The Ontario Health Premium: implications for employers

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The introduction by the Ontario government of a new Ontario Health Premium (OHP) in the 2004 provincial budget means that Ontarians earning over $20,000 will see an additional $150 to $450 deducted from their pay this year. In 2005, the deduction will range from $300 to $900. The revival of a levy for health care purposes has raised the question of whether unionized employers whose collective agreements oblige them to pay the cost of employee health care premiums will have to bear the cost of the OHP.

The issue arises because, before 1990, Ontarians paid health care premiums. Many collective agreements negotiated before that year contained provisions requiring the employer to pay the cost of those premiums. Then the provincial government of the day removed the health care premium provisions of 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.

Despite this change, some collective agreements retained the old language, mainly because unions were reluctant to delete this benefit, while employers saw no harm in leaving it in place. The introduction of the OHP has re-ignited the issue in workplaces where such clauses were not deleted, with some unions filing grievances demanding that the employer pay the cost of the new OHP. As the Employer Health Tax has not been repealed by the legislation implementing the OHP, this would leave some employers shouldering a double burden for health care funding.

Four recent arbitration decisions have dealt with this issue. The union has been successful in only one, *Lapointe Fisher Nursing Home v. United Food and Commercial Workers Union, Local 175/633* (October 6, 2004).

LAPOINTE FISHER NURSING HOME

In the *Lapointe Fisher* case, the provision of the collective agreement on which the union's grievance was based read as follows:

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 employer refused to pay the OHP, contending that the new levy is actually a tax, not a premium because

- it was not introduced by way of amendments to the *Health Insurance Act*, which was the enabling statute for the old premiums, but through amendments to the Ontario *Income Tax Act*.
- it is based on overall taxable income, regardless of whether that income comes from employment; and

- the employer is in no position to know the total taxable income of its employees, some of whom work part-time for the employer and part-time elsewhere.

The union argued that the OHP is indeed a premium, claiming that the fact that the OHP is collected through the tax system does not mean that it is not a premium and that any health premium that goes to the government can be characterized as a form of taxation.

The union also pointed to arbitration cases relating to the introduction of the Employer Health Tax system in 1989. In one such case, the union had sought to enforce a provision requiring a negotiated re-allocation of benefits if OHIP was no longer funded by "contributions directly to it by, or on behalf of employees". The union in that case had argued that the new tax levied on the employer could not possibly be construed as a contribution "on behalf of employees". The arbitrator had dismissed that argument on the basis that it did not matter whether the amounts required to pay for provincial health were collected by premiums or a tax. Rather, what was important was the purpose for which the government was using the money. In particular, the employer health tax was dedicated exclusively to raising funds for the purpose of providing health care.

The arbitrator in the *Lapointe Fisher* case held for the union. She noted, first, that the *Employer Health Tax Act*, which had replaced employee health premiums in 1989, had purported to *revise*, not eliminate, the system of premium payments. This suggested the possibility of further revisions, which, in turn, explained why the premium clause was retained in the collective agreement.

While the *Employer Health Tax Act* had removed the premium provisions from the *Health Insurance Act*, the latter Act still governed the method for insuring Ontario residents against the cost of medical services:

> "The *Health Insurance Act* creates a plan of insurance. In the beginning, premiums were paid by individuals, but, in 1990, that requirement was "revised" to make the premium payable from an employer health tax. In 2004, the premium requirements were "revised" again to make the premiums payable by both the employer health tax and individuals resident in Ontario. As I see it, it is still an insurance scheme and the Plan still pays for insured services in Ontario. The new premium is directed solely to the Plan and must be accounted for on an annual basis. It pays for insured services on behalf of insured persons."

One did not have to stretch the wording of Article 24.01, the arbitrator noted, to find that the new premium was still an OHIP premium. The fact that it was collected through the tax system did not rob it of its character as a premium; and the employer had provided no authority for the proposition that a tax cannot also be a premium for a specific service. What matters is that the OHP is used to fund health care costs, not that it is implemented through the tax system.

Moreover, the arbitrator stated, the difficulty faced by the employer in calculating the amount owed

by employees based on their global income did not override its obligation under Article 24.01. Despite the change in the regime for funding the health insurance system, the bargain between the two parties had to stand for a period of time before either party could require its renegotiation.

As a result, the arbitrator ruled that the employer had breached Article 24.01 by failing to pay employees' health premiums.

JAZZ AIR INC.

In *Jazz Air Inc. v. Air Line Pilots Association, International* (September 27, 2004), an arbitrator held that a reference to premiums in a collective agreement did not include the OHP. While noting that a tax is not a premium in common parlance, the arbitrator did not rest his reasoning on the distinction between a tax and a premium, but rather on "collective bargaining considerations".

First, he held that, at the time the relevant provisions were negotiated, the parties would not have contemplated a tax such as the OHP. Rather, they would have been thinking about the premiums previously paid by individuals that had been replaced by the Employer Health Tax.

Noting that the OHP fluctuates with income, the arbitrator also expressed the view that no employer would agree to pay a tax based on income earned outside employment.

Finally, he stated that benefits are always specifically bargained and identified. In this case, the OHP was not identified as a benefit under the collective agreement.

GOODYEAR CANADA INC.

Goodyear Canada Inc. v. United Steelworkers of America, Local 834L (November 1, 2004) involved the interpretation of the following provision:

> 5(a) The Company agrees to pay the whole of the monthly premium to the Ontario Health Insurance Commission in respect to each employee eligible to receive benefit from the Employer so as to qualify the employee and his/her dependants, if any, for entitlement to receive the insured benefits provided by the Ontario Health Insurance Plan as in effect on or after April 27, 2002.

In addition, the following excerpt from a letter from the employer to the union was relevant to the issue:

> "This letter will serve to confirm the understanding given to you by the Company during recent negotiations.

It is the intention of the Company to pay the present rate or subscription payment as well as any

subsequent increase that might be implemented during the term of the Agreement for the Ontario Health Insurance Plan."

Among the facts agreed to by the two parties to the arbitration were that the employer continued to be liable for payment of the Employer Health Tax, and that non-payment by a person of the OHP had no impact on that person's access to health care benefits under OHIP. The parties took issue over whether the OHP should be characterized as a tax or a premium.

The arbitrator dismissed the union's grievance, noting that the agreement provided that the employer was liable to pay only the premium that qualifies an employee to entitlement to health care benefits. Here, the legislation implementing the OHP established no relationship between payment of the OHP and entitlement to benefits.

Nor did the language of the supplementary letter from the company to the union, in which the company stated its intention to "pay … any subsequent increase that might be implemented during the term of the Agreement for the Ontario Health Insurance Plan" assist the union. The arbitrator held that any agreement to pay a subsequent increase must be read in light of the provision in the agreement requiring the employer to pay only the premium that entitled an employee to OHIP benefits. The arbitrator therefore did not accept that the OHP was "an increase … for the Ontario Health Insurance Plan".

COLLEGE COMPENSATION AND APPOINTMENTS COUNCIL

In *College Compensation and Appointments Council v. Ontario Public Service and Employees Union* (October 29, 2004), the relevant provision read as follows:

> Re: Ontario Health Insurance Plan
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> The parties recognize that the method of funding OHIP has been changed from an individually paid premium to a system funded by an employer paid payroll tax.
>
> If the government, at any time in the future, reverts to an individually paid premium for health insurance, the parties agree that the Colleges will resume paying 100% of the billed premium for employees.

Having determined that the intent of the legislation was to implement a tax, not a premium, the arbitrator then considered the language of the collective agreement. He expressed agreement with the view of the arbitrator in *Jazz Air* that the OHP would not have been in the contemplation of the parties who negotiated this language because the legislation implementing the OHP had not

changed the existing Employer Health Tax system but, rather, had imposed a surcharge on that system. Noting that the second paragraph referred to "reverting" to an individually paid system and "resuming" paying the billed premiums, the arbitrator concluded:

> "[T]he Government did not return the existing tax or tax system to its former state, or practice, because the existing state, or practice, namely, the existing paid payroll tax continues in effect. There is no reversion or change back. … Rather, there is simply an add on, or extraordinary charge, or surcharge to the existing system. … [I]t is my view, when the agreement was signed, the parties contemplated a return or reversion to an individually paid premium system in substitution for the existing system. The language did not contemplate the extraordinary or additional surcharge payment that is now imposed on the existing system."

As a result, the grievance was dismissed.

In Our View

It should be noted that, in commenting on the potential liability of unionized employers to pay the OHP, the Ministry of Finance has said that, "unless employers have bargained to pay employees' taxes, we would not expect that this charge has been anticipated in collective agreements". Three of the decisions described above confirm that prediction. The employer has applied for judicial review of the *Lapointe Fisher* decision. We will keep readers informed of further developments.

If an employer does pay the cost of the OHP, it may do so either by increasing an employee's pay by the amount it estimates the employee owes for OHP, or by reimbursing the employee for the OHP. The amount received by the employee as reimbursement would be considered a taxable benefit to be added to the employee's income.

For further information, please contact Colleen Dunlop at (613) 940-2734.