

"Materially and reasonably similar": Ontario Court upholds arbitration award on health premium

In a decision rendered on October 17, 2005, the Ontario Divisional Court has dismissed an employer's attempt to quash an arbitration award holding that it must pay the Ontario Health Premium (OHP). The award, *Lapointe-Fisher Nursing Home v. United Food and Commercial Workers Union, Local 175/633*, which was reported in *FOCUS Alerts* (see "[The Ontario Health Premium: implications for employers](#)" on our What's New page), is one of the few examples of a union victory on the issue. The arbitrator had ruled that, in failing to pay the OHP, the employer had breached Article 24.01 of the collective agreement, which provided:

- "24.01 (a) The Employer agrees to pay 100% of the OHIP premiums for all full-time employees who are regularly scheduled to work seventy-five (75) hours in a bi-weekly pay period on a permanent base.
- (b) The Employer agrees to pay 50% of the OHIP premiums for all employees who work in excess of forty-eight (48) hours but less than seventy-five (75) hours in a bi-weekly pay period on a permanent base. The employee shall pay 50% of the OHIP premiums through payroll deductions.
- (c) To be eligible for (a) or (b) above, the employee must be the principal breadwinner in their family."

The issue has arisen because, before 1990, Ontarians paid health care premiums. Many collective agreements negotiated before that year contained provisions that required the employer to pay the cost of those premiums. Then the provincial government of the day removed the health care premium provisions from the *Health Insurance Act* and enacted the *Employer Health Tax Act*, under which employers with payrolls over \$400,000 pay 1.95 per cent to fund the health care system.

With the introduction in 2004 of the OHP, unions in workplaces in which the old language was retained filed a spate of grievances calling for the employers to pay the OHP. The issue in most of the grievances is whether the OHP is properly seen as a tax or a premium.

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In declining to quash the award, the Divisional Court was persuaded by the approach taken by the arbitrator in *Ontario Power Generation Inc. v. Power Workers' Union (OPG)*, a 2005 decision rendered shortly before the Court heard arguments in this case. In *OPG*, the collective agreement contained language similar to that in Article 24.01. The arbitrator in *OPG* held that, given the language of the agreement, reasonable parties in the position of

the union and the employer would have intended that, if the government were to require payment for OHIP insured services by individual employees, the employer would be responsible to make those payments, "provided that it was materially and reasonably similar to the OHIP premium payable prior to 1989".

Moreover, the arbitrator in *OPG* held that the distinction between premiums and taxes had little bearing on the interpretation of the collective agreement, as "both the OHIP premium and the [OHP] are hybrids of those pure legal concepts, and both are far closer in nature to taxes than premiums". He further concluded that the OHIP premium had been "a tax contributed to the consolidated revenues of the province with the intention that it be used to fund the OHIP health care system" and that the OHP was materially and reasonably similar in nature.

The Court held that the approach taken by the arbitrator in *OPG* was "logical, reasonable and compelling". It noted that, in both cases, the parties had agreed to keep the relevant provisions in the collective agreements over the years when there was no OHIP premium payable by individuals in existence, and that they had also agreed that, if future legislation required payment by individual employees, the employer would be responsible for the payments.

Accordingly, the employer's application was dismissed.

In Our View

In reaction to this decision, Premier McGuinty has stated that the government intended that individuals, not employers, pay the OHP. However, he has rejected calls to clarify the legislation. We will keep readers advised of future developments in this case and others involving the OHP.

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