD

Union grievance dated June 27, 2000, alleging breach of Article 9.02(d) of the Collective Agreement between the Employer and the Union effective November 1, 1997 - October 31, 2000, in that after employees go on extended sick leave the Employer continues to reduce the sick leave credits in their sick leave banks by 100 per cent instead of 75 per cent for each hour they would otherwise have worked. The Union requested an order that sick leave credits reduced contrary to the Collective Agreement be restored to each employee's sick leave bank.

At the outset of the hearing in this matter the parties agreed that I am properly seized of it and that I should remain seized to deal with any issues arising from the application of this award. Specifically, the parties agreed I should remain seized to deal with any issues of individual entitlement upon which they were unable to agree, were I to allow the Grievance. The Union stated that it would not seek reimbursement if any recalculation as a result of this Award meant that an employee had in fact exhausted his or her sick leave bank earlier than had been determined by the Employer.

The issue here is whether, as the Union claims in its Grievance, the Employer breached the Collective Agreement by continuing to reduce employees' sick leave credits in their sick leave banks by 100 per cent after they had been on sick leave for more than 10 consecutive shifts and were therefore on extended sick leave. At the hearing before me the Union relied on the words of the Collective Agreement and, in the alternative, argued that the Employer was estopped by representations it had made during the bargaining of the Collective Agreement from giving the Articles in issue an interpretation other than that urged by the Union. In the further alternative the Union argued that, if the relevant words of the Collective Agreement are held to be ambiguous, either inherently or based on the alleged fact that the same words in other Collective Agreements are applied differently by other District Health Authorities, the evidence of negotiation history relevant to the alleged estoppel also

demonstrates that the parties intended that those words be given the interpretation put forward by the Union.

The Grievance before me is as follows:

DETAILS OF GRIEVANCE

Effective on day 11 of a nurse's absence from work due to an illness (11 consecutive scheduled shifts), salary is reduced to 75%, but the sick time removed from the sick time bank is 100%.

CORRECTIVE ACTION REQUESTED

Sick leave credits should be reduced in direct relationship to the hours paid while on short term and/or extended sick leave, ⑧ [*sic*] when reduced to 75% pay only 75% of the reduction should be removed from sick bank. Retroactivity of sick time removed when it reduced rate of pay back to sick bank.

Article 9.02(d) of the Collective Agreement provides:

Sick Leave Credit Reduction

9.02(d) Sick leave credits shall be reduced in direct relationship to hours paid while on short-term and/or extended leave.

This must be read in the context of the other provisions in the Collective Agreement with respect to sick leave, most importantly clauses 9.02(a) and (b), particularly the words of clause 9.02(b) which I have italicized below, and 9.03, which provide:

Sick Leave Benefits

9.02(a) Sick leave is an indemnity benefit and not an acquired right. A nurse who is absent from a scheduled shift on approved sick leave shall only be entitled to sick leave pay if the Nurse is not otherwise receiving pay for that day, and providing the Nurse has sufficient sick leave credits.

Sick Leave Pay

9.02(b) Sick leave pay for occasional short term sick leave shall be at 100% of the Nurse's regular rate for the shift. *Sick leave pay for extended sick leave shall be at 75% of the Nurse's regular rate for the shift.* Extended sick leave will be an absence in excess of 10 consecutive scheduled shifts. Effective on the eleventh (11th) shift of absence *the Nurse shall be reduced to 75% of the Nurse's previous gross earnings for the shift.* This provision is not applicable to absences due to illnesses or injury for which Workers Compensation Benefits are payable.

Essentially, the Employer has interpreted the words in clause 9.02(b), "shall be reduced to 75% of the Nurse's previous gross earnings for the shift", as meaning that an employee on extended sick leave is paid sick leave for the same 11.25 hours that the employee worked before becoming ill, but at 75 per cent of the rate. Counsel for the Employer emphasized the words "Sick leave *pay* for

expended sick leave *shall be at 75% of the Nurses regular rate* for the shift". The "rate", he submitted, is the relevant hourly rate set out in Appendix "A" to the Collective Agreement. Thus on the Employer's interpretation, because clause 9.02(d) provides that "Sick leave credits shall be reduced in direct relationship to *hours* paid" (emphasis added), it calls for the employee's sick leave bank to be reduced by 11.25 hours for each regular 11.25 hour shift. The Employer submits that this is the clear and unambiguous meaning of the words in issue.

The Union, on the other hand, has interpreted the same words, and the words of the penultimate sentence in clause 9.02(b), "shall be reduced to 75% of the Nurse's previous *gross earnings for the shift*", as meaning that an employee on extended sick leave is to be paid sick leave for 75 per cent of the hours that employee worked before becoming ill. Thus clause 9.02(d), on the Union's interpretation, calls for the employee's sick leave bank to be reduced by (11.25 x .75) or 8.44 hours.

With respect to sick leave accrual, Article 9.03 provides:

Sick Leave Accrual

9.03 Paid sick leave credits shall accumulate at the rate of 11.5 hours for each one hundred and sixty-three (163) regular hours paid. Accrual is effective the first day of employment. The maximum amount of accumulated sick leave credits shall be eleven hundred and twenty-five (1125) hours.

It is apparently undisputed that employees under this Collective Agreement accumulate further sick leave credits while receiving sick pay. Thus, in the Union's submission, whether the Employer draws down 11.25 hours for each shift of paid sick leave, as the Employer submits it should, or 8.44 hours, as the Union submits it should, 11.25 hours has to be added to the amount that, when it totals 163, creates in that employee an entitlement to an additional 11.5 hours of sick leave. Counsel for the Employer agreed that this is how accrual works under the Employer's interpretation of how the sick leave bank is accrued. However, the Employer is of the view that it is illogical for sick leave credits to accrue at the rate of 11.25 hours per shift while an employee is on extended sick leave but for them to be drawn down at a rate of only 8.44 hours per shift.

The same issue with respect to accrual arises under clause 10.00(a) in connection with the accrual of vacation credits and under clauses

10.09 and 10.12 in connection with the accrual of holiday entitlements or credits. Clauses 10.00 and 10.00(a) provide:

Annual Vacation Accumulation

10.00 Each year of service for the application of this Article shall be a period of twelve (12) months effective on the Nurse's date of hire. Vacation credits shall accumulate to the Nurse on the following basis:

10.00(a) Effective the date of hire, vacation shall accumulate at the rate of one (1) hour of vacation credit for each 17.392 regular hours paid.

Again, there is no dispute that employees under this Collective Agreement accumulate vacation credits while on sick leave. For each shift on sick leave, either short term or extended, 11.25 hours is added to the 17.392 hours that creates entitlement to an additional hour of vacation credit.

Clauses 10.09 and 10.12 provide:

Holiday Credits

10.09 Any hours for which the nurse receives regular pay from the Employer shall be applied in calculating Holiday entitlements. Nurses shall accumulate entitlement on the basis of one (1) hour of holiday credit for each 23.5 regular hours paid.

. . . . .

10.12 Accumulated holiday credits shall be scheduled as paid hours off at a time mutually agreed between the Nurse and the Employer.

Similarly, assuming there is no dispute that employees under this Collective Agreement accumulate holiday entitlements or credits while on sick leave, for each shift on sick leave, either short term or extended, 11.25 hours is added to the 23.5 hours that creates entitlement to an additional hour of holiday credit.

These clauses were new to this Collective Agreement which was effective September 1, 1997, but which was, in fact, signed by the parties on May 15, 1998.

Jean Candy, Labour Relations Officer with the Union, testified with respect to her understanding, and that of the Union and its membership, of the provisions in issue. She has serviced what are now District Health Authorities #'s 7 and 8 for the last five years. Ms. Candy testified that following the signing of the Collective Agreement she told Union members that their sick leave banks would drawn down on the basis put forward here by the Union. She told them that once members were on extended sick leave and getting 75 per cent of their pay, their sick leave credits would also be

reduced by 75 per cent of their regular 11.25 hour shifts, or 8.44 hours. It was brought to her attention by a member of the Union that this Employer was drawing down at 100 per cent, or 11.25 hours. The matter was discussed in committee with the Employer, whose representatives stated that they were drawing down at 100 per cent, and similarly employees on sick leave were accumulating new sick leave credits at 100 per cent. Upon learning that the Union advised that it would file this Grievance.

Ms. Candy testified that the new sick leave provisions were the most controversial in this Collective Agreement. Previously sick leave had been paid out at 100 per cent until the employee's sick leave bank was exhausted. The change to 75 per cent when sick leave extended beyond ten days was hotly debated in membership meetings related to the collective bargaining. She testified that the membership had understood and accepted the change, to the extent that it was accepted, on the basis that "while they would get less each day it would last longer". She testified that that was how the provisions in question were explained to the Union's labour relations staff after the Collective Agreement was ratified.

Ms. Candy testified that in her experience in the former Eastern Region, now District Health Authority #7, where the current Collective Agreement has identical wording, a nurse's sick leave bank is drawn down at only 75 per cent when on extended sick leave, in accordance with the Union's position here, although credits are accrued at 100 per cent, as they are with this Employer.

Ms. Candy further testified that she has been told that, all under the same language, the Northern District Health Authority, the Central District Health Authority, the Western District Health Authority and the IWK Hospital all *draw down* on nurses' sick leave banks at 75 per cent when they are on extended sick leave, in accordance with the Union's position here. Like District Health Authority #7 and the Employer here, the Northern District Health Authority *accrues* at 100 per cent, but the other three also *accrue* at 75 per cent. On her hearsay evidence, only this Employer draws down at 100 per cent.

With the agreement of counsel, Heather Henderson, Provincial President of the Union, testified by telephone. She was President when this Collective Agreement was negotiated and participated in its negotiation as a member of the Union's Provincial Negotiating

Committee. Although Charles Crowell was the Union's chief negotiator, Ms. Henderson was the principal spokesperson away from the negotiating table. Tom Patterson, then the Union's Chief Executive Officer, was also on the team. Phil Vienotte was the chief negotiator on the Employer side, including on behalf of the Cape Breton Health Care Complex. Neil MacEachern, now Director of Human Relations District Health Authority #8, who represented the Employer at the hearing before me, was a member of the Cape Breton Health Care Complex negotiating team.

Ms. Henderson testified with respect to the course of negotiations in the late winter of 1998. The Employer's offer of March 6 was rejected by the Union's membership at the Cape Breton Health Care Complex and in the other regions, on the Union's recommendation, in part at least because it was not identical to what was being offered to the QE II bargaining unit, where there had been a pay equity settlement. The result, with a Provincial election set for the following week, was that on March 17th the Union was notified that the Provincial negotiating teams would meet at the Citadel Inn on the 18th.

Ms. Henderson and Tom Patterson had been invited to a meeting with representatives of the Nova Scotia Government on March 17th, which Ms. Henderson remembered particularly because it was Saint Patrick's Day. Ms. Henderson said she had a vivid recollection of that day because Mr. Patterson had a heart attack immediately before, with the result that Ms. Henderson attended the meeting of the 17th initially alone on behalf of the Union. The Government was represented by Kevin McNamara, then an official with the Department of Human Resources and George Raine, also a Government official, whom Ms. Henderson did not further identify. Mr. McNamara led the discussion. Greg North, then a lawyer in private practice, attended according to Ms. Henderson "to take notes". When she realized that the meeting was becoming a negotiation session, Ms. Henderson called the acting C.E.O. of the Union, who agreed that Charles Crowell should join them, which he did. Neither Phil Vienotte nor any member of the management of the Cape Breton Health Care Complex was there.

In the discussion that followed, in the context of discussing how wage parity with the QE II might be accomplished, there was focus on the sick leave plan in the Collective Agreement proposed for the Cape Breton Health Care Complex and the other regional hospitals.

According to Ms. Henderson, she and Mr. Crowell were told that the proposal was that a nurse on sick leave would continue to accrue sick leave entitlement, that after the tenth day the nurse would be paid at only 75 per cent but that only 75 per cent of a regular shift would be deducted from her bank of sick days. This last, according to Ms. Henderson, was "the selling point".

It was stressed that while nurses at the Cape Breton Health Care Complex were being asked to give up the 100 per cent sick pay they had previously had however long their sick leave extended, they would still have a plan superior to that at the QE II. Under the sick pay arrangements there nurses reverted to 75 per cent of their regular pay after the third, rather than the tenth, day of sick leave and got only 15 sick days a year rather than building up a bank as nurses at the Cape Breton Health Care Complex did.

The next day, March 18th, the full Provincial negotiating teams met with the conciliation officer, including, on the Employer side, Phil Vienotte, and Neil MacEachern as representative of the Cape Breton Health Care Complex. Kevin McNamara and George Raine were also in attendance and Ms. Henderson observed that they withdrew from and returned to the negotiation sessions with the Employer team. Ms. Henderson made notes at the time, which she relied on in her testimony, and which are in evidence, although she said that she did not need to rely on them because of the dramatic character of the events.

Following "speeches" by the chief negotiators Mr. Vienotte presented a document headed "CONCILIATION — POSITION 1 (March 18, 1998 @ 11:00 a.m.) Wage Package Proposal", which is in evidence here. The only part of that document in bold type is headed "SICK LEAVE". It includes an explanatory paragraph, which adds nothing helpful in resolving the issue before me, and then sets out the text of what are now clauses 9.02(a)-(d), with a minor change to clause 9.02(c) not relevant here.

Ms. Henderson testified that Mr. Vienotte explained to the Union's Provincial Negotiating Team that to give wage parity with the QE II the sick leave policy had to be changed, so that only 75 per cent pay would be given after the tenth day. According to Ms. Henderson's testimony, he explained that hours would be drawn out of the sick leave bank of a nurse on extended sick leave at the rate of 8.44 hours per sick day, not 11.25 hours per sick day. This was

stated, she said, in Mr. Vienotte's presentation of the issue and confirmed in answer to questions. The Union team's understanding was that therefore, although extended sick leave pay would be reduced, sick leave banks "would last longer". Ms. Henderson testified that there was no basis whatever to think that management of the Cape Breton Health Care Complex was not part of or did not agree with this position.

Ms. Henderson testified that Mr. Vienotte also explained that while the sick leave bank would be drawn down on the basis of 8.44 hours per shift while a nurse was on extended sick leave sick leave entitlements would continue to accrue at a rate of 11.25 hours per shift. According to the testimony there was no discussion of accrual, of what is now clause 9.03 of the Collective Agreement, because that had already been agreed to.

According to Ms. Henderson, the Union did not like the proposals overall, and discussions continued for some time. At 7:00 p.m. the Employer presented another document headed "CONCILIATION — POSITION 2 (March 18, 1998 @ 7:00 p.m.) Wage Package Proposal", which contained nothing relevant here. At midnight on the 18th the Union team indicated its willingness to accept the package.

According to Ms. Henderson's testimony, the Union did not promise the Employer's negotiators on the 18th of March that it would recommend that its membership accept the package, but subsequently decided to do so. According to her, in doing so Union officials uniformly told the members that their sick leave banks would be drawn down at a rate of 8.44 hours per shift while they were on extended sick leave.

Ms. Henderson was not cross-examined on any significant part of her testimony and Employer counsel did not call upon Neil MacEachern, now Director of Human Relations District Health Authority #8, who was a member of the Employer negotiating team and present at the meeting of March 18, 1998, to testify, although he attended the hearing before me. Counsel for the Employer called Bruce Buchanan, Human Resources Manager for District Health Authority #8, to testify with respect to the Employer's practice in administering the sick leave provisions in issue.

Mr. Buchanan testified that the Employer's computerized payroll system bases accrual of hours for purposes of sick pay, and vacations and holidays, on hours paid, not on the rate of pay. In the past, when

sick pay was based on 100 per cent for the whole period of the sick leave, the drawing down of hours from a nurse's sick bank and accrual to it while the nurse was on sick leave worked exactly the same way. Initially, when the Collective Agreement came into effect such that only 75 per cent of the rate was paid to a nurse on extended sick leave, the computer system credited only 75 per cent of the regular amount of hours to the nurse's sick leave bank while she was on extended sick leave. As soon as management became aware of that, the system was corrected to credit to the sick bank a full 100 per cent of the hours a nurse was on extended sick leave.

Mr. Buchanan was firmly of the opinion that the disputed clauses of the Collective Agreement provide for the reduction to 75 per cent of the rate of pay of a nurse on extended sick leave, not for the reduction of the hours for which the nurse is paid. On this logic, hours must, he said, be drawn down from a nurse's sick leave bank at 100 per cent and accrue at 100 per cent. There is no justification that he could see for treating these operations differently.

The Issues

(1) The first issue is that of interpretation, as explained at length at the outset of this award. Clause 9.02(d) requires that sick leave credits are to be reduced "in direct relationship to hours paid" while on extended sick leave. Reading those words in the context particularly of clause 9.02(b), is it their plain meaning that sick leave credits are to be reduced at a rate of 75 per cent of the regular shift hours for which the nurse is on extended sick leave as the Union contends, or do they mean that sick leave credits are to be reduced one full hour for each hour of the regular shift hours for which the nurse is on extended sick leave?

(2) If the words in issue mean the latter, as the Employer contends, is the Employer estopped from giving them that effect by representations that it made in the course of bargaining?

(3) Alternatively, are the words in issue ambiguous, either standing alone or when read in the context of the evidence of the different ways the same words are being interpreted in very similar collective agreements in other health administration districts? If the words in issue are ambiguous, does the evidence of the history of the negotiations leading to their adoption by the parties resolve that ambiguity in favour of the Union?

Decision

(1) Interpretation

The words of clause 9.02(b) are at the crux of the dispute here. The first two sentences are:

> Sick leave pay for occasional short term sick leave shall be at 100% of the Nurse's regular rate for the shift. Sick leave pay for extended sick leave shall be at 75% of the Nurse's *regular rate for the shift*. [Emphasis added.]

One sentence later the parties have, for some reason changed the terminology to say that, effective the eleventh shift "the Nurse shall be reduced to 75% of the Nurse's previous *gross earnings for the shift*". Obviously, this means "the Nurse['s sick leave pay] shall be reduced to 75% . . .".

This emphasis on "the shift" gives some plausibility to the Union's interpretation of Clause 9.02(d), as requiring reduction on the sick leave credits in "direct relationship to the hours paid" in the sense of the percentage of the total hours which have been paid for in full. However, it certainly does not render the Employer's interpretation less plausible.

Counsel for the Union stressed that the wording of clause 9.02(b) does not use the term "regular hours paid" as is used in the provisions for accrual of hours in clauses 9.03, 10.01(b) and 10.09, quoted above. Clause 10.01(b) does not define that phrase but does provide:

> 10.01(b) Regular hours paid for the purpose of calculating vacation, holiday and sick leave credits shall include the straight time hourly equivalent of overtime hours worked to the maximum equivalent.

She also stressed that clause 9.03 should not be taken to "drive" the meaning to be given to clauses 9.02(b) and (d) as it was not put in the Collective Agreement at the same time but was "grafted on later". I do not find either of these points very helpful.

Taken together in the context of the Collective Agreement as a whole, and without considering any larger context, clauses 9.02(b) and (d) are somewhat ambiguous. Were I forced to interpret them on that basis, I would probably agree with the Employer that the use of the words "hours paid" in Clause 9.02(d) suggests that sick leave credits should be reduced on the basis of hours paid for at the reduced rate, not on the basis of a reduced number of hours. However, for reasons to which I now turn, I have concluded that, at least for the life of the Collective Agreement signed in May of 1998,

the Employer is estopped from proceeding on that interpretation, and, beyond that, I have also concluded that the words of clauses 9.02(b) and (d) are sufficiently ambiguous that when read in a context which includes the history of their negotiation they must be interpreted as contended for by the Union.

(2) Estoppel

Counsel for the Union relied heavily on the doctrine of promissory estoppel. Counsel for the Employer agreed that I have jurisdiction to apply this doctrine and there was no dispute with the way I stated the doctrine in my award in *Re Strait Crossing Joint Venture and I.U.O.E.* (1997), 64 L.A.C. (4th) 229, at pp. 240-41:

> Brown and Beatty, *Canadian Labour Arbitration*, 3rd ed., looseleaf, state in para. 2:2210 that the essentials of the doctrine of equitable estoppel are;
>
> > "[1] a finding that there was a representation by words or conduct, which may include silence, [2] intended to be relied on by the party to which it was directed, [3] some reliance in the form of action or inaction, and [4] detriment resulting therefrom."
>
> Where these requirements are met the party against whom the estoppel is set up will not be allowed to enforce the rights it has represented itself as undertaking to forego, at least not until the party setting up the estoppel has had a fair opportunity to escape the effects of its detrimental reliance.
>
> It is well established that equitable estoppel may arise from representations made in the course of collective bargaining (Brown and Beatty, *supra*, at footnote 12), but for good reason arbitrators have insisted that the evidence upon which an estoppel is to be based in this context be "clear and cogent". As arbitrator Adams said in *Sudbury District Roman Catholic Separate School Board* (1985), 15 L.A.C. (3d) 284 at pp. 286-7;
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> > "I emphasize that evidence establishing an estoppel in the form of a representation made during negotiations and inconsistent with the clear wording of a collective agreement must be in the form of clear and cogent evidence. Labour relations statutes in all Canadian jurisdictions require that a collective agreement be in writing and it is simply too easy for parties in difficult negotiations, on the conclusion of the collective agreement, to allege that representations were made contrary to the document signed. Much is said in collective bargaining negotiations and because of the nature of that process, parties tend to hear what they wish to hear. Tactic and strategy underlie the communications between the parties as they attempt to persuade and cajole each other into agreement. But it is well understood that on the conclusion of a collective agreement, the parties' rights are to be found in the agreement and not in the *rationale* and arguments made during the negotiations preceding the document's execution."
>
> In concluding that the case for estoppel had not been made out before him, arbitrator Adams drove his point home, at p. 293;

> ". . . collective bargaining negotiations are conducted under considerable pressure and often, as in this case, agreements are arrived at under physically trying circumstances. In collective bargaining negotiations much is said and much can be misunderstood or misinterpreted. But what should be clear to parties involved in the process is that the language they have achieved in their agreements is the language on which they must generally rely. More substantial and concrete evidence of an oral representation is required than was adduced before me in order to avoid the express terms of a collective agreement."

I agree with Arbitrator Adams, but that does not mean that estoppel should never be applied in the context of negotiations. As I have also said elsewhere (*Re Memorial University of Newfoundland and Memorial University of Newfoundland Faculty Assn. (A-90-01)*, July 8, 1992 (unreported) [summarized 27 C.L.A.S. 251]:

> This does not, however mean that estoppel can never be based on representations at the bargaining table. Brown and Beatty list six such arbitration awards bearing dates later than the *Sudbury* award. The Employer's brief includes one of them; *Rogers Cable T.V. British Columbia Ltd. (Victoria Division)* (1988), 29 L.A.C. 441, in which the comments of arbitrator McColl at pp. 447-8 are clearly on point;
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> > "The question in this dispute is whether or not when there, *as I have already found, is no such ambiguity the doctrine of estoppel still operates to defeat the proponent's claim.* I think it does." [Emphasis added.]
> >
> > . . . . .
> >
> > "Once the question of purpose or intent is raised, as it was in this case, the union is under a duty and obligation to express its true purpose and intent . . . There was no need for the employer to investigate or pursue the matter further once the union's expression of intention had been given."
> >
> > . . . . .
>
> In *Hallmark Containers Ltd.* [which was put before me here by counsel for the Union] (1983), 8 L.A.C. (3d) 117, pp. 129-31, arbitrator Burkett found the evidence of representations made in the course of negotiations sufficiently "clear and cogent" to found an estoppel in the following circumstances;
>
> > ". . . the union, after proposing the language in question, gave a full explanation of the purpose and meaning of the language which it was proposing. The employer did not ask for clarification or in any way signal the union that, although prepared to accept the language, it was not accepting, or at least had reservations, with respect to the interpretation placed on the language by the union. Instead, the employer accepted the union's proposal in writing. The union in response to the written acceptance of the employer, made no attempt to clarify or otherwise modify the language. The company now seeks to rely on the plain meaning of the language which does not support the interpretation put on it by the union. These are the salient facts upon which we must decide if the employer in this case is now estopped from asserting the plain meaning.
> >
> > . . . . .

> "The company, for whatever reason, acted in a manner designed to convey to the union its acceptance of the union's interpretation of the language at issue . . . The conduct of the company had the effect of denying the union the opportunity to clarify or rewrite the language to reflect its understanding of the meaning of the clause."

Here, the evidence is at least equally clear and cogent. I have no reason not to accept Ms. Henderson's testimony of what was said at the meeting of March 17, 1998. As I have mentioned, Mr. MacEachern was at that meeting as a member of the Employer's team, he was at the hearing before me and he was not called to contradict any of Ms. Henderson's testimony.

The only relevant submission by counsel for the Employer was that it was not clear that at the meeting of March 18 Mr. Vienotte had authority to bind the Employer. I do not accept that submission. It was not disputed that Mr. Vienotte was the chief negotiator for the Employer throughout and there was no evidence to suggest that he was not in fact, or should not have been perceived by the Union as, speaking in that capacity at the meeting of March 18, 1998.

Here the Employer did not merely acquiesce by silence in the Union's interpretation of the words in issue. Its chief negotiator actively represented to the Union that clauses 9.02(b) and (d) had the meaning now asserted by the Union. I find that in doing so the Employer knew the Union would rely on its representation that it would not exercise any right it might have under the then proposed clause 9.02(d) to reduce sick leave credits by 11.25 hours for each day a nurse was on extended sick leave. I find that the Employer intended the Union to so rely, that the Union did rely on that representation by foregoing the opportunity to negotiate for a change in the wording of those clauses before signing the Collective Agreement and, as a result, were I not to hold the Employer estopped Union members on extended sick leave would suffer a clear detriment. Their sick leave credits would be reduced on an hour for hour basis rather on a 75 per cent basis, as, according to the only evidence before me, which I have no reason to doubt, Mr. Vienotte said they would be.

My conclusion that the Employer is estopped from giving the Collective Agreement a meaning other than that contended for by the Union is based on what Mr. Vienotte said at the meeting of March 18, 1998, not on what was said at the Union's meeting with Mr. McNamara and Mr. Raine on March 17. I do not need to decide what role those men, or the Provincial government, had in the negotiations.

Ms. Henderson's testimony with respect to that meeting was an important part of the context, but for purposes of the legal doctrines of estoppel and the use of negotiation history to resolve ambiguity what transpired at that meeting was overtaken by Mr. Vienotte's statements the next day.

(3) Ambiguity and Negotiating History

As I stated earlier, I have also concluded that the words of clauses 9.02(b) and (d) are, in the context of the Collective Agreement as a whole, somewhat ambiguous. The fact that the same words are interpreted differently by other Employers applying different but jointly negotiated collective agreements supports that conclusion, but I do not rely on that fact to reach my finding of ambiguity. It is therefore unnecessary for me to be concerned that Ms. Candy's evidence on that matter was mostly hearsay and rather vague.

While it is probably unnecessary for me to cite any authority for such a proposition, Brown and Beatty, *Canadian Labour Arbitration*, 3rd ed. (Aurora, Ont.: Canada Law Book) (looseleaf), state in para. 3:4400;

> . . . the general rule at common law is that extrinsic evidence is not admissible to contradict, vary, add to or subtract from the terms of an agreement reduced to writing.
>
> . . . . .
>
> Where an ambiguity is patent, that is, where it appears on the face of the agreement, an arbitrator may resort to extrinsic evidence as an aid to its interpretation.

The learned authors footnote the non-labour law case of *Leith Gold Mines Ltd. v. Texas Gulf Sulphur Co.* (1968), 3 D.L.R. (3d) 161 (Ont. H.C.J.), as support for the proposition quoted. They also cite half a dozen arbitration awards, including *Re CKF Inc. and C.P.U., Loc. 576* (1990), 12 L.A.C. (4th) 1 (Darby, chair).

When read in a context which includes the history of their negotiation as set out above, the crucial words of clauses 9.02(b) and (d) must be interpreted as contended for by the Union, although, as I said above, absent that context, I might have favoured the Employer's interpretation.

Conclusion and Order

As I have already said, based on what Mr. Vienotte, the Employer's chief negotiator said to the representatives of the Union at the meeting of March 18, 1998, my conclusion is that the Employer is estopped

from giving the Collective Agreement a meaning other than that contended for by the Union. That is, clause 9.02(d) must be applied as requiring that when a nurse's sick leave credits are reduced "in direct relationship to hours paid" while the nurse is on extended sick leave, those sick leave credits are to be reduced at a rate of 75 per cent of the regular shift hours for which the nurse is on extended sick leave.

Also, this is the meaning I attribute to clause 9.02(d) on the basis that, when it is interpreted in the context of what Mr. Vienotte said at that meeting, that evidently was the meaning the parties mutually intended it should have.

For all of these reasons I have concluded that this Grievance is allowed. The sick leave banks of all nurses employed by the Employer are to be adjusted retroactively to the commencement of this Collective Agreement to reflect the interpretation I have given to clause 9.02(d).

As agreed at the outset of the hearing in this matter, I remain seized of it and will reconvene at the request of either party to deal with any issues that may arise in its application upon which the parties are unable to agree, including the determination of the sick leave in the sick leave bank of any individual nurse affected by this order.